

WHAT IS A FAMILY?

LAW AND REGULATION IN A
TRANSDISCIPLINARY CONTEXT

EDITED BY
ALICE MARGARIA
CLAIRE FENTON-GLYNN

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With a Foreword by
Martha Albertson Fineman

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To all the families whose diverse experiences, love,
and resilience inspire this exploration of the many
ways family is understood and lived

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Series Editor Preface

The Law, Society, Policy series publishes high-quality, socio-legal research monographs and edited collections with the potential for policy impact. Cutting across the traditional divides of legal scholarship, Law, Society, Policy offers an interdisciplinary, policy-engaged approach to socio-legal research which explores law in its social and political contexts with a particular focus on the place of law in everyday life.

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Foreword

Martha Albertson Fineman

This interesting new collection brings together a multidisciplinary group of scholars to consider the contemporary family. The authors not only address issues of family ‘population’, such as who is included and who is excluded, but also focus on the history, implications, and justifications for revisions in family law. The Editors designed this project not only to describe the process of legal change but also to highlight the ways in which law has been (and might continue to be) used to embrace the normative value of ‘family diversity’.

A reformist desire for creative and transformative legal approaches to the family came in the wake of the significant changes over the past several decades in the behaviour of individuals in regard to intimate or family-like relationships. These behavioural shifts both reflected and were facilitated by corresponding alterations of values and norms. Not surprisingly, such cultural changes eventually presented challenges to existing laws and policies, which incorporated a more rigid and traditional notion of the family as a social institution.

The three related seismic social disruptions that occurred during the mid-twentieth century revolved around established beliefs about gender difference, appropriate sexual behaviour, and the permanence of the marital bond. Disruption of traditional assumptions and expectations in these areas also unsettled existing legal approaches to the family, ultimately leading to substantial alterations of family law (as well as challenging and sometimes transforming other doctrinal areas, such as employment law). Primary among these foundational challenges (and essential for understanding the other two) is the gender-equality movement.

A product of the mid-twentieth century civil rights era, gender equality (at least formally) dismantled the routine legal acceptance of the idea that there were inherent biological differences between women and men that justified their different treatment in law and within society. Those (ultimately discredited) differences formed the basis for the construction of the family as a legal institution that was built around distinct but complementary

gendered roles and responsibilities. This gender-differentiated family served as a foundational social institution, one that profoundly influenced the way other social arrangements (such as work and politics) were arranged. Removing gender as the basis for making legitimate distinctions between the rights and responsibilities of men and women inevitably had profound institutional consequences.

Changes in the very language used in family law reflect the breadth and depth of the mandate for gender equality: we moved from the differentiated and gender specific categories, such as ‘husband and wife’ (which incorporated the complementary social roles of ‘wage-earner and caretaker’) and ‘father and mother’ (‘disciplinarian and nurturer’) to the unified and gender-neutral designations of ‘spouses’ and ‘parents’. The mandated equality of treatment of spouses decreed in law was further reflected in language that presented marriage as a ‘partnership’, as well as alterations in custody rules that privileged ‘sharing’ or ‘joint custody’ arrangements.

Not surprisingly, the increasing acceptance of the concepts of gender equality and legal neutrality also substantially undermined traditional social and cultural norms when it came to sexual activity. The alteration of what had been a ‘double standard’, was decidedly in the direction of liberation. While it wasn’t quite a ‘boys will be boys’ acceptance of their non-marital sexual activity, women were perceived increasingly as having more acceptable options. Behavioural change was further facilitated by the invention of the birth control pill, and acceptance (or at least toleration) of sex outside of marriage for both sexes ushered in what commentators of my generation referred to as the ‘sexual revolution’.

The changes in attitudes toward sexual behaviour had implications for social institutions, as well as individuals. Incidents of non-marital cohabitation, either as an alternative ‘family’ arrangement or a pre-marriage ‘trial run’, increased. Not surprisingly, novel legal questions concerning the ‘rights’ and ‘obligations’ of cohabitants based on comparisons with the analogous position of marital partners arose, particularly if those arrangements ended. So did legal issues surrounding the status, rights, and obligations of parents of children born outside of marriage. The laws privileging marriage had historically done a lot of ‘work’ in establishing, limiting, and enforcing the legitimate expectations for both marital and non-marital intimate relationships. Given acceptance of non-marital intimate and partnering relationships, traditional family law was no longer adequate or sufficient. What should be the design of the new legal scheme regulating the consequences of intimate relationships both in and outside of marriage?

The fundamental social and cultural shift in what was considered appropriate sexual behaviour between men and women ultimately also had implications for same-sex relationships. When regulation of sex escaped the confines of marriage it had implications far beyond family law. Family law’s

privileged place for marriage was historically complemented by criminal laws regulating sexuality, such as laws against fornication, cohabitation, and adultery. The emerging attitudes toward non-marital sexuality tended to focus on the individual, not institutional interests. Privacy, identity, and the need for intimate connection were emphasized rather than concerns about preserving the integrity of the institution of marriage. Laws criminalizing sodomy and indecency thus were undermined and eventually discarded.

The third fundamental shift in response to behavioural and normative changes is evident in the way the family was perceived in the so-called ‘no-fault divorce’ revolution. The family has traditionally been considered one of the fundamental societal institutions, the unit for the reproduction and socialization of the next generation. As such, the stability of the family was an important state or societal object, which was reflected by its definition of marriage as the lifelong commitment between heterosexual spouses. Termination of a marriage – if possible at all – was permitted only when one partner was found guilty of violating an aspect of the marital commitment deemed fundamental by the state.

Enacting a no-fault divorce scheme significantly altered the focus of state interest from preserving marriage to ensuring a just or equitable termination of the relationship the spouses had decided to end. Like the shifts in gender and sexuality, this legal transformation emphasized the individual rather than societal interests. It has also had profound implications for the social as well as the legal understanding of the family.

The laws that create and regulate today’s family are far more individualistic, voluntary, and flexible. We might even conclude that the family has been ‘deinstitutionalized’, unanchored by the institutional values and norms, social practices and expectations that traditionally defined both the family and the rights and responsibilities of those within it. Many see such deinstitutionalization as a positive development. The traditional expectations for and operation of the marital family have rightly been criticized as not only discriminatory but also as imposing unwarranted discipline and conformity, stifling, even abusing, the individuals within the family.

Institutional interests aside, it is clear that the legal understanding of the family has been dramatically adjusted over the past several decades. As a result, the family as a social institution has been opened up to those previously excluded. The history, implications, and effects of this diversification are explored – and mostly celebrated – in many of the chapters in this volume.

Liberalization and diversification are not, however, panaceas when it comes to the role and place of family for both individuals and society. As some chapters indicate, despite its legal and social liberalization and egalitarian and individually oriented transformation, family law (and the family as a lived experience) continues to function inequitably. Perhaps this should not be surprising: the traditional marital family functioned institutionally to define

not only the individual couple's relationship to each other as spouses or parents, but also their relationship to other family members and the place and function of the family in society.

This institutional or functional factor in the equation has been deemphasized in the current, highly individualized rendering of the family, but that does not mean it has disappeared. The family is composed not only of independent individuals but also of the social institution in which we all rely for care and nurture at multiple points in our lives. At a minimum, the family is the recognized repository for our inevitable biological and developmental dependency. We also have emotional needs. Values such as trust and reliance are essential to the individuals who live within families as well as to the functioning and integrity of the family as a social institution.

Even with reform, family law continues to recognize this need for stability and reliability in some contexts. Individualized and voluntary standards are not imposed on the family in regard to children, whose family status is appropriately governed by different, less individualistic principles and values. The responsibilities and rights inherent in the parent-child relationship are thus recognized as appropriately the subjects of societal regulation and standardization.

It will be interesting to see if and how the need for reliance and trust in adult relationships might get incorporated into a new legal order concerned with the regulation of intimate connections. How should we address the possibility of exploitation? How should the interests of both individuals and society be balanced in the post-family legal landscape? The final two chapters in this collection begin this type of exploration.

Introduction: What Is a Family?

Alice Margaria and Claire Fenton-Glynn

1.1. Setting the Scene

Families on the ground have changed significantly over the past decades, and family laws have been left struggling to keep up. The traditional nuclear family is no longer the only family recognized by the law: a plurality of family forms and structures now find *some* place within legal frameworks. Shifts as diverse as the liberalization of divorce, the regulation of assisted reproductive technologies, and the recognition of non-marital relationships all signal the law's increasing openness to family diversity. That being said, legal regulations of family relationships do not always meet the needs of contemporary families. There are multiple reasons for this gap: one has to do with the prescriptive nature of law and its related desire for systematization and certainty, which clashes with the complexity and fluidity of contemporary family practices and realities. Another relevant factor could be the *responsive* character of law's increasing openness to diversity. Legal reforms have indeed often arisen as pragmatic responses to the pressure exercised by social realities over outdated legal frameworks and have typically been limited to extending legal recognition and rights to unconventional families that resemble the norm. As a consequence, the supremacy of the traditional nuclear family, deeply embedded in legal regulation, remains largely untouched.

This book aims to encourage trans- and interdisciplinary conversations on what is a family, with the ultimate goal of furthering reflections on the relationships between legal conceptions of 'family' and family relationships on the ground. Each chapter explores the central question 'What is a family?' from the perspective of a specific discipline and/or field of study. As such, the volume brings together diverse perspectives, approaches, and ideas about families derived from a range of disciplines – including law, sociology, psychology, demography, economics and history – and explores the extent

to which extra-legal understandings of ‘family’ (may) inspire, are taken into consideration and integrated into legal regulation, if at all.

Authors were given the following guiding questions to shape their thinking:

1. *What* is a family? Who is included, excluded, or downgraded by existing definitions of ‘family’?
2. *Who/which* social and legal actors contribute to shaping notions of ‘family’ in your field of study?
3. *What* are the rationales underlying conceptualizations of ‘family’ in your field of study? (*What for? For whom* are they relevant?)

1.2. The Book’s Structure

The volume is organized into four parts. The first, ‘Unsettling Traditional Paradigms’, brings together three contributions that, read together, juxtapose the rigidity and narrowness of legal understandings of ‘family’ with the fluidity, complexity and innovation found in non-traditional family patterns and emphasized by perspectives attentive to lived experience.

In [Chapter 2](#), Katherine R. Allen approaches the question of ‘What is a family?’ from a feminist family science perspective, viewing ‘family’ as a personal, social and political space where care and conflict comeingle. This perspective challenges the imposition – often mediated through and legitimized by law – of a modern, patriarchal, heteronormative and wealthy notion of ‘family’ onto the vast diversity and complexity of ways that individuals love, partner, parent and transmit their lineage to kin. In its place, Allen advances a feminist approach to families that is intersectional, critical of the status quo, reflexive, grounded in lived experience and responsive to changing social-historical circumstances. Positioning power, diversity and complexity as central to family life, Allen uses reflexive feminist autoethnography as a method to reveal how ‘private’ experiences both illuminate and are shaped by broader social structures, thereby offering an empowering lens to shed new light on family relationality.

In [Chapter 3](#), Alan Brown reflects on the nature of the legal family and on the norms and values that underpin this, in the specific context of family law in the UK. He notes the influence of the ‘nuclear family’ as the central prism through which the legal system continues to view family relationships and considers how the ongoing significance of this concept continues to exert influence in a changing contemporary social context. Drawing on debates concerning divorce and trans parenthood, he highlights the assimilationist nature of family law – focusing on traditional institutions, while gradually extending to those families who look similar enough to the ‘norm’ as to be granted protection.

In [Chapter 4](#), Claire Jenkins considers how transgender families disrupt normative conceptions of ‘the family’. Drawing on the stories of two couples as case studies, she highlights how the omission of trans-familial patterns of intimacy from academic and societal accounts creates particular challenges, especially as these families lack reliable road maps to navigate their transitions. Jenkins shows how transgender individuals and their partners develop new forms of intimacy and novel familial arrangements. For example, the need for a partner to renegotiate her lesbian identity to accommodate her partner’s change in sex/gender identity opens space for new modes of erotic connection and, consequently, the formation of reconfigured families.

Part II, ‘Regulating Personal Relationships through and beyond Marriage’, questions the legal, historical and societal relevance of marriage and other forms of legal recognition in defining personal relationships. Read together, these contributions examine how the laws and practices around adult relationships have evolved towards greater liberalization and autonomy, whilst simultaneously revealing the continuing influence of state interests in shaping which relationships are recognized.

In [Chapter 5](#), Mary Jo Maynes approaches the laws and practices around family formation through sexual unions – namely, ‘marriage’ and its variants – from the perspective of a family historian. She considers contemporary legal debates over and changes in marriage laws as a lens to explore the broader questions of how ‘legitimate’ family formation paths have been defined, how varying legal traditions (including religious and secular laws) have addressed questions about who can marry whom, who controls decisions about marriage partners, and what rituals or processes are required to make a marriage legitimate.

In [Chapter 6](#), Jens M. Scherpe examines the changing nature of the family from a comparative legal perspective, highlighting how views on what constitutes a family have shifted radically in the last decades and continue to do so. Historically, marriage defined what a family was and, by extension, what constituted a ‘European family’. Over time, however, the growing recognition of both formal and informal family relationships outside of and as an alternative to marriage has emerged as a common trend across Europe, gradually ending the hegemony of marriage as the only legitimate family form. With mandatory rules concerning married life having largely disappeared, divorce law has, to some extent, taken over the ‘moral messaging’ regarding marital behaviour by defining what can bring a marriage to an end. However, Scherpe cautions against taking this idea too far: while there appears to be some homogenization of laws across jurisdictions in certain areas, there is still no pan-European understanding of what constitutes a ‘family’ when it comes to same-sex families.

In [Chapter 7](#), Nausica Palazzo and Daniel Cardoso examine one particular type of familial relationship – non-conjugal unions amongst friends, relatives

and other non-sexual relationships – to ask crucial questions such as, ‘What is the state trying to achieve when regulating personal relationships?’ and ‘Why does it prioritize one family form over other family forms?’. The chapter undertakes a content analysis of scholarly reflections on the legal recognition of non-conjugal unions, in order to identify the different rationales put forward by these contributions: autonomy, equality through comparison, utility, empirical data, historicizing, and sociological values. In doing so, Nausica Palazzo and Daniel Cardoso demonstrate that what a family *is* in a given time and space is always contingent on what it *should be* from the perspective of the state.

Part III of the book, ‘Empirical Approaches to Defining Families’, brings together chapters that draw on evidence-based research to explore family functioning, decision-making and ideals. Collectively, these chapters highlight how empirical approaches to studying families can illuminate the dynamics of family relationships, how laws and social structures influence women’s choices, and how perceptions of the ‘ideal family’ both vary and converge across contexts.

In Chapter 8, Kate Ellis-Davies and Sarah Foley explore how developmental psychology has approached the question of ‘What is a family?’ and, in particular, what defines a functional family that is supportive of child well-being and development. They examine key theories, including attachment theory, family systems theory and the bioecological approach – each rooted in decades of empirical work – tracing their evolution and the insights they have offered to developmental psychologists. In doing so, they highlight the limits of examining families as a mere collection of individuals and argue that only by considering the broader roles of familial relationships in shaping family dynamics, the wider community and the socio-cultural context, can these insights provide relevance and application for psychology.

In Chapter 9, Shoshana Grossbard takes the perspective of a feminist economist and focuses on the fertility implications of laws regulating asset ownership in marriage – specifically, how family law can affect women’s decision about having a child within marriage, within a couple, or not. She investigates this through two case studies: the first analyses empirical evidence relating to coverture laws in the United States of America from 1850 to 1920; the second considers the impact of laws concerning financial arrangements on marital dissolution, focusing on community property laws in New Zealand and the Canadian province of Ontario. Grossbard shows that family laws have influenced women’s fertility choices: the greater the financial advantage of marrying or forming a couple before having a child, the more likely women are to have children within that union rather than outside it.

In Chapter 10, Arnstein Aassve et al investigate perceptions of the ‘ideal family’ through a survey conducted across eight jurisdictions

worldwide, comparing and contrasting various family components, such as union status, number of children, household income level, contact with grandparents, gender roles between the couple, family–work conflict and expected educational outcomes for children. They find that divorce is viewed negatively in all countries – even those with high divorce rates – as is childlessness. By contrast, income status, community respect, and good communication between family members and grandparents are all highly valued in individuals’ family ideals, whereas gender roles are less relevant. Despite differences in family laws and traditions across jurisdictions, the study shows that, while the magnitude of effects varies, the direction of preferences is consistent, suggesting that family ideals are a universal concept.

To conclude, [Part IV](#), ‘Rethinking the Family of Law’, explores ways to carry these conversations forward. It brings together a range of perspectives through which the family of law and the purposes of family law can be reimagined and reshaped to better meet the needs of contemporary families.

In [Chapter 11](#), Noam Peleg adopts a children’s rights perspective to examine the objectives, forms and functions of the legal family. Drawing on the UN Convention on the Rights of the Child, he asks how this instrument understands ‘the family’ and its role in children’s lives, as well as how it conceptualizes what ‘good’ child-rearing practices look like. He then turns to the question of how parent–child relationships are established, engaging the perennial debate between formal and functional approaches to the recognition of the legal family and considering how these approaches might evolve to better support children’s rights. Ultimately, Peleg argues that the central aim of family law should be to recognize the relationships – both existing and potential – that enable the full realization of children’s rights, particularly their developmental rights.

In [Chapter 12](#), Helena Moradi considers the role of the state in shaping the idea of ‘the family’. Using the Swedish welfare state as a case study, she traces how its ideological foundation of *Folkhemmet* (or the ‘people’s home’) – which emphasises interdependence and a shared universal responsibility for dependency – has been eroded by the neoliberal transformations of the late twentieth century. These shifts have reframed dependency as a private responsibility, a trend reflected also in Swedish family law, which prioritizes procedural neutrality in custody arrangements and mediation, assuming that parents negotiate from equal bargaining positions. Drawing on Martha Albertson Fineman’s Vulnerability Theory, Moradi argues that a vulnerability-centred perspective can help revive the collectivist spirit of *Folkhemmet* by challenging the notion of the family as an autonomous caregiving unit, instead acknowledging its deep reliance on legal and economic structures, recognizing caregiving as a universal social concern and positioning the state as a responsive actor.

Finally, in [Chapter 13](#), Jonathan Herring encourages the reconceptualization of the core role of family law, shifting the focus from regulating sexual relationships and parenting to addressing care and loneliness. He contends that family law should provide a framework in which care is valued, rewarded and protected – extending beyond the care of children to encompass all forms of caregiving. Herring also highlights that loneliness and social isolation are major sources of distress and infringements on the right to social interaction, making it a responsibility of the state to facilitate connection and mitigate these issues. Underpinning his argument is the acknowledgement that humans are inherently vulnerable and relational and that caring relationships are key to our well-being.

We acknowledge that this volume is by no means comprehensive, and many additional perspectives could be brought to bear on the question of ‘What is a family?’. Religious perspectives, for example, can illuminate how religious teachings, beliefs and practices influence family relationships, structures and dynamics, highlighting shared normative ideals – such as marriage and parenthood – while also revealing the varied cultural and ethical frameworks that guide religious traditions. Similarly, critical race theories highlight how systemic racism, historical legacies and cultural identity shape family experiences, enabling a more intersectional understanding of family formation, identity and the challenges faced by families across racial and ethnic groups. Another noticeable absence is that of anthropology, a discipline that has long engaged in the study of kinship systems, family structures and relational dynamics across time and space. In addition to foregrounding the social and cultural nature of kinship, anthropological perspectives empirically reveal the ever-present diversity of family forms, challenging the moral panic that often animates debates over the recognition of non-traditional families in Western societies. Despite not being represented through chapters due to various constraints, these perspectives were part of our discussions during the workshops leading up to the development of this book and are partially reflected in the current contents, particularly in the attention given to lived realities, social identities and values in (re)shaping understandings of ‘family’.

Moreover, while we have attempted to consider many different *academic* perspectives on the family, we are also aware that the authors predominantly reflect a largely homogeneous Western standpoint, which inevitably presents its own biases.

1.3. Emerging Common Threads

When reading these chapters together, three common threads emerge from this volume. The first is the – perhaps inevitable – persistence of the traditional nuclear family as ‘the ideal’, which, despite being increasingly and more vocally contested, remains an implicit or explicit reference point and analytical category for exploring contemporary family realities. In spite

of appearing in tension, ‘the ideal’ (family) and ‘the real’ – that is, the family realities on the ground – more often than not coexist both empirically and conceptually. In the field of law, this coexistence results from the *ongoing* legal process of family pluralization, which has led to shifting legal attitudes more than to changed legal frameworks – at least for now. The challenges arising from this difficult coexistence are experienced *in primis* by those who have created family relationships not matching ‘the ideal’ and whose lived experiences are therefore not afforded (full) legal recognition and protection. At a more conceptual level, the tension between ‘the ideal’ and ‘the real’ is also internally experienced by the law itself, in the sense that legal frameworks are themselves torn between the need to maintain clear and coherent regulation of family relationships and the need to be more inclusive and flexible in order to meet the needs of today’s families.

The second common thread concerns the central role of gender – and, more broadly, social identities – as an analytical lens for tracing the origins, the development and the legacy of certain understandings of ‘family’ and, more importantly, for challenging and rethinking these understandings. The changing position of women in Western societies has triggered considerable reflections upon crucial questions concerning families, including the gender of reproduction, the past and the future of the institution of marriage and the organization of paid and unpaid labour within families. More broadly, feminist and queer perspectives across disciplines have brought to the fore ‘the invisible’, ‘the privatized’, and ‘the invisibilized’, enabling a critical appraisal of how families are regulated.

The third common thread resonates with the plurality of norms and consequently of actors and institutions that contribute to defining ‘family’ inside and beyond the law. Undeniably, legal conceptualizations of ‘family’ continue to constrain people’s social imaginaries and impact day-to-day family experiences. Yet, within legal scholarship at least, there is also an increased attention to the bi-directional relationship between law and society, leading to a greater appreciation of the role of social actors, including contemporary families, in setting the terms of current conversations about what constitutes a family. Families are therefore plural configurations, not only in the ways they are created and experienced but also in the sense that a plurality of norms, actors, narratives and experiences contribute to their conceptualizations.

In conclusion, we hope that this volume serves as the beginning of a wider conversation between law and other disciplines, ensuring that the legal regulation of the family remains responsive, dynamic and, above all, informed by insights from diverse fields that have demonstrated a deeper engagement with the actual lives of families – often through empirical approaches – and a greater adaptability to real-world complexities. A next key question is, ‘How can we effectively and fruitfully mobilize and operationalize extra-legal knowledge and experience to drive inclusive and sustainable legal change?’.

PART I

Unsettling Traditional Paradigms

What Is a Family? A Feminist Family Science Perspective

Katherine R. Allen

2.1. A Reflection on Family: It's Personal, It's Political, but It's Not Always Legal

Much of the literature on 'What is a family?' is based on a positivist, rational perspective that privileges legal ties and a sanitized, idealized image of family togetherness.¹ Prevailing wisdom about family positions it as a legal structure, with instrumental and emotional bonds legitimized by blood, marriage, and adoption. Missing from this definition is an understanding of the invisible, ambiguous, contradictory, messy, and often unexamined ways in which people belong to families and enact family roles, responsibilities, and relationships, consciously and unconsciously.² The families in which humans live are far different – and far more variable – than the families that scholars conceptualize and measure.³ Compared to the families in which people actually live, family scholarship is depicted in abstract terms and appears 'lifeless'.⁴ Indeed, the description of family is typically ordered

¹ K Daly, 'Family Theory versus the Theories Families Live By' (2003) 65(4) *Journal of Marriage and Family* 771; KR Allen and AC Henderson, *Family Theories Today: A Critical Intersectional Approach* (2nd ed, Cognella Academic Publishers 2023).

² IA Connidis, 'Exploring Ambivalence in Family Ties: Progress and Prospect' (2015) 77(1) *Journal of Marriage and Family* 77; KR Allen, 'Feminist Theory, Method, and Praxis: Toward a Critical Consciousness for Family and Close Relationship Scholars' (2023) 40(3) *Journal of Social and Personal Relationships* 899.

³ Daly (n 1).

⁴ VW Marshall, SH Matthews and CJ Rosenthal, 'Elusiveness of Family Life: A Challenge for the Sociology of Aging' (1993) 13(1) *Annual Review of Gerontology and Geriatrics* 39.

around a distanced, normative definition, such that the idealized image of ‘The Family’ (capitals intended) substitutes for the realities and complexities of how people actually live within and interact with one another as families. Not only is this depiction lifeless, but it also lacks agency. Agency is the capacity to make choices within the constraints (often debilitating) of social institutions,⁵ in short, to be a wilful subject, capable of agentic being and doing.⁶ Yet the idealized image of the Standard North American Family (SNAF) is actually depicting a mythological norm of the two-generational White, middle-class, heterosexually married couple and their children.⁷ This model is both idealized and outdated, and it never reflected the majority of families in North America, except during the post-war decade of the 1950s.⁸

As a feminist family scholar, I consider issues of power, diversity, and complexity to be central to the lived experience of families.⁹ The overt and covert constructions of families impact how people who are related to one another live, just as lived experience, in turn, drives the creation of new social norms. For example, the technological revolution, which is unfolding at an unprecedented rate, is rapidly changing society, upending old ways of constructing social relationships and ushering in new forms of relating. Artificial intelligence has infiltrated homes, jobs, bedrooms, and psyches, challenging every corner of human engagement including caregiving, communication, parenting, and sex.¹⁰

Before describing the theoretical bases of a feminist family science perspective on family structure and process, I wish to turn the lifeless, objectivist view of families upside down by offering an autoethnographic story to bring to life a feminist perspective on family complexity. I use reflexive feminist autoethnography, which is a type of politicized narrative writing, as a method to reveal how the particular of private experience can shed light on general social structures and vice versa,¹¹ thereby offering an

⁵ S Hitlin and GH Elder Jr, ‘Time, Self, and the Curiously Abstract Concept of Agency’ (2007) 25(2) *Sociological Theory* 170.

⁶ S Ahmed, *Living a Feminist Life* (Duke University Press 2017).

⁷ DE Smith, ‘The Standard North American Family: SNAF as an Ideological Code’ (1993) 14(1) *Journal of Family Issues* 50.

⁸ S Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* (revised edition, Basic Books 2016).

⁹ Allen (n 2).

¹⁰ J Hall, *Relating through Technology* (Cambridge University Press 2020); E Kislev, *Relationships 5.0: How AI, VR, and Robots Will Reshape Our Emotional Lives* (Oxford University Press 2022); GM Longo, ‘The Internet as a Social Institution: Rethinking Concepts for Family Scholarship’ (2023) 72(2) *Family Relations* 621.

¹¹ E Ettore, *Autoethnography as Feminist Method: Sensitising the Feminist ‘I’* (Routledge 2017); Allen (n 2).

empowering lens to shed new light on family relationality.¹² Building on the work of feminist theorists such as Audre Lorde¹³ and Sarah Ahmed,¹⁴ I use an experience from my own life to theorize about families. Ahmed identifies this kind of theorizing as a ‘sweaty concept’,¹⁵ which is a way to conceptualize – and survive – a shattering experience by staying within the embodied difficulty of the situation. I intend my tale of two fathers-in-law as a sweaty concept to illustrate that the family of lived experience I narrate is very different from the normative structure of families that permeates the mindset of the public and the research products of scholars who study families. The experience of being and doing family – because it is both invisible and taken for granted – is far more challenging to define and understand than examining the disembodied averages of the norm.¹⁶

2.2. A Tale of Two Fathers-in-law

I just received a telephone call from a young man, Zack, that I helped to bring into the world. About three decades ago, before there was legal marriage, divorce, custody, or second parenthood for LGBTQ families in the United States, I was a member of a lesbian family. I was in a committed partnership with another woman. We were raising two sons: my biological son from a previous heterosexual marriage, and my partner’s biological child, whose donor was my gay brother’s life partner.¹⁷ When our second son, Zack, was 6 years old, my partner found another woman with whom she wanted to live, and she left me along with my biological son, and took Zack to live in her new family. After a great deal of effort and seeking the assistance of four different lawyers, I learned in no uncertain terms that Zack and I were, indeed, legal strangers to one another. I had no legal recourse to seeing Zack if his biological mother did not want to grant me access. This was in the early 2000s, well before the year 2015 when *Obergefell v Hodges* was decided by the US Supreme Court, granting legal rights to same-sex partners.¹⁸ Zack did find a way back to me when he was 22 years old, and, together, we are forging a familial connection.

¹² J Gabb, ‘Family Lives and Relational Living: Taking Account of Otherness’ (2011) 16(4) *Sociological Research Online* 1.

¹³ A Lorde, *Sister Outsider: Essays & Speeches* (Crossing Press 1984).

¹⁴ S Ahmed, *The Cultural Politics of Emotion* (Routledge 2015); Ahmed (n 6).

¹⁵ Ahmed (n 6) 12.

¹⁶ Daly (n 1).

¹⁷ TJ Stone and KR Allen, ‘Parenthood and Pregnancy: The Journey of a Lesbian Couple and Their Children’ in VR Fu and AJ Stremmel (eds), *Affirming Diversity through Democratic Conversations* (Prentice Hall 1998) 171–185.

¹⁸ N Knauer, ‘Implications of *Obergefell* for Same-sex Marriage, Divorce, and Parental Rights’ in AE Goldberg and AP Romero (eds), *LGBTQ Divorce and Relationship*

Fast forward to the present when I received a phone call from Zack. Now, nearly 30, he called to tell me, 'My grandfather just died. He took his own life'. My heart leapt up into my throat. 'Oh no', I said, 'I'm so sorry. I'm so deeply sorry for your loss. How are you feeling? What is going on with you? How are you holding up?'. Amidst the intensity of feelings, Zack also told me that his grandfather's quality of life was declining, and he no longer wanted to live, thereby deciding to end his life. Dread and despair filled me, as I thought, Zack has already experienced loved ones dying from suicide several times – now his grandfather, then his high school girlfriend. And, as I have written about,¹⁹ worst of all for me, when his brother, my biological son, Matt, died by suicide. I was devastated for Zack, for what this means to his sense of family, to his stability and security, for his future. He has already experienced so much tragedy in his short life, and now another loss to suicide to process, to understand, and to learn to live with.

In the days that followed, filled with many conversations with Zack about how he was coping with this new loss, I began to realize that I, too, was experiencing a new layer of grief. This is a grief that is not recognized by society. This grief is unnamed and unacknowledged. Identified by Doka as disenfranchised grief, this is a type of grief that occurs 'when a person experiences a significant loss and the resultant grief is not openly acknowledged, socially validated, or publicly mourned'.²⁰ My reaction to my former partner's father's death – who was my father-in-law emotionally and familially but not in a legal or socially sanctioned sense because I could not be married to his daughter – is extra complicated because my ex-partner and I are not in communication. Ours was not a 'good divorce'²¹ where both parties worked through their differences and put the well-being of the future of their family first. Ours was not even a divorce, in that we were not allowed to be married, and my ex-partner did not want me in her life after she left.²² When she decided to leave and take her biological child with her, the only legal decision that could be negotiated was selling our home.

I had been 'related' to my former 'father-in-law' for 12 years, during the length of my partnership with his daughter. But when she left me, he too

Dissolution: Psychological and Legal Perspectives and Implications for Practice (Oxford University Press 2019) 7–34.

¹⁹ KR Allen, 'Family, Loss, and Change: Navigating Family Breakup before the Advent of Legal Marriage and Divorce' in AE Goldberg and AP Romero (ibid) 221–232; Allen (n 2).

²⁰ KJ Doka, 'Disenfranchised Grief in Historical and Cultural Perspective' in MS Stroebe, RO Hansson, H Schut and W Stroebe (eds), *Handbook of Bereavement Research and Practice: Advances in Theory and Intervention* (American Psychological Association 2008) 224–240.

²¹ CR Ahrons, *The Good Divorce: Keeping Your Family together When Your Marriage Comes Apart* (Harper Collins 1994).

²² KR Allen, 'Ambiguous Loss after Lesbian Couples with Children Break Up: A Case for Same-gender Divorce' (2007) 56(2) *Family Relations* 175.

became a legal stranger to me, just like his daughter and her biological child were. So now, this 84-year-old man was dead, in a tragic way that reverberates across the generations, and even the simple act of offering my ex-partner condolences is unwelcomed by her. Because we have no legally or socially recognized relationship, despite the fact that he had been a strong presence in my life for 12 years, I must mourn his loss alone. Historically, LGBTQ people have converted their legally invisible family members into kin, a social-psychological phenomenon called ‘chosen kin’²³, but my ex-partner withdrew the potential of even the social connection of being chosen kin. What’s worse, my former father-in-law died in a way that my own son died, by suicide. The circumstances and complications of this type of death have brought on tremendous waves of grief, and I mostly experience it in a silenced and solitary fashion as a legal stranger but also as a lost member of the chosen kin network we once had. Although my ex-partner and I, along with our two sons, were once ‘the lesbian poster family’ of our community, after she left, I had no legal or socially sanctioned way to continue connections to what was once our family. We remained legal strangers to one another and have become social strangers.

Death – especially tragic death and the disenfranchisement that accompanies it – has a way of revealing that family ties are not so neatly continued or cleanly severed. My former ‘father-in-law’, who was never ‘legally’ my in-law, was now dead, and, given my non-status in his daughter’s current family, I must grieve the loss in silence. I am able to offer Zack support, especially by being present for him and not running away from this highly disorientating family tragedy. Having lived through the devastation of my son’s suicide as a bereaved parent, I can treat Zack’s vulnerability with care and understanding. Yet all of these feelings swirl around and make life difficult and complicated. ‘What is a family’ in a situation like this is a profound question to ask and one without easy answers. Who is in my family is complex, ambivalent, contradictory, and often does not follow clearly demarcated lines of descent, marriage, divorce, or death. Once again, the family of lived experience does not match legal or normative definitions.

Simultaneously, I also live in a clearly delineated normative family that, on the surface – in terms of being heterosexually married – appears to mimic some of the dimensions of SNAF. Currently, my immediate family consists of my husband to whom I have been married for 20 years. My family also consists of my husband’s parents, almost 90, both of whom have health issues

²³ K Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press 1991); KR Allen, R Blieszner and KA Roberto, ‘Perspectives on Extended Family and Fictive Kin in the Later Years: Strategies and Meanings of Kin Reinterpretation’ (2011) 32(9) *Journal of Family Issues* 1156.

associated with late life and are in an assisted living facility where they can receive daily care. As a family gerontologist, I serve on the board of directors for this retirement community, which renders my connection to their daily lives both personal and professional.

In my current family, my relationship with my father-in-law, David, is both legally and socially recognized. His son, to whom I am legally married, serves as the power of attorney for his parents. As the wife of his son, I am listed as one my father-in-law's two primary contacts, and his health care providers are allowed to share information about his care with me. Informally, I assist my father-in-law with mundane needs of everyday life, such as buying clothes for him, helping with correspondence, driving him to appointments, and organizing and hosting dinners for the rest of the family when they come to visit. My father-in-law and I also attend the same religious community, and many people at church informally keep up with both of us by asking about the other person. Before the pandemic, I accompanied my in-laws to church every Sunday. People know us as a family, and when they ask how we are doing, we speak about the other in familiar and familial ways.

Nearly 90, and in declining health, my father-in-law is in the last years of his life. I am accompanying him on this journey into late old age, and I anticipate being with him when his final days come. I anticipate the memorial service in our spiritual community, which I have helped to plan. I anticipate the social acceptance and social approval that comes from being a caring and attentive daughter-in-law, especially since daughters and daughters-in-law are the primary caregivers for parents in late life.²⁴ In the future, I anticipate socially sanctioned grief, the receipt of sympathy cards, and poignant memories shared by friends in our church. In short, there are innumerable cultural, legal, and social milestones available to assist me in my relationship with my father-in-law, in both life and death. Even though death is perhaps the most difficult of all topics to discuss,²⁵ society has well-established guideposts and rituals for dealing with normative family transitions such as the end of a beloved family member's life.²⁶

Contrast the scenario with my 'legal' father-in-law to the simultaneous loss of my former 'father-in-law', again, with whom I was never legally connected and ultimately became socially unconnected. Unlike the socially sanctioned attention I receive and provide for my 'legal' father-in-law, I must grieve the loss of my non-legal father-in-law in silence and solitude. As I consider

²⁴ IA Connidis and AE Barnett, *Family Ties & Aging* (3rd ed, Sage 2019).

²⁵ F Church, *Life Lines: Holding on (and Letting Go)* (Beacon Press 1996).

²⁶ L Lewis and WG Hoy, 'Bereavement Rituals and the Creation of Legacy' in RA Neimeyer, DL Harris, HR Winokuer and GF Thornton (eds), *Grief and Bereavement in Contemporary Society: Bridging Research and Practice* (Routledge 2011) ch 24.

his death and how the mourning of it must be private because I was left behind by that family, words from the academic literature fail me. There are no readily available cards, rituals, or dialogue for this kind of loss – it is truly disenfranchised because this kind of loss is not one that is built into the way scholars or the public talk about family ties, connections, structures, or processes. For these words and insights, we must turn to lived experience.

2.3. Family as Lived Experience

Considering my experiences of dealing with issues of life and death associated with two different fathers-in-law, it is clear that the definition of family must be far more comprehensive than who lives with whom or who is legally related to whom. My tale of two fathers-in-law narrates the importance of extending the definition of family composition to take seriously the family of lived experience, where the legal and non-legal, the expected and unanticipated, the harmony and the tragedy, all come in. As a feminist family scholar, I take clues and hints from my own life to see how reality matches and/or contradicts the fantasy of how families are or, more to the point, how they are supposed to be. Contrary to the positivist, rational view that permeates scholarly writing, with its pursuit and enshrinement of objectivity, our own subjectivities are a good starting point for checking the validity of academic constructs about families.²⁷

At the same time that I have been silently grieving the death of my former father-in-law, I read Annette Gordon-Reed's research about Thomas Jefferson and Sally Hemings.²⁸ Thomas Jefferson was the third president of the United States and the author of the Declaration of Independence. His Virginia estate, Monticello, is only a few hours from my home, and I have visited it often. The version of family that is now on display at Monticello, and in Gordon-Reed's book about Jefferson and Hemings, is very different from the mythical family enshrined in our collective imagination. Sally Hemings was both the half-sister of Thomas Jefferson's deceased wife, Martha, because they shared the same father, as well as an enslaved woman on Jefferson's plantation. In his will, Jefferson freed only five males, two of whom were Hemings' sons and three of whom were her brother and nephews. Gordon-Reed, an acclaimed historian and legal scholar, examines the evidence that Sally Hemings's children were fathered

²⁷ KR Allen, 'A Conscious and Inclusive Family Studies' (2000) 62(1) *Journal of Marriage and Family* 4; K Daly, *Qualitative Methods for Family Studies & Human Development* (Sage 2007); S Gannon, 'Sketching Subjectivities' in TE Adams, SH Jones and C Ellis (eds), *Handbook of Autoethnography* (Routledge 2022) 41–51.

²⁸ A Gordon-Reed, *Thomas Jefferson & Sally Hemings: An American Controversy* (University of Virginia Press 1997).

by Thomas Jefferson. She charts the scholarly backlash against this claim by established Jefferson biographers. What results is a compelling analysis of the evidence about marriage, paternity, power, enslavement, individual liberty, and the historical and institutional racism that calls into question every moralistic standard about who counts as family. The contradictions about blood, lineage, and power embedded in the intimate and institutional history of the country in which I live shakes every notion of what counts as a legitimate family and begs for a far more expansive definition than what currently exists. To arrive at a more expansive definition, I turn to feminist theorizing in family science.

2.4. A Feminist Perspective on Families: Critical and Intersectional

A feminist family science perspective on families examines intimacy and kinship over the life course and attends to the use and abuse of power in how families are structured and interact. The discipline of family science pulls from the social and behaviour sciences, especially sociology, psychology, history, and women's studies, in order to theorize about, research, and enact social change on behalf of families, with a particular emphasis on marginalized and minoritized families. A feminist lens heightens the understanding of power and empowerment, in the differential treatment of families, on the basis of the resources they have and the identities they embody, all of which are entrenched in political, cultural, and social contexts.

Feminist family science views families as stratified in ways that can oppress or privilege. One way in which families are stratified is externally, by structural systems of power that dole out resources and opportunities disproportionately on the basis of race, social class, sexuality, gender identity, nationality, ability status, age, and the like. Another way families are stratified is internally, at the very least, by gender (for example, women as subordinate) and by generation (for example, the very old and the young are marginalized). Ultimately, a feminist approach relies on critical and intersectional theorizing to tell a different story about how families really are, compared to the more proscriptive version of how they should be.

2.4.1. Critical

First, feminist family science is critical of the functionalist, normative, and so-called traditional view of families (the SNAF model). Feminist scholars critique how this hypothesized template of the normative family has been used as the standard bearer, against which *all* families have been measured, in contemporary social science. Instead of positing that there is a 'best' or most functional form of how to live in and be a family, a critical feminist approach

decentres the mythical norm and challenges the authority of intellectual traditions that ‘valorize androcentricity, heteronormativity, cisgenderism, and Whiteness over other identities and forms of social order’.²⁹

The SNAF template and other variations of the idealized normative family is problematic because of the ontological assumptions on which the notion of a uniform family legitimacy is based. The heteronormative assumption presumes a family is initiated by two opposite-sex individuals – a man and a woman – who, upon marriage, begin their own family life cycle, which continues uninterrupted until their death (for example, no divorce). The patriarchal assumption presumes that the man, as paterfamilias, has the legitimate power in the family. He earns the money and holds the authority; the woman, as the emotion worker, is relegated to the function of caregiver and is required to do double duty with the burden of invisible, unpaid labour imposed upon her. The biological parentage assumption presumes that this pair-bonded unit reproduces through heterosexual penetration and has children who are biologically related to the parents. Other forms of intergenerational connection are allowed, but biology always trumps social ties forged through remarriage, adoption, or informal (chosen) arrangements. The racist and classist assumption presumes a White, Anglo-Saxon, educated, at least middle- to upper-middle-class (American) family, thereby rendering as other families of colour and families who struggle financially.³⁰

Turning away from what is idealized (for example, most functional, normative, standard, or fantasized about), a feminist view, instead, sheds light on the experiences of marginalization and vulnerability in family life that result from the imposition of oppressive social conditions that privilege some and oppress others. Poverty, pandemics, incarceration, climate change, war, violence, and physical and mental illness are among the most challenging difficulties families face, and yet all of these are disproportionately experienced by minoritized and marginalized groups.³¹ Feminist family

²⁹ AL Few-Demo and KR Allen, ‘Gender, Feminist, and Intersectional Perspectives on Families: A Decade in Review’ (2020) 82(1) *Journal of Marriage and Family* 326, 328.

³⁰ KR Allen and AC Henderson, ‘Family Theorizing for Social Justice: A Critical Praxis’ (2022) 14(3) *Journal of Family Theory & Review* 364.

³¹ K Ferguson, ‘Feminist Theory Today’ (2017) 20(1) *Annual Review of Political Science* 269; V Gago, *Feminist International: How to Change Everything* (L Mason-Deese tr, Verso 2020); H Prime, M Wade and DT Browne, ‘Risk and Resilience in Family Well-Being during the COVID-19 Pandemic’ (2020) 75(5) *American Psychologist* 631; N Hannah-Jones (ed), *The 1619 Project: A New Origin Story* (One World 2021); CJ Cross, P Fomby and B Letiecq, ‘Interlinking Structural Racism and Heteropatriarchy: Rethinking Family Structure’s Effects on Child Outcomes in a Racialized, Unequal Society’ (2022) 14(3) *Journal of Family Theory & Review* 482; S Gupta and JA Ardit, ‘Women at the Margins: Experiences with Spousal Incarceration in India’ (2023) 15(2) *Journal of Family Theory & Review* 313.

scholars urge the replacement of the SNAF template with conceptualizations and studies that accommodate and understand how families actually live in the world, in all of their vulnerability and complexity.

However, the SNAF model, which ‘never was the way we were’,³² is highly resistant to eradication. It still provides the idealized image of what a family is and how it should function, fuelling emotional sentimentality, the culture wars in the United States, and a lot of mainstream empirical research.³³ This normative model was a reality for only a decade in the post-war era of the 1950s (nearly 60 per cent of American families were White, middle class, heteropatriarchal, and still married).³⁴ There are many compelling trends suggesting that people live in far more diverse ways than this singular, one-size-fits-all model. Notably, the rise of singlehood, especially among older populations worldwide, suggests alternative ways of constructing adult life in which marriage and parenthood are not privileged.³⁵ Other trends include the volatility of fertility and its worldwide decline, from 1960 to 2021,³⁶ as well as the increasing visibility of sexual and gender identities that lead to new ways of identifying, partnering, parenting, and cohabitation.³⁷ Yet, despite the evidence of tremendous diversity in the many other forms of intimacy and kinship, this ideal of the normative family continues to provide the model for the popular, professional, and political imagination.

2.4.2. *Intersectional*

Second, feminist family science draws from intersectionality theory to reveal how the social and political forces, of racism, patriarchy, heteronormativity, and the like, are interrelated, and they function to privilege and protect White wealthy heterosexual family supremacy.³⁸ This leaves all other kinds

³² Coontz (n 8).

³³ Allen and Henderson (n 30).

³⁴ Coontz (n 8).

³⁵ B DePaulo, ‘Single and Flourishing: Transcending the Deficit Narratives of Single Life’ (2023) 15(3) *Journal of Family Theory & Review* 389; ES Lavender-Stott, ‘Queering Singlehood: Examining the Intersection of Sexuality and Relationship Status from a Queer Lens’ (2023) 15(3) *Journal of Family Theory & Review* 428.

³⁶ World Bank, *Fertility Rate, Total (Births per Woman)* <https://data.worldbank.org/indicator/SP.DYN.TFRT.IN> accessed 2 March 2024.

³⁷ M-J Barker and A Iantaffi, *Life Isn’t Binary: On Being Both, Beyond, and In-between* (Jessica Kingsley Publishers 2019); AE Goldberg and KR Allen (eds), *LGBTQ-parent Families: Innovations in Research and Implications for Practice* (2nd ed, Springer 2020).

³⁸ PH Collins, *Intersectionality as Critical Social Theory* (Duke University Press 2019); Cross, Fomby and Letiecq (n 31).

of families, including LGBTQ families³⁹ and families aligned with diverse racial-ethnic groups, such as Black families in America, to be marked as a social problem that must be corrected through public policy or state intervention.⁴⁰ Intersectionality theory pairs analyses of structural statuses, such as race, gender, age, and nationality to understand the disproportionate impact of state policies on individuals and families. For example, China has dismantled state-sponsored collectivist child, elder, and health care systems, rendering working mothers little choice but to leave their jobs and return home in order to provide the invisible care work for families.⁴¹

Although feminist analysis has always been concerned with gender as a primary system of oppression, Black feminist scholars and activists have critiqued gender as a singular category to reveal how it interacts with other systems of oppression.⁴² Members of the Combahee River Collective first challenged the use of single-axis, binary thinking about how oppression worked (for example, White/Black, male/female, straight/gay).⁴³ Instead of a singular concept of ‘gender’ as an oppressive structure that renders all women second-class citizens, intersectional feminists have revealed how major systems of power, such as race, class, gender, and sexuality, ‘are interdependent and mutually construct one another [...] and produce complex, interdependent social inequalities’.⁴⁴ For example, misogynoir, which is a particular type of oppressive treatment of Black women, links the intersection of racism and sexism, creating a new space to understand the double jeopardy that Black women face in terms of discriminatory practices simultaneously occurring from race and gender.⁴⁵

³⁹ AE Goldberg, KR Allen and C Sanner, ‘Cherished Families, Unspoken Truths: Navigating Hidden and Challenging Family Experiences While Growing Up with LGBTQ Parents’ (2024) 86(1) *Journal of Marriage and Family* 219.

⁴⁰ I Banks, ‘Intersectional Blackness Matters: Why Family Science Should Care about the College Board’s A.P. African American Studies Course Controversy’ (2023) 15(4) *Journal of Family Theory & Review* 637.

⁴¹ Y Ji, X Wu, S Sun and G He, ‘Unequal Care, Unequal Work: Toward a More Comprehensive Understanding of Gender Inequality in Post-Reform Urban China’ (2017) 77(11–12) *Sex Roles* 765.

⁴² Lorde (n 13); PH Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman 1990); K Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 *Stanford Law Review* 1241; AL Few-Demo, ‘Intersectionality as the “new” Critical Approach in Feminist Family Studies: Evolving Racial/Ethnic Feminisms and Critical Race Theories’ (2014) 6(2) *Journal of Family Theory & Review* 169.

⁴³ Combahee River Collective, ‘The Combahee River Collective Statement, 1977’ in GT Hull, PB Scott and B Smith (eds), *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women’s Studies* (Feminist Press 1982).

⁴⁴ Collins (n 38) 44.

⁴⁵ M Bailey, *Misogynoir Transformed: Black Women’s Digital Resistance* (New York University Press 2021).

Intersectionality is needed to fully understand how political systems are steeped in racist manipulation. For example, in the United States, the prison population is primarily comprised of men of colour, and Black adults are imprisoned five times the rate as White adults.⁴⁶ Intersectionality is a necessary corrective to analysing how oppression operates within particular social groups and how people who are marginalized come together to make the political changes that the wider social systems have failed to do.⁴⁷ Because the consequences of inequality and its resulting marginalization are debilitating and pervasive, intersectional analysis is needed in order to challenge the status quo and effect complex change at multiple levels.

Given its origins in Black feminist theory and activism, intersectionality provides a constant reminder of the resistance to inclusive social justice for all families, especially historically marginalized Black families in the United States.⁴⁸ Just as progress is being made, a backlash arises to curtail progressive movement toward equality for all. The challenges, for example, to Black Studies in the United States,⁴⁹ Florida's 'Don't Say Gay' campaign to ban discussion of gender identity and sexual orientation,⁵⁰ and the rise of anti-gay legislation and activism in the United States⁵¹ are all examples of regressive resistance to inclusive social justice. Intersectionality is a concept that helps to explain the zero sum game, where those with power do not want to share their privileges or resources, for fear that sharing will lead to relinquishing power. Instead, intersectionality theory teaches that our fates are intertwined; all people, across sexual, racial, ethnic, and gender lines, need each other and can benefit from 'the solidarity dividend'⁵² of equality for all.

⁴⁶ Pew Charitable Trusts, *Racial Disparities Persist in Many US Jails* (16 May 2023) <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/05/racial-disparities-persist-in-many-us-jails#:~:text=This%20finding%20is%20in%20line,individuals%20as%20of%20June%202021.&text=The%20three%2Dcounty%20analysis%20using,data%20found%20similar%20admissions%20disparities> accessed 2 March 2025.

⁴⁷ Collins (n 38); A Srinivasan, *The Right to Sex: Feminism in the Twenty-first Century* (Farrar, Straus and Giroux 2021).

⁴⁸ Lorde (n 13); Few-Demo and Allen (n 29); Banks (n 40).

⁴⁹ Banks (n 40).

⁵⁰ AE Goldberg and R Abreu, 'LGBTQ Parent Concerns and Parent-Child Communication about the Parental Rights in Education Bill ("Don't Say Gay") in Florida' (2024) 73(1) *Family Relations* 318.

⁵¹ Movement Advancement Project (nd) *LGBTQ Equality by State* (2025) <https://www.lgbtmap.org/equality-maps> accessed 2 March 2025.

⁵² H McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* (One World 2021) 271.

2.5. Being and Doing Family: Some Common Features

In place of an idealized, normative version of ‘The Family’, thinking about families as lived experience, whose identities and structures vary by diverse social, political, and cultural contexts, it is still possible to consider the consensus around several commonalities that families share.⁵³ This requires an understanding of families as socially constructed rather than simply being rooted in biology or genetics. Just as gender is a cultural and social product, individuals perform family by constructing their identities and making meaning from the cultural artifacts of their particular nationality, geographic region, religion, ethnicity, and the like.⁵⁴ In other words, ‘being’ in a family means that people ‘do’ family by drawing from life history, culture, and society.⁵⁵

At the same time, it is important not to reify the unique nature of family being and family doing. Other entities can also provide the basic functionalities that families have historically provided. A case in point is the emphasis in Japan to design and integrate ‘robots into family life to care for sick populations, to help families with the burden of working long hours, and to assist with the growing number of elders’.⁵⁶ In another example, people are increasingly seeking social relationships online, such as dating,⁵⁷ and expressing themselves sexually online as well. Indeed, Weiser et al found that the discovery of a partner’s online sexual infidelity is experienced as just as harmful as in-person infidelity.⁵⁸ On balance, there are certain qualities that families share. Identifying these components helps to move the discourse about families beyond the reification of the normative family. Family scholars concur that (a) families are diverse (they vary in their composition, structure, and context), (b) families are developmental (they change over time), (c) families are systemic (their members are interrelated

⁵³ Allen and Henderson (n 1).

⁵⁴ A Swidler, ‘Culture in Action: Symbols and Strategies’ (1986) 51(2) *American Sociological Review* 273; C West and D Zimmerman, ‘Doing Gender’ (1987) 1(2) *Gender & Society* 125; MK Nelson, ‘Single Mothers “Do” Family’ (2006) 68(4) *Journal of Marriage and Family* 781.

⁵⁵ Daly (n 1).

⁵⁶ Kislev (n 10) 13.

⁵⁷ GT Tsunokai, AJ Kposowa, E Carroll and M Karamoko, ‘The Color Continuum: Skin Tone and Online Dating Preferences among Asian Americans’ (2019) 36(11–12) *Journal of Social and Personal Relationships* 4027.

⁵⁸ DA Weiser, MR Shrout, AV Thomas, AL Edwards and J Cravens Pickens, ‘“I’ve Been Cheated, Been Mistreated, When Will I Be Loved”: Two Decades of Infidelity Research through an Intersectional Lens’ (2023) 40(3) *Journal of Social and Personal Relationships* 856.

parts of a broader whole), and (d) families are processual (they are dynamic and emotional units).

2.5.1. Families are diverse and complex

As the critique of the ideology of the normative family has revealed, there is no one boilerplate type of family. Feminist family scholars champion family complexity, diversity, and plurality, in the ways that individuals love, partner, parent, and transmit their lineage to kin. Family occupies personal, social, and political space where activities of care and conflict simultaneously occur. In theorizing about, studying, and generating ways to intervene on behalf of families that are grounded in what the families themselves see as important, it is helpful to use at least three layers of analysis: (a) the individual level, which is a person's life, as it changes from birth to death, and lives on in memory and legacy; (b) the familial level, which occurs through interpersonal interaction, where family members are most connected to one another, where home is made, where ties are more obligatory, where it is hoped we can count on one another, despite the differences we may have and the difficulties we face; and (c) the social/historical level, where the structural constraints that shape and challenge individual and family life, including the ever-changing political, legal, and economic systems within which individuals work, go to school, are policed, and are otherwise stratified.

2.5.2. Families are developmental

Families are temporal entities, where change and growth are constantly occurring. The individual life course begins with birth and progresses through stages and transitions marked by important developmental tasks, such as learning to trust, gaining an education, launching into adulthood, and forming intimate relationships both inter- and intragenerationally. In his conceptualization of the eight stages of life, Erikson described how the fruits of the previous seven stages ripen in old age, and a sense of integrity results as one completes a life review and comes to terms with all that has happened.⁵⁹ Families, too, develop over time, with the initiation of intimate partnerships, with family expansion as children enter, with family contraction as children depart, and with family dissolution as older family members die. Key to the family life course is an understanding of how lives are linked over time. The birth of one's first child not only launches a new individual life course but also expands the familial repertoire of the parent and changes

⁵⁹ EH Erikson, *Childhood and Society* (WW Norton 1950).

the family across the generations. Our fates are linked to one another, most dramatically as families develop over time.⁶⁰

2.5.3. *Families are systemic*

Families are relational systems, comprised of interdependent individuals. Family members mutually influence one another.⁶¹ There are many subsystems in a family, including the parental subsystem, the step-parent–step-child subsystem, the grandparent–grandchild system, the sibling subsystem, the aunt–niece subsystem, the cousin subsystem, even the pet subsystem, just to name a few. Each of the various systems of a family is characterized by interaction rules – both overt and covert – that govern issues such as family privacy, communication, boundaries, and the like. Because families are intergenerational systems, not all members of the family are necessarily alive. The influence of deceased kin, whether ancestors or family members whose lives ended abruptly, impact the interactions and functioning of the family system. Indeed, the family is more than the sum of its individual parts. That is, families have their own shifting identities that are not always known to all members. Although some families are close, even enmeshed with porous or few boundaries, and other families are disengaged and lack cohesion, there are systemic level expectations and histories that govern interaction.

2.5.4. *Families are emotional*

Families are dynamic, and it is in the family where we most often process emotions. Humans first learn about emotions before there is language acquisition, from the earliest family interactions, in terms of how infants are cared for when they express themselves.⁶² Emotions are typically intense, and most of the ‘everyday rhetoric of living in families is about love, jealousy, anger, disappointment, hurt, tolerance or care’.⁶³ Throughout life, the family is the primary spatial location for feeling, expressing, examining, and working through emotions. Although all families have rules about how

⁶⁰ VL Bengtson and KR Allen, ‘The Life Course Perspective Applied to Families over Time’ in P Boss, WJ Doherty, R LaRossa, WR Schumm and SK Steinmetz (eds), *Sourcebook of Family Theories and Methods: A Contextual Approach* (Plenum 1993) 469–499.

⁶¹ J Baptist and R Hamon, ‘Family Systems Theory’ in K Adamsons, AL Few-Demo, C Proulx and K Roy (eds), *Sourcebook of Family Theories and Methodologies* (Springer 2022) 209–226.

⁶² J Bowlby, *A Secure Base: Parent–Child Attachment and Healthy Human Development* (Basic Books 1988).

⁶³ Daly (n 1) 775.

emotions may be expressed, it is inside the family that the charged language and experience of emotions are most acutely felt and applied.⁶⁴ Despite how important a family's emotional climate is to the ways that individuals function at home and in the wider world, emotions have been ignored in favour of objectification of families. Families often have difficulty allowing for intense emotional expression. The emotional realm is a fertile ground for new research on families, given the difficulty many people have in identifying and expressing the complexity of what they feel. Emotions matter, especially in the current era of political polarization, when rage and hate fuel much of online content.⁶⁵ Understanding emotions and the rules that guide human interaction is essential to family and societal well-being.

2.6. Conclusion

In this chapter, I have presented ideas from feminist family science that reflect a critical and intersectional view of family structure, process, and complexity. Instead of the normative family model, where 'one size fits all' but only if they are the Standard North American Family (SNAF), I propose that we need to come to our senses and examine the family as lived experience.⁶⁶ My goal in this chapter was to offer another way of envisioning family that goes beyond the compositional, legal, or sentimental family. Families are emotional, dynamic entities, and they are elusive. Ultimately, families are ever-changing, yet often enduring units of care, conflict, and choice.

The family as lived experience approach is a way of conceptualizing families that requires reflexivity. Using a reflexive approach means to take seriously our own experiences of privilege and marginalization and to work from the messiness of our own lives – what Ahmed calls, the sweaty concept.⁶⁷ I used the example of my normative and nonnormative experiences of two different fathers-in-law to illustrate how one can be, simultaneously, both inside and outside the privileged fold of family. Thinking about families from one's own experience reveals the illusory, inexplicable, and often surreal nature of conceptualizing family. Even now, having lived through the death of my own beloved child from suicide, I am studying how young adult offspring of LGBTQ parents talk about, deal with, and interpret the hidden family problems that no one has dared speak of for fear that their families would be in legal jeopardy or socially stigmatized.⁶⁸ My son's suicide was the breaking

⁶⁴ Daly (n 1).

⁶⁵ Ahmed (n 14); M Boler and E Davis (eds), *Affective Politics of Digital Media: Propaganda by Other Means* (Routledge 2021).

⁶⁶ Marshall, Matthews and Rosenthal (n 4); Daly (n 1); Allen (n 27); Allen (n 2).

⁶⁷ Ahmed (n 6).

⁶⁸ Goldberg, Allen and Sanner (n 39).

point where all of my academic privilege fell away and led me to find new ways of relating to knowledge, scholarship, family, and life. Lived experience in families can be a compelling breaking point and spurs us onto more and deeper understandings of what really matters.

Feminist family science is about going to those places others want to stay away from. These places are just the tip of the iceberg as to what is happening in families, and unless we strip off the masks of what is considered normative, standard, traditional, and good, we will not understand the complexity of the phenomena we study. Feminism has always been sceptical of the status quo, which imposes a notion of the ‘deserving’ family as patriarchal, heteronormative, White, and wealthy. To be reflexive is also to be contentious⁶⁹ and leads to asking new questions. How do *I* actually live? How has my own heart been broken? Whom am I fighting with or not speaking to? Whom can’t I have contact with because the law won’t let me? Whom do I know who is hungry, sick, or disenfranchised? Feminist family science does not erase ‘diversity’ by seeking only generalization but is informed by how people actually live and struggle with themselves, their partners, their children, their families, and their communities. It is critical of the unjust and disproportionate distribution of resources that all families need to survive and thrive. At the personal and interpersonal levels, people can define as family whomever they choose, and they can convert non-kin into kin as they need or desire. At the political level, however, the state has strong legal hooks in the family, and the rights of who is legally named as family override the emotional bonds that individuals forge with one another.

In 1983, while still in graduate school, I read a paper by Bronfenbrenner and Weiss⁷⁰ about child well-being that forever imprinted on me the importance of family as lived experience. Bronfenbrenner was the psychologist who proposed a highly influential theory called the Bioecological Model of Human Development.⁷¹ In this paper, describing some of their early work on the Head Start program for young children, Bronfenbrenner and Weiss said, ‘Somebody has to be crazy about that kid’.⁷² Those words have stayed with me my whole career: To thrive, a child needs someone to attend to them, to care, to love them, to be there and doing something, together, with that child. Somebody needs to show up in that role, and sometimes it cannot be

⁶⁹ Allen (n 2).

⁷⁰ U Bronfenbrenner and H Weiss, ‘Beyond Policies without People: An Ecological Perspective on Child and Family Policy’ in EF Zigler, SL Kagan and E Klugman *Children, Families, and Government* (Cambridge University Press 1983).

⁷¹ U Bronfenbrenner (ed), *Making Human Beings Human: Bioecological Perspectives on Human Development* (Sage 2005). See also K Ellis-Davies and S Foley, [Chapter 8](#), this volume.

⁷² *Ibid.*, 398.

the biological or legal parent. In this sense, we are all responsible for those kids, to care deeply for their well-being and to protect the well-being of the family unit – however defined – that supports the child. Ultimately, that is the goal of feminist family science – to identify, fight for, and to improve the well-being of the most fragile among us.

The Legal Family

Alan Brown

3.1. Introduction

The legal understanding of the ‘family’ is not necessarily explicit, nor is the concept of ‘family’ often the specific focus of legislation¹ or case law² or the source of the allocation of particular legal obligations or legal rights. In this way, I have previously suggested ‘that there is no single, overarching *definition* of the “family” within the law’.³ Nonetheless, despite this lack of specific consideration and definition within the law, I have previously argued that the legal *understanding* of the ‘family’ is fundamentally revealing of the norms and values that underpin the legal regulation of family life. Indeed, this legal understanding of the family is illustrated not through the law specifically defining the concept ‘family’ but instead through the ways in which different family relationships are regulated or not regulated. Relatedly, the judicial interpretation of various specific legal rules relating to family life provides further evidence from which the legal understanding of the ‘family’ can be ascertained despite the lack of specific definition. Both of these contexts allow understanding of how the boundaries of ‘family’ are drawn by the law, which

¹ For a rare example, see Rent Act 1977, Sch 1 Para 3(1), which provides that: ‘a person who was a member of the original tenant’s family’ will be ‘entitled to an assured tenancy’.

² The English courts considered the definition of ‘family member’ under this provision (and its predecessor provisions) in a series of cases throughout the twentieth century. The definition was gradually expanded to encompass relationships that were not initially included, see e.g. *Hawes v Evenden* [1953] 1 WLR 1169 (unmarried mixed-sex cohabitants with children), *Dyson Holdings Ltd. v Fox* [1976] QB 503 (unmarried mixed-sex cohabitants without children) and *Fitzpatrick v Sterling Housing Association Ltd.* [2001] 1 AC 27 (unmarried same-sex cohabitants).

³ A Brown, *What Is the Family of Law? The Influence of the Nuclear Family* (Hart 2019) 6.

occurs through what I have described as ‘a determinate and archetypal *idealized image* of the “family”’⁴ that is evident across family law. The choices made concerning which relationships are subject to legal regulation (and are thus recognized as familial relationships by law) inevitably leaves some relationships outside of the scope of that regulation.⁵ To that end, seven years ago, I argued that: ‘the legal understanding of the “family” continues to be centred around the idealized image of the traditional “nuclear family”[...] despite the acceptance of a greater diversity of family forms the legal system continues to conceptualize all families through the prism of the nuclear family’.⁶ However, in the relatively brief time since then, social attitudes⁷ and family forms⁸ within UK society have continued to evolve in ways that suggest that the traditional ‘nuclear family’ possesses even less influence on people’s actual choices about family life and represents the reality for an even smaller number of families in contemporary society.⁹

Therefore, in this chapter, I will return to the influence of this idealized image of the ‘nuclear family’ on the legal understanding of the ‘family’ and consider what has and what has not changed since I originally made these arguments. This will involve considering three different contexts: first, subsequent legislative developments in domestic family law – specifically the introduction of ‘no-fault divorce’ in England and Wales,¹⁰ and the

⁴ Ibid.

⁵ See, for example, KR Allen, [Chapter 2](#), this volume.

⁶ Brown (n 3).

⁷ See e.g. E Clery, ‘A Liberalisation in Attitudes?’ (2023) *British Social Attitudes Survey* 40 <https://natcen.ac.uk/sites/default/files/2023-09/BSA%2040%20Moral%20issues.pdf> accessed 13 August 2024; E Harrison, ‘Family Life: Attitudes to Non-traditional Family Behaviours’ (2020) *British Social Attitudes Survey* 37, 18, https://natcen.ac.uk/sites/default/files/2023-08/bsa37_family-life_0.pdf accessed 13 August 2024; M Albakr, S Hill, N Kelley and N Rahim, ‘Relationships and Gender Identity: Public Attitudes within the Context of Legal Reform’ (2019) *British Social Attitudes Survey* 36 https://natcen.ac.uk/sites/default/files/2023-08/BSA_36.pdf accessed 13 August 2024.

⁸ Office for National Statistics (ONS), ‘Families and Households in the UK: 2023’ (May 2024) 5, <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2023> accessed 13 August 2024: cohabiting couple families made up 18 per cent of all families in 2023, this was up from 15 per cent in 2021, an increase of 469,000 families in that decade, ‘accounting for 42% of the total growth in families since 2013’.

⁹ ONS, ‘Marriages in England and Wales: 2019’ (May 2022) 2 (the last pre-pandemic year for which statistics are available) noted: ‘Marriage rates for opposite-sex couples have fallen to their lowest on record since 1862’. This represented a 50 per cent decline since 1972, <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2019> accessed 13 August 2024.

¹⁰ Divorce, Dissolution and Separation Act 2020.

opening of civil partnerships to mixed-sex couples.¹¹ Second, potential further legislative developments proposed by the UK's Law Commissions – the regulation of surrogacy arrangements¹² and specific statutory rights for cohabitants in Scotland.¹³ Third, an issue that was not explored in my previous consideration of the legal understanding of the family – the legal approach to trans parenthood. In this chapter, I will focus upon the implications of recent judicial decisions¹⁴ concerning trans parenthood¹⁵ for the law's understanding of family. While this may appear to amount to a diverse range of legal contexts, these all relate to either the legal regulation of adult personal relationships¹⁶ or the determination and attribution of legal parenthood,¹⁷ the two relationships that I have previously described as 'the core familial relationships that comprise the central nexus of the nuclear family'.¹⁸ Therefore, in this chapter, I will explore these different areas of law and the continuing significance of the idealized image of the traditional, 'nuclear family' in each context. From this, I will examine the extent to which this idealized image continues to exert normative influence on the legal understanding of the 'family' in the constantly changing contemporary social and legal context.

3.2. Subsequent Legislative Reforms

For the purposes of this chapter, the two most significant legislative developments in family law since my previous consideration of the legal understanding of the 'family' are: (a) the introduction of 'no-fault' divorce in England and Wales through the Divorce, Dissolution and Separation

¹¹ Civil Partnerships, Marriages and Deaths (Registration, etc) Act 2019, Civil Partnership (Scotland) Act 2020 and the Marriage (Same-Sex Couples) and Civil Partnership (Opposite-Sex Couples) (Northern Ireland) Regulations 2019.

¹² Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law: Volume II: Full Report* (Law Com No 411, Scot Law Com No 262, March 2023) https://webarchive.nationalarchives.gov.uk/ukgwa/20250109102443mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/2.-Surrogacy-full-report.pdf accessed 14 November 2025.

¹³ Family Law (Scotland) Act 2006, ss 25–30.

¹⁴ *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 3 WLR 683 and *R (on the Application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin), [2016] 1 All ER 354.

¹⁵ However, see my subsequent specific consideration of the *McConnell* judgment and its wider implications for legal parenthood, A Brown, 'Trans (Legal) Parenthood and the Gender of Legal Parenthood' (2024) 44 *Legal Studies* 168.

¹⁶ See Brown (n 3) 79–104, for my previous consideration of 'The Legal Regulation of Conjugal Relationships'.

¹⁷ *Ibid*, 107–131, for my previous consideration of 'The Attribution of Legal Parenthood within UK Law'.

¹⁸ *Ibid*, 6.

Act 2020 ('the 2020 Act')¹⁹ and (b) the opening of civil partnership to mixed-sex couples throughout the UK's jurisdictions, in response to the Supreme Court decision in *R (on application of Steinfeld and Keidan) v S of S for International Development*.²⁰

3.2.1. 'No-fault divorce'

First, the 2020 Act removed the statutory requirements that specific facts be established in order for the 'irretrievable breakdown' of a marriage (or civil partnership) to be proved before a divorce (or dissolution) could be granted. To achieve this, section 1 of the 2020 Act inserts a new section 1 into the Matrimonial Causes Act 1973. This new section provides that 'either or both parties' may apply for a 'divorce order',²¹ on the basis of an accompanying 'statement by the applicant or applicants that the marriage has broken down irretrievably',²² and that (when considering such an application) the court 'must [...] make a divorce order'.²³ Therefore, the effect of these reforms is that divorce is now granted on the basis of an application made by one or both spouses, without the need for any facts (including those facts based on 'fault') to be proven. The policy underpinning this legislation represented a significant change from the policy of the previous 'fault'-based system of divorce²⁴ in England and Wales.²⁵ In the consultation paper that preceded the 2020 Act, it was stated that: '[t]he Government strongly supports marriage as a legal union that is freely entered into. We therefore believe that the law should respect people's autonomy in decision-making at the end of a marriage as much as at its beginning'.²⁶ This explicit reference to

¹⁹ This reform was also introduced for civil partnership dissolution, s 3, where the previous substantive rules were similar, Civil Partnership Act 2004, s 44(5) (as enacted). Therefore, references in this section to divorce include the dissolution of civil partnerships.

²⁰ [2018] UKSC 32, [2020] AC 1.

²¹ Matrimonial Causes Act 1973, s 1(1) (as amended). Section 3 contains provision to amend Civil Partnership Act 2004, s 44.

²² s 1(2).

²³ s 1(3)(b).

²⁴ At the time in Matrimonial Causes Act 1973, s 1(2), which required either adultery, s 1(2)(a), or 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent', s 1(2)(b), or non-cohabitation between the spouse for two years with consent, s 1(2)(d), or non-cohabitation for five years without consent, s 1(2)(e).

²⁵ In Scotland there has been no equivalent reform to the law relating to divorce, and 'fault' remains part of the means through which 'irretrievable breakdown of a marriage' is proven, Divorce (Scotland) Act 1976, s 1(2).

²⁶ Consultation Paper, 'Reducing Family Conflict: Reform of the Legal Requirements for Divorce' (Ministry of Justice, September 2018) 25, https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf accessed 13 August 2024.

‘autonomy’²⁷ shows that these reforms were influenced by the growing understanding that the legal regulation of adult personal relationships must be based upon respecting the autonomy of the individuals within those relationships.²⁸

On this point, I have previously written that ‘it is clear that “autonomy” is a fundamental aspect of the dominant, orthodox understanding of the individual and the “legal subject”’.²⁹ Therefore, the emphasis on autonomy in the policy documentation that led to the 2020 Act fits within the prevailing understanding of individuals that underpins the legal system. At the same time, I also described this growing emphasis on autonomy within legal regulation as ‘an uneasy fit within the dominant conceptual understandings of the “family”’.³⁰ In that regard, it is apparent that the 2020 Act’s reforms are an illustration of the influence of ‘autonomy’ within family law and represent a further weakening of the traditional conceptualization of marriage. However, despite this conceptual positioning, these reforms were prompted to a significant extent³¹ by the (much publicized) litigation in *Owens v Owens*.³² In this judgment, the Supreme Court held that a defended divorce petition had been correctly refused at first instance under the previous divorce regime,³³ meaning that a divorce could not be granted despite the marriage having apparently broken down in fact. At the conclusion of his judgment, Lord Wilson commented (with uncharacteristic directness for judicial language) that: ‘[p]arliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances’.³⁴ Therefore, the 2020 Act was the culmination of a wider campaign for divorce reform,³⁵

²⁷ Ibid, 24; it is noted that the reforms ‘will also recognise people’s autonomy in making decisions about major life events’.

²⁸ See e.g. the Supreme Court judgment on prenuptial agreements in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534. On the concept of ‘autonomy’ in family law generally, see A Barlow, ‘Solidarity, Autonomy and Equality: Mixed Messages for the Family?’ (2015) 27 *Child and Family Law Quarterly* 223.

²⁹ Brown (n 3) 186.

³⁰ Ibid, 187. See further A Diduck, ‘Autonomy and Vulnerability in Family Law’ in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2013) 95–114.

³¹ Ministry of Justice Consultation Paper (n 26) 3, the *Owens* case is referred to in the second sentence of the ministerial foreword.

³² [2018] UKSC 41, [2018] AC 899.

³³ Ibid, per Lord Wilson, [43].

³⁴ Ibid, [45].

³⁵ See the work of Resolution – <https://resolution.org.uk/campaigning-for-change/no-fault-divorce-becomes-law/> accessed 13 August 2024 – an organisation of ‘family justice professionals’ who campaigned extensively for divorce reform.

which included significant media coverage of the existing legal regime³⁶ and its apparent disjuncture with contemporary social understandings of marriage and divorce.³⁷ This provides important background context for why there was sufficient governmental interest in undertaking these reforms that is not necessarily related to what these reforms might suggest about the legal understanding of the ‘family’.

3.2.2. *Mixed-sex civil partnership*

Second, civil partnership was opened to mixed-sex couples through the Civil Partnerships, Marriages and Deaths (Registration, etc) Act 2019 (‘the 2019 Act’) in England and Wales, which resulted in the amendment³⁸ of the eligibility criteria in section 3 (1) Civil Partnership Act 2004, and similar reforms were undertaken both in Scotland³⁹ and Northern Ireland.⁴⁰ Thus, in all of the UK’s jurisdictions, marriage⁴¹ and civil partnership are now available to both same-sex and mixed-sex couples. This represents a fundamental shift in eligibility from the introduction of civil partnerships, where there was a delineation between the two forms of legally recognized adult relationship – with marriage only available to mixed-sex couples and civil partnership only available to same-sex couples.⁴² These reforms, as mentioned, were introduced in response to the decision in *Steinfeld and Keidan*. In that judgment, the Supreme Court issued a ‘declaration of incompatibility’,⁴³ on the basis that the (then) exclusion of mixed-sex couples

³⁶ See e.g. L Barton, ‘Tini Owens Is Locked into an Unhappy Marriage – This Is Why We Need “No Fault” Divorce’, *The Guardian* (16 May 2018) <https://www.theguardian.com/lifeandstyle/shortcuts/2018/may/16/tini-owens-is-locked-into-an-unhappy-marriage-this-is-why-we-need-no-fault-divorce> accessed 13 August 2024.

³⁷ See e.g. L Trinder, D Braybrook, C Bryson, L Coleman, C Houlston and M Sefton, ‘Finding Fault? Divorce Law and Practice in England and Wales’ (Nuffield Foundation, October 2017) https://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL.pdf accessed 13 August 2024.

³⁸ Civil Partnership (Opposite-Sex Couples) Regulations 2019, reg 3.

³⁹ The equivalent eligibility requirements, Civil Partnership Act 2004, s 86(1), were amended by Civil Partnership (Scotland) Act 2020, s 6(2).

⁴⁰ Civil Partnership Act 2004, s 138(1) was amended by Marriage (Same-Sex Couples), and Civil Partnership (Opposite-Sex Couples) (Northern Ireland) Regulations 2019, reg 16(3).

⁴¹ Marriage for same-sex couples was first introduced in Northern Ireland at the same time as mixed-sex civil partnership, Marriage (Same-Sex Couples), and Civil Partnership (Opposite-Sex Couples) (Northern Ireland) Regulations 2019, reg 3.

⁴² See e.g. H Fenwick and A Hayward, ‘From Same-Sex Marriage to Equal Civil Partnership: On a Path towards “Perfecting” Equality’ (2018) 30 *Child and Family Law Quarterly* 97.

⁴³ Human Rights Act 1998, s 4.

from civil partnership,⁴⁴ after the opening of marriage to same-sex couples,⁴⁵ was a violation of the claimants (a mixed-sex couple who wished to enter a civil partnership) rights under Article 14 in conjunction with Article 8 of the European Convention on Human Rights (ECHR).⁴⁶ Therefore, as with the 2020 Act's reforms, the opening of civil partnership to mixed-sex couples was the result of a significant and organized campaign for law reform.⁴⁷ However, a key difference between the two legislative contexts is that mixed-sex civil partnership was the direct result of litigation brought by campaigners, rather than a consequence of media and political reaction to the result of 'ordinary' litigation as in the *Owens* case. With that said, in a consultation prior to these reforms being implemented, the UK Government stated that legislating for mixed-sex civil partnership would 'enable such couples to have a personal choice of the type of legal recognition of their relationship'.⁴⁸ The language of 'personal choice' reflects the focus on 'autonomy' in the introduction of 'no-fault' divorce, suggesting that the policy underpinning mixed-sex civil partnership also provides evidence of the growing significance of individual autonomy in the legal regulation and understanding of 'the family'. However, two important caveats are that the 'choice' in relationship recognition is limited to conjugal couples, and there remains no overarching specific legal regime for unmarried cohabitants in England and Wales. On the first point, the continued exclusion of polyamorous, other multiple-party relationships⁴⁹ and non-conjugal adult relationships⁵⁰ from the scope of legal regulation clearly illustrates the ongoing centrality of the traditional

⁴⁴ Civil Partnership Act 2004, s 1(1) and s 3(1)(a) (as enacted) – these provisions have been amended by the legislation referred to in n 10.

⁴⁵ Marriage (Same Sex Couples) Act 2013 and Marriage and Civil Partnership (Scotland) Act 2014.

⁴⁶ *Steinfeld and Keidan* (n 20) [6].

⁴⁷ See 'The Equal Civil Partnership Campaign' – <https://equalcivilpartnerships.org.uk/> accessed 13 August 2024.

⁴⁸ Government Equalities Office, 'Implementing Opposite-Sex Civil Partnerships: Next Steps' (July 2019) 5, https://assets.publishing.service.gov.uk/media/5d25a56d40f0b611f72b6e2b/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf accessed 13 August 2024.

⁴⁹ See generally e.g. C Klesse, 'Marriage, Law and Polyamory. Rebutting Mononormativity with Sexual Orientation Discourse?' (2016) 6 *Oñati Socio-Legal Series* 1348 and RC Den Otter, 'A Perfectionist Argument for Legal Recognition of Polyamorous Relationships' in E Brake and L Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press 2018) 95–114.

⁵⁰ This encompasses other 'family' relationships and relationships based upon dependency and 'care'; see e.g. J Herring, *Caring and the Law* (Hart 2013) and B Clough, 'What about Us? A Case for Legal Recognition of Interdependence in Informal Care Relationships' (2014) 36 *Journal of Social Welfare and Family Law* 129. See also N Palazzo and D Cardoso, Chapter 7, this volume; and J Herring, Chapter 13, this volume.

‘nuclear family’ model to the legal understanding of the ‘family’. Therefore, as I have previously argued, ‘marriage and the traditional nuclear family retain significant normative power in the construction of adult (conjugal) relationships within the legal understanding of the “family”’.⁵¹ In this way, I argue that the introduction of civil partnership for mixed-sex couples, while appearing to respect individual ‘autonomy’ and provide greater choice, actually shows the influence of the traditional, ‘nuclear family’ model on the legal understanding of ‘the family’, because these reforms allow more couples to be situated within the boundaries of that ‘nuclear family’ model.

Therefore, these two legislative reforms present a mixed picture in terms of the continuing influence of the ‘nuclear family’ model. I entirely accept that the introduction of ‘no-fault’ divorce in the 2020 Act, and the emphasis on individual autonomy and choice inherent to any liberalization of divorce suggests a potential weakening of the ‘nuclear family’ model. Indeed, the policy aims of this legislative reform clearly sought to respect such individual autonomy. However, I argue that the opening of civil partnerships to mixed-sex couples, while also appearing to be premised upon policy aims offering greater choice and ideas of individual autonomy, provides a further illustration of the continuing influence of the ‘nuclear family’ model. This is because the law extends recognition to certain types of relationship but does not extend recognition to others; with conjugality and coupledness remaining at the centre of this extension of regulation.

3.3. Potential Legislative Reforms

In addition to these statutory reforms, there are areas of family law where future legislative reform is possible⁵² and under active consideration. In this section, I will discuss two such contexts where completed Law Commission projects have resulted in substantive proposals for law reform in the past five years – (a) the regulation of surrogacy arrangements throughout the UK and (b) cohabitants’⁵³ rights in Scotland.

⁵¹ Brown (n 3) 81.

⁵² For example, in England and Wales, legislative reform creating specific rights for cohabitants remains on the political agenda. See the House of Commons Women and Equalities Select Committee Report, ‘The Rights of Cohabiting Partners’ (July 2022) paras 63–64, which recommended that the Government introduce rights for cohabitants, <https://committees.parliament.uk/publications/23321/documents/170094/default/> accessed 13 August 2024. This supported the model of the Law Commission Report, ‘Cohabitation: The Financial Consequences of Relationship Breakdown’ (Law Com No 307, July 2007) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228881/7182.pdf accessed 13 August 2024.

⁵³ In the UK, the language ‘cohabitants’ is used to describe what in other jurisdictions is referred to as ‘unmarried partners’ or ‘de facto partners’, i.e. relationships where couples

3.3.1. Surrogacy arrangements

First, the Law Commission of England and Wales and the Scottish Law Commission Final Report, ‘Building Families through Surrogacy: A New Law’,⁵⁴ was published in March 2023.⁵⁵ This was the culmination of a lengthy law reform project⁵⁶ and contained comprehensive consideration of the legal regulation of surrogacy arrangements.⁵⁷ However, for the purposes of this chapter, the key proposals are those relating to the attribution and determination of legal parenthood after surrogacy – what the report describes as the ‘new pathway’ to parenthood.⁵⁸ Put simply, this proposal would result in legal parenthood from birth for the intended parents.⁵⁹ This is a significant change from the current legal position, under the Human Fertilisation and Embryology Act 2008’s ‘parenthood provisions’, where the surrogate is always the legal mother of the child at birth,⁶⁰ and the intended

(either mixed-sex or same-sex) live together in committed (sexual) relationships outside of marriage or (now) other formal relationship recognition.

⁵⁴ Law Commission and Scottish Law Commission (n 12).

⁵⁵ Alongside a draft Surrogacy Bill (see https://webarchive.nationalarchives.gov.uk/ukgwa/20250109113136mp_/https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/30/2023/03/3.-Surrogacy-draft-bill.pdf accessed 9 January 2026).

⁵⁶ The existing legal framework has been criticised extensively, see e.g. K Horsey and S Sheldon, ‘Still Hazy after All These Years: The Law Regulating Surrogacy’ (2012) 20 *Medical Law Review* 67, and A Alghrani and D Griffiths, ‘The Regulation of Surrogacy in the United Kingdom: The Case for Reform’ (2017) 29 *Child and Family Law Quarterly* 165.

⁵⁷ The (then) UK Government provided an ‘Interim Response’ to the Final Report in November 2023, ‘Letter from Maria Caulfield MP’, 8 November 2023, which stated: ‘While we appreciate the importance of this work, parliamentary time does not allow for these changes to be taken forward at the moment’, https://webarchive.nationalarchives.gov.uk/ukgwa/20250109111042mp_/https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/30/2023/03/Law-Commission-Letter.pdf accessed 28 July 2025. The current UK Government responded in April 2025, stating ‘that the Government is unable to prioritise surrogacy reform and do not intend to put forward these legislative proposals at the current time’, ‘Letter from Baroness Merron’, April 2025, <https://cloud-platform-e218f50a4812967ba1215eaece923f.s3.amazonaws.com/uploads/sites/54/2025/04/Letter-from-Baroness-Merron.pdf> accessed 28 July 2025. Therefore, it is unclear whether these proposed reforms will be taken forward in the future.

⁵⁸ Law Commission and Scottish Law Commission (n 12) chapters 2 and 4.

⁵⁹ Ibid, [2.1]. The Final Report sets out a range of requirements in order for the ‘new pathway’ to legal parenthood to be available to intended parents, [2.15]–[2.35]. If those requirements were not met, the proposal is that a reformed version of the existing (post-birth) ‘parental order’ process would apply, see chapter 10.

⁶⁰ And, if married, the surrogate’s husband is potentially the legal father, through the operation of Human Fertilisation and Embryology Act 2008, s 35.

parents must apply for a 'parental order'⁶¹ after birth in order to transfer legal parenthood to them.⁶²

However, while the 'new pathway' to (legal) parenthood would represent a significant substantive reform to the existing law, the Final Report explicitly rejected the possibility of a 'three-parent' model of legal parenthood being applied to surrogacy arrangements.⁶³ When considering this alternative model, the Law Commissions stated: '[i]n keeping with current law, under our recommendations there can only be two legal parents at any one time',⁶⁴ while also observing that '[w]e have concluded that there is insufficient support for a three-parent model in surrogacy'.⁶⁵ Therefore, the report does not consider the normative case for extending legal parenthood beyond the binary, two-parent model in cases of surrogacy. This omission is both surprising and striking because, as I have previously argued, 'the attribution of legal parenthood in cases of surrogacy sits uneasily within a legislative framework that is premised upon the exclusive, binary, two-parent model'.⁶⁶ However, despite this, both the substantive content of the 'new pathway' to parenthood, and the absence of detailed consideration of an alternative 'three-parent' model of legal parenthood clearly illustrates the continuing influence of the traditional, nuclear family model within the legal understanding of parenthood and therefore of the 'family'. I argue that this ongoing influence in this context is particularly striking because surrogacy arrangements represent a factual and reproductive scenario where more than two individuals are always *in fact* involved in the process of reproduction that results in the child being born.⁶⁷ To that end, I have previously noted 'the centrality of the binary, two-parent model, and the traditional, nuclear family within the policy underpinning the legal regulation of assisted reproduction and

⁶¹ Human Fertilisation and Embryology Act 2008, s 54 and s 54A.

⁶² The judicial interpretation of s 54 has been extensively criticised, see e.g. K Norrie, 'English and Scottish Adoption Orders and British Parental Orders after Surrogacy: Welfare, Competence and Judicial Legislation' (2017) 29 *Child and Family Law Quarterly* 93; C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' (2015) 27 *Child and Family Law Quarterly* 83; and K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24 *Medical Law Review* 608.

⁶³ Law Commission and Scottish Law Commission (n 12) [4.129]–[4.134].

⁶⁴ *Ibid.*, [4.4].

⁶⁵ *Ibid.*, [4.133].

⁶⁶ Brown (n 3) 130.

⁶⁷ See K Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 *Child and Family Law Quarterly* 449, 453, who observes that in the context of surrogacy, 'a child can have up to six potential "parents": two gamete providers, the gestational/birth mother and her husband or partner (if she has one) and the two intending parents, where these are different people.'

surrogacy.⁶⁸ Therefore, the Law Commissions' proposals, while potentially substantively significant for children born through surrogacy, intended parents, and surrogates, do not seek to challenge the centrality of the binary two-parent model to the regulatory regime. Instead, the proposals would mean that a *different* choice was made about which two individuals with potential claims to parenthood should be deemed legal parents after (some) surrogacy arrangements. Therefore, the Final Report shows the continuing influence of the traditional, nuclear family model on the legal understanding of the 'family' in a context where that model struggles to accommodate the reality of the underlying circumstances. I argue that this illustrates the pervasiveness of the idealized image and its influence.

3.3.2. Cohabitants rights in Scotland

Second, in November 2022, the Scottish Law Commission, 'Report on Cohabitation'⁶⁹ was published.⁷⁰ This report resulted from a review of the legislative regime that provides specific rights and obligations for unmarried cohabitants in Scotland, in the Family Law (Scotland) Act 2006 ('2006 Act').⁷¹ For the purposes of this chapter, it is notable that the Report both proposes various substantive changes to the current legal regime for cohabitants⁷² and notes: '[t]he evidence that we have seen is of a substantial body of opinion that perceives cohabitation in much the same way as marriage and civil partnership, and cohabitants as similar to spouses and civil partners'.⁷³ However, even while acknowledging this 'body of opinion',

⁶⁸ A Brown, 'Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Orders in Surrogacy' (2018) 30 *Child and Family Law Quarterly* 23, 36.

⁶⁹ Scottish Law Commission, 'Report on Cohabitation' (Scot Law Com No 261, November 2022) https://www.scotlawcom.gov.uk/files/4916/6781/8178/Cohabitation_Report_and_draft_Bill.pdf accessed 13 August 2024.

⁷⁰ In December 2023, the Scottish Government stated that they intended to: 'consult on the Scottish Law Commission's draft Bill to reform the law on a cohabitant's financial rights against their former partner when they separate', Siobhan Brown MSP, 'Ministerial Response to Parliamentary Question' (7 December 2023) <https://www.parliament.scot/chamber-and-committees/questions-and-answers/question?ref=S6W-23651> accessed 13 August 2024. However, at the time of writing, no such consultation has taken place.

⁷¹ ss 25–30. For consideration and critique of the current legal regime, see E Sutherland, 'From "Bidie-In" to "Cohabitant" in Scotland: The Perils of Legislative Compromise' (2013) 27 *International Journal of Law Policy and the Family* 143.

⁷² Scottish Law Commission (n 69). The most significant proposals concern the statutory definition of 'cohabitant', Family Law (Scotland) Act 2006, s 25, [3.72] and the substantive rules governing financial provision on breakdown of the relationship, Family Law (Scotland) Act 2006, s 28, [chapter 5](#).

⁷³ *Ibid*, [2.37].

the Scottish Law Commission does not propose that unmarried cohabitants should be brought within the existing legal regime, in the Family Law (Scotland) Act 1985,⁷⁴ that applies to spouses and civil partners.⁷⁵ Instead, the Report proposes that a (reformed) distinct and bespoke regime of statutory rights for cohabitants is retained.⁷⁶ The approach adopted by the Scottish Law Commission reflects what Herring has previously described as the ‘hierarchy of families in family law: with the top position being taken by married couples’.⁷⁷ This continued hierarchy of relationships illustrates what I have called the ‘significant normative power’ of marriage ‘in the construction of adult (conjugal) relationships within the legal understanding of the “family”’.⁷⁸ However, even more significant than the substantive content of the proposed reforms, in terms of the legal understanding of ‘the family’ that underpins this potential law reform, is what is not included. To that end, in an earlier Discussion Paper,⁷⁹ the Scottish Law Commission explicitly excluded (after relatively brief consideration) both ‘multiple party relationships’⁸⁰ and non-conjugal relationships⁸¹ from consideration within this law reform project. Indeed, the Discussion Paper stated separately that each category of relationship was ‘beyond the scope of this project.’⁸² I argue that this decision to exclude certain types of adult relationship from substantive consideration within the law reform project (occurring before consultation with relevant stakeholders and the public, far less the point at which law reform proposals were made) illustrates the continuing significance of the conjugal couple form within the legal understanding of ‘the family’, which I have previously noted is central to the dominant, idealized image of the ‘nuclear family’.⁸³ Therefore, both through what is included in its

⁷⁴ Family Law (Scotland) Act 1985, ss 8–17.

⁷⁵ Scottish Law Commission (n 69) [2.38].

⁷⁶ Other jurisdictions have brought unmarried cohabitants within the scope of the rules that apply to registered relationships, providing certain statutory conditions are met, see e.g. Family Law Act 1975, s 90SB in Australia and Property Relationships Act 1976, s 1C(2)(b) in New Zealand.

⁷⁷ J Herring, *Family Law* (9th ed, Pearson 2019) 6.

⁷⁸ Brown (n 3) 81.

⁷⁹ Scottish Law Commission, ‘Aspects of Family Law: Discussion Paper on Cohabitation’ (Scot Law Com Discussion Paper No 170, February 2020) https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf accessed 13 August 2024.

⁸⁰ Ibid, [3.89]–[3.98].

⁸¹ Ibid, [3.102]–[3.123]. These relationships are described in the Discussion Paper as ‘platonic relationships’.

⁸² Ibid, [3.98] (for ‘multiple party relationships’) and [3.123] (for ‘platonic relationships’). The phrase ‘beyond the scope’ is repeated in Scottish Law Commission (n 69) [3.2].

⁸³ Brown (n 3) 93–104.

proposal – retaining a clear distinction between regulated and unregulated adult relationships in terms of financial provision after relationships break down – and what is not included – any consideration of legal recognition for relationships that do not involve ‘conjugal couples’ – the Report shows the continued centrality of the traditional, nuclear family model to the legal understanding of the ‘family’.

Notably, this exclusion of certain categories of relationship reflects the similar exclusion of non-conjugal and multiple party relationships from the extension of civil partnership to mixed-sex couples previously discussed. I argue that this commonality across two different aspects of adult relationship recognition and regulation strengthens the argument regarding the continuing centrality of the idealized image of the nuclear family. Indeed, these two proposals for law reform, relating to two very different areas of family law – legal parenthood after surrogacy arrangements and rights for unmarried cohabitants – both illustrate through a combination of their substantive proposals, their underpinning assumptions, and (crucially) the more radical reforms that are *not* proposed, the continued normative significance of the traditional, nuclear family model within legal understanding.

3.4. Trans Parenthood

In this section, I will discuss an issue that I did not substantively explore in my previous consideration of the legal understanding of ‘family’ –⁸⁴ the legal approach to trans parenthood in the UK. This absence from previous consideration perhaps⁸⁵ partly reflects the increasing prominence (and toxicity) of public and political discourse regarding trans people in the UK over the past five years. Within this, political debates have focused upon proposed reforms allowing for ‘self-ID’⁸⁶ for the granting of Gender Recognition Certificates (GRCs) in both England and Wales⁸⁷ and

⁸⁴ Brown (n 3) 107–131.

⁸⁵ However, this lack of consideration may simply reflect an oversight on my own behalf when previously considering the legal understanding of ‘the family’. Therefore, this section represents an attempt to partially address that oversight.

⁸⁶ In the UK context, this would involve removing the requirements in the Gender Recognition Act 2004, s 2, and the need for medical evidence in s 3. This would allow for a GRC to be granted on the basis of a declaration to the Registrar General.

⁸⁷ UK Government, ‘Reform of the Gender Recognition Act – Government Consultation’ (July 2018), consulted on the introduction of a system of ‘self-ID’ in England and Wales https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf accessed 13 August 2024. However, this did not ultimately become government policy, see Liz Truss MP, Written Ministerial Statement: Response to Gender Recognition Act (2004) Consultation

Scotland,⁸⁸ and there has been a plethora of relatively high-profile litigation concerning issues related to the legal definitions of ‘sex’ and ‘gender’.⁸⁹ This culminated in the UK Supreme Court decision in *For Women Scotland v the Scottish Ministers*,⁹⁰ which held that the words ‘sex’, ‘woman’ and ‘man’ in the Equality Act 2010 (‘the 2010 Act’) are defined on the basis of ‘biological sex’.⁹¹ Consequently, trans people with GRCs are not able to access the 2010 Act’s anti-discrimination protections in the sex recognized by their GRCs.⁹² It is likely that this decision will have significant effects on the legal position of trans people beyond the specific context of the interpretation of the 2010 Act.⁹³ With that said, in addition to these increasingly prominent political debates and judicial developments concerning the wider legal position of trans people in the UK, there has also been specific judicial consideration of trans parenthood by the English courts⁹⁴ that prompts the exploration in this section. The context for such judicial consideration is the mechanism for legal gender recognition in the UK – section 9 (1) of the Gender Recognition Act 2004 (‘the 2004 Act’) – which provides that ‘[w]here a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender

(September 2020) <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation> accessed 13 August 2024.

⁸⁸ Gender Recognition Reform (Scotland) Bill, s 4, would have inserted a new s 8C into the Gender Recognition Act 2004 that would have introduced a process of ‘self-ID’ for the granting of GRCs in Scotland. However, this Bill was blocked by the UK Government through their powers under Scotland Act 1998, s 35(1)(b). The Scottish Government were unsuccessful in a judicial review of this decision, *Scottish Ministers, Petitioners* [2023] CSOH 89, and subsequently announced that they would not be appealing that judgment, Scottish Government, ‘Section 35 Order Judicial Review: Scottish Government Response’ (20 December 2023) <https://www.gov.scot/publications/scottish-government-response-section-35-order-judicial-review/> accessed 13 August 2024.

⁸⁹ See e.g. *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199, *For Women Scotland Ltd v The Lord Advocate* [2022] CSIH 4, 2022 SC 150, and *For Women Scotland Ltd v Scottish Ministers* [2023] CSIH 37, 2023 SLT 1216.

⁹⁰ [2025] UKSC 16, [2025] 2 WLR 879.

⁹¹ *Ibid*, per Lord Hodge, Lady Rose and Lady Simler, [264].

⁹² The full implications of the *For Women Scotland* decision on the position of trans people within equality and anti-discrimination law are outside the scope of this chapter.

⁹³ However, at the time of writing, the extent of these effects within family law remains unclear. See further A Brown and P Dunne, ‘The Family Law Implications and Consequences of *For Women Scotland*’ (2025) *Family Law* 1191, for an exploration of what those substantive consequences may be for family law.

⁹⁴ The first such judicial consideration of trans parenthood in the UK was in *R (on the Application of JK)* (n 14). In this case, a trans woman, JK, had fathered two naturally conceived children with her wife prior to the granting of her GRC. The judgment held that JK’s registration as ‘father’ on the children’s birth certificates did not violate her rights under Art. 8 ECHR.

is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman'. However, the legislative scheme is premised upon there being exceptions to this general position set out in section 9 (1)⁹⁵ and, in relation to legal parenthood, section 12 of the 2004 Act provides: '[t]he fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child'.

Therefore, in *R (McConnell and YY) v Registrar General for England and Wales*,⁹⁶ the Court of Appeal⁹⁷ had to consider the interpretation of these statutory provisions, after a trans man (with a GRC) – Freddy McConnell⁹⁸ – challenged the decision to register him on his son's birth certificate as 'mother' rather than either 'father' or 'parent'.⁹⁹ The judgment held that the registration as 'mother' was correct under the legal regime provided by the 2004 Act¹⁰⁰ and that such registration was not a violation of Mr McConnell's (or his son's) rights under Article 8 ECHR.¹⁰¹ In reaching this conclusion, the Court of Appeal held that section 12 of the 2004 Act had both retrospective¹⁰² and prospective effect,¹⁰³ and as such, a trans man with a GRC must be registered as 'mother'.¹⁰⁴ The consequence of the *McConnell* judgment is that a trans man with a GRC who gives birth is legally male

⁹⁵ Gender Recognition Act, s 9(3) states: 'Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation'.

⁹⁶ *McConnell* (n 14).

⁹⁷ The Supreme Court refused an application for permission to appeal in November 2020.

⁹⁸ Freddy McConnell was the subject of a documentary 'Seahorse' about his experiences of undergoing fertility treatment, being pregnant, and giving birth as a trans man, more information available at <https://seahorsefilm.com/> accessed 13 August 2024.

⁹⁹ *McConnell* (n 14) [10].

¹⁰⁰ See further the first instance judgment *R (On the Application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam), [2019] 3 WLR 1195.

¹⁰¹ *McConnell* (n 14) [89]. Consideration of those human rights arguments is outside the scope of this chapter. However, for my previous analysis of those arguments, see A Brown 'Trans Parenthood and the Meaning of "Mother", "Father" and "Parent" – *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559' (2021) 29 *Medical Law Review* 157, 167–171.

¹⁰² *Ibid*, [31], the Court of Appeal notes that Gender Recognition Act, s 9(2) provides that a GRC 'does not affect things done, or events occurring, before the certificate is issued', and that s 12 would be 'rendered otiose' if it only applied retrospectively to children born prior to the granting of the GRC.

¹⁰³ In Ireland, Gender Recognition Act 2015, s 19 is written in the following terms: 'The fact that a gender recognition certificate is issued to a person shall not affect the status of the person as the father or mother of a child born prior to the date of the issue of the certificate'. In notable and clear contrast to s 12 of the 2004 Act, the language of this provision is explicit that it does not have prospective effect.

¹⁰⁴ *McConnell* (n 14) [29]–[39].

and a ‘mother’, seemingly separating legal sex from the gendered word used to describe legal parenthood. Indeed, in the first instance judgment,¹⁰⁵ Sir Andrew McFarlane P is explicit (where the Court of Appeal judgment is implicit) about this separation, observing: ‘my preliminary conclusion *as a matter of law* is that the term “mother” is freestanding and separate from consideration of legal gender, thus in law there can be male mothers and female fathers’.¹⁰⁶ This reflects the language previously used by Hickinbottom J in *R (on the Application of JK) v Registrar General for England and Wales*,¹⁰⁷ an earlier case concerning a trans woman who had fathered two children before her GRC had been granted, where it was noted that ‘[i]t is therefore inherent in the GRA 2004 that, following a gender change, a “mother” may be a man and a “father” may be a woman’.¹⁰⁸ The key result of *McConnell* is that this legal position remains after a trans person has undergone the process of legal gender recognition by obtaining a GRC.¹⁰⁹ Given this repeated judicial language, as McGuinness and Alghrani argued several years before this issue was determined judicially, ‘[b]y forcing definitions to stretch, so that males are acting as “mothers” and females as “fathers” we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations.’¹¹⁰ Thus, for trans parents, legal parenthood is determined and described according to their birth assigned sex, rather than their legal sex (if different), ignoring the social ‘reality’ of trans parenthood and trans identities in favour of an approach premised upon the biological ‘reality’.¹¹¹

Given the approach taken by the *McConnell* judgment, I have previously argued that ‘trans parenthood provides another example of the problems caused by the continuing reliance upon the binary, two-parent model of the traditional, heterosexual, cis, nuclear family within the understanding of legal parenthood.’¹¹² This model that underpins the attribution of legal parenthood has been described by McCandless and Sheldon as ‘parental dimorphism [...] by which we mean that the two parents are seen as occupying complementary

¹⁰⁵ See C Fenton-Glynn, ‘Deconstructing Parenthood: What Makes a “Mother”?’ (2020) 79 *Cambridge Law Journal* 34 for analysis of that judgment.

¹⁰⁶ *R (On the Application of TT) (n 100)* [251].

¹⁰⁷ *R (on the Application of JK) (n 14)*.

¹⁰⁸ *Ibid*, [65].

¹⁰⁹ See further P Dunne and A Brown, ‘Trans Parenthood in the UK: the “Unanswered Questions” of the *McConnell* Litigation’ (2024) 83(3) *Cambridge Law Journal* 490.

¹¹⁰ S McGuinness and A Alghrani, ‘Gender and Parenthood: The Case for Realignment’ (2008) 16 *Medical Law Review* 261, 279.

¹¹¹ Brown (n 15) 182–183.

¹¹² *Ibid*, 185.

yet different legal roles’,¹¹³ and Jackson has called this limitation of legal parenthood to ‘one mother’ and ‘one father’, ‘the law’s principal stumbling block’.¹¹⁴ Indeed, I previously commented upon the significance of this binary, two-parent model in my earlier discussion of the Law Commissions’ proposals concerning legal parenthood after surrogacy arrangements. In this way, trans parenthood represents a further factual and reproductive context (after surrogacy arrangements and medically assisted reproduction) in which the application of the default rules for the determination of legal parenthood creates significant problems because those rules were not necessarily designed for these contexts, and because the existing rules do not (and cannot) be comfortably applied to trans parenthood. However, the difference for trans parenthood is that the binary, two-parent model, and the ongoing normative influence of the traditional, nuclear family model results in a divergence between legal parenthood and legal sex, which has significant implications for the identity of the trans parent and their child(ren). The result of the *McConnell* decision, and the legislative regime for legal gender recognition in the 2004 Act, is that there is currently no mechanism for trans legal parenthood at birth to be recognized congruently with trans identities.¹¹⁵ Notably, this incongruence for trans identities reflects the approach of the Supreme Court in *For Women Scotland* to trans people (particularly those with GRCs) within anti-discrimination law. As such, the determination and attribution of legal parenthood for trans parents is clearly situated within the wider legal understanding of trans identities. Thus, while the legal regime does not deny legal parenthood to trans parents (as, for example, it currently does to intended parents after surrogacy at birth), it *only* grants legal parenthood using language that presents what I have previously described as, ‘an incongruent depiction of trans parents’ gender or their legally recognized sex and gender.’¹¹⁶ This identity incongruence and divergence between legal parenthood and legal sex shows how the approach to trans legal parenthood

¹¹³ J McCandless and S Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73 *Modern Law Review* 175, 193.

¹¹⁴ E Jackson, ‘What Is a Parent?’ in A Diduck and K O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 59–74.

¹¹⁵ K Horsey and E Jackson, ‘The Human Fertilisation and Embryology Act 1990 and Non-Traditional Families’ (2023) 86 *Modern Law Review* 1472, 1483, observe that ‘further inconsistencies’ result because ‘a trans man who uses surrogacy will, following the making of a parental order, be recognised as his child’s “parent”’. This occurs because legal parenthood granted by either a parental order or an adoption order is expressed in gender neutral terms, Human Fertilisation and Embryology Act 2008, s 54 and s 54A and Adoption and Children Act 2002, s 67(1). However, both of these contexts relate to legal parenthood created through a court order after the birth of the child rather than legal parenthood at birth.

¹¹⁶ Brown (n 15) 178.

starkly illustrates the continuing influence of a binary and gendered model of parenthood within law. This model of parenthood reflects the traditional, cisgendered, heteronormative, nuclear family, which the legal regulation of trans parenthood indicates continues to underpin the legal understanding of the ‘family’.

3.5. Conclusion

In this chapter, I have returned to my previous consideration of the legal understanding of the ‘family’, in light of the social, political, and legal developments that have occurred since that consideration. The purpose of this chapter was to consider the extent to which those subsequent legal developments may have affected my previous arguments and conclusions, or whether these developments reinforced those conclusions. To that end, in the final two sentences of my monograph, I concluded: ‘I have found no evidence to suggest that the substantial normative and rhetorical endurance of the nuclear family [...] is diminishing. It may well continue to underpin the legal understanding of ‘family’ for a long time to come’.¹¹⁷ The (short) passage of time since I came to this conclusion has seen significant further legislative reform within family law, and there is the potential for more significant and substantive reform to come in both the short and medium term.¹¹⁸ This chapter considered two areas of recent legislative reform – the removal of any requirement to prove ‘fault’ from divorce in England and Wales and the opening of civil partnership to mixed-sex couples – and two areas of potential subsequent reform – legal parenthood after surrogacy arrangements and the specific scheme of statutory rights for cohabitants in Scotland. Finally, the chapter explored the legislative and judicial approach to trans legal parenthood, an issue that was (regrettably) absent from my previous examination of the legal understanding of the ‘family’.

Certain general conclusions can be drawn from my exploration of these diverse contexts. First, the chapter acknowledged the clear and apparent emphasis on individual autonomy represented by the reforms in the Divorce, Dissolution and Separation Act 2020. Second, however, I argued that the general trends evident within the rest of the reforms considered (both enacted and potential) reinforce my previous conclusions regarding the continuing significance of the idealized image of the traditional, ‘nuclear

¹¹⁷ Brown (n 3) 202.

¹¹⁸ See EC Romanis and A Brown, ‘Legal Parenthood, Novel Reproductive Practices, and the Disruption of Reproductive Biosex’ (2025) 88(1) *Modern Law Review* 155 for a detailed consideration of the potential challenges to the UK’s approach to the determination and attribution of legal parenthood from novel and emerging reproductive practices.

family’ on the legal understanding of the ‘family’. Third, in the chapter, I argued that this continuing normative influence is most strongly evident in terms of the approaches adopted to the determination and attribution of legal parenthood across different factual and reproductive circumstances. This influence is illustrated by both the judicial approach to trans parenthood in the *McConnell* decision and the Law Commissions’ recommendations for reform regarding legal parenthood after surrogacy arrangements, which explicitly and categorically rejected the possibility of moving beyond the binary, two-parent model of legal parenthood in a factual context where reproduction (in most cases) involves more than two people.¹¹⁹

To conclude, while it is clear that social attitudes continue to evolve, that family life continues to exhibit a greater diversity of forms and structures, and that substantive law reform has occurred (and will continue to occur) in different areas, the overarching, legal understanding of the ‘family’ remains unchanged, and this understanding continues to be underpinned by the idealized image of the traditional, ‘nuclear family’. Therefore, I argue (once again) that the normative power of the ‘nuclear family’ remains significant within the law, and this archetypical family continues to exert influence in shaping the ‘family of law’, and that it appears likely that this normative influence will continue into the future.

¹¹⁹ The only circumstance in which surrogacy would involve only two people was if a single male intended parent undertook a surrogacy arrangement in which the (single) surrogate’s genetic material was used.

The Family and Its Disruption by Transgender Families: A Study of the Cases of ‘Nigel and Beth’ and ‘Christina and Kimberly’

Claire Jenkins

4.1. Introduction

Heterosexual (straight) and non-heterosexual (gay/lesbian) intimate relationships have received significant attention over the past 40 years. In contrast, trans (transgender) intimacies have only recently come under the gaze of scholars. Through the case studies of two couples, this paper will provide context to the difficulties faced by trans families – challenges that are in part compounded by the historical neglect of trans-familial patterns of intimacy in academic analyses.¹

To investigate how familial intimates negotiate binary trans emergence² with its members and to investigate the impact of transition on the intimates discussed in this paper, it is necessary to show how knowledge of intimacy developed from the early traditional conceptualization of the family. This understanding

¹ These couples were part of the larger group of participants in my empirical qualitative doctoral study into the effect of transition on intimate family members: C Jenkins, ‘Straddling the Scalpel of Identity: A Critical Study of Transsexual Transition in a Familial Context’ (University of Sheffield 2012).

² Transgender or trans terminology is constantly evolving. When this study was conducted, binary transgender transition (this is, for example, when someone assigned male at birth moves towards a female sex/gender or vice versa) was known as ‘transsexual transition’. The contemporary terms ‘trans’ and ‘transition’ are used throughout the text, except where original terms are necessary for textual accuracy.

emphasizes the powerful hegemony of heterosexual families, essentially male–female coupledom and marriage which is focused on a naturalistic, reproductive, and biological schema positioned in the private sphere of family life. Despite recent research,³ traditional understandings of the family are remarkably persistent in the imagination of the general population (and consequently and understandably also adopted by the couples described here). This paper seeks to capture the tensions between this powerful everyday notion of the family and scholarly analysis of personal intimacy through the empirical analysis of two couples' stories.

After discussing how conceptualizations of family and intimacy have evolved in the social sciences, the paper moves to review important components of this evolution, namely the detraditionalization and democratization theses. These theses are next critiqued to examine some later studies, showing their significance for the case studies of transition presented here. Nevertheless, when theoretically applying these predominately straight and gay/lesbian conceptualizations of intimacy to transition, it is important to ground the study in the material conditions of trans people's lives and familial intimacies.⁴ Furthermore, it is essential to recognize the need for theorizing about the family to take account of the untidiness and concreteness of family relationships, as emphasized by Gabb⁵ and Smart.⁶

Following this theoretical overview, the core of this paper is the discussion and analysis of two couples, Nigel and Beth and Christina and Kimberly. It investigates:

- Whether these couples rely on biological and naturalistic understandings of sexual embodiment;
- The extent of a return to the private and secret interiority of traditional family life by these contemporary trans families;
- The ruptures of traditional heterosexual life trajectories (the conventional life course of heterosexual courtship, marriage and nuclear family life);
- Whether there is a movement towards what is termed 'do-it-yourself biography'⁷ – known as the detraditionalization and democratization theses;

³ D Morgan, *Rethinking Family Practices* (Palgrave Macmillan 2011); J Gabb, *Researching Intimacy in Families* (Palgrave Macmillan 2008); DH Morgan, *Family Connections: An Introduction to Family Studies* (Blackwell Books 1996); S Jackson, 'Women, Marriage and Family Relationships' in V Robinson and D Richardson (eds), *Introducing Women's Studies* (Macmillan 1997) 195–212; S McRae, *Changing Britain: Families and Households in the 1990s* (Oxford University Press 1999); P Laslett, *The World We Have Lost: Further Explored* (Routledge 2004).

⁴ S Whittle, 'Foreword' in S Stryker and S Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) xi–xv.

⁵ Gabb (n 3).

⁶ C Smart, *Personal Life: New Directions in Sociological Thinking* (Polity Press 2007).

⁷ U Beck and E Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995); J Weeks, B Heaphy and C Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge 2001).

- The nature of the emotional reactions experienced by the couples when sex/gender identification changes during transition.

The paper concludes with a discussion of these trans close relationships in the light of contemporary intimacy studies and offers further insight into the critical study of intimate life by extending the studies of other scholars.⁸

4.2. Methodology

A research design predicated on the analysis of autobiographical transitional narratives is central to this study of transition and its effect on family/intimacy. Qualitative research was used because the social world of transition is complex, involving intimates who have multiple perspectives and multiple selves, and is thus best understood using a methodology based on open-ended interviews.⁹ The approach has the potential to illuminate how participants perceived transition, to give them voice, to empower them, and to give meaning to their experiences as they sought greater understanding of themselves and their intimates; in these ways, it follows the emancipatory principles of feminism.

This qualitative approach to the analysis of intimates' biographic narratives enabled data to be gathered about the complex and contradictory ways in which intimates behave during transition, and, as Polkinghorne¹⁰ argues, it revealed the salient issues associated with transition within the socio-historical context of institutional heterosexuality. The methodology illuminates the complexities of sex, trans/gender, and sexual identities. An emphasis on shared processes and social context has wider significance than that of the participants studied; it has the potential to illuminate transition within a familial context¹¹ and furthermore to improve knowledge about the violence associated with transgender identities.

⁸ N Gross, 'The Detraditionalisation of Intimacy Reconsidered' (2005) 23(3) *Sociological Theory* 286; L Jamieson, *Intimacy: Personal Relationships in Modern Society* (Polity Press 1998); F Williams, *Rethinking Families: Moral Tales of Parenting and Step-parenting* (Calouste Gulbenkian Foundation 2004); S Roseneil and S Budgeon, 'Cultures of Intimacy and Care beyond "the Family": Personal Life and Social Change in the Early 21st Century' (2004) 52 *Current Sociology* 135.

⁹ Morgan (n 3); J Elliott, *Using Narrative in Social Research: Qualitative and Quantitative Approaches* (Sage 2005).

¹⁰ DE Polkinghorne, 'Narrative Configuration in Qualitative Analysis' in JA Hatch and R Wisniewski (eds), *Life History and Narrative* (Falmer Press 1995) 5–23.

¹¹ M Rustin, 'Reflections on the Biographical Turn in Social Science' in P Chamberlayne, J Bornat and T Wengraf (eds), *The Turn to Biographical Methods in Social Science* (Routledge 2000) 33–52; P Ricoeur, *Time and Narrative* (vol 1, K McLaughlin and D Pellauer trs, University of Chicago Press 1984).

Chrys Ingraham¹² argues that the narrative approach adopted resists the hegemony of institutional heterosexuality and especially the social stigma associated with transition. Moreover, it echoes the demand that ‘people who hold legal, cultural or other forms of power take action to bring about justice’.¹³ The study responds to the identified need to focus on issues of the body, sexuality, family history, migration and the voices of the socially marginalized.

My analysis of participants’ transitional narratives relies on a social constructivist approach, and their interaction with me offered explanations about their experiences.¹⁴ However, there is a commonly recognized tension between individual subjectivity, socio-historical contexts, and social structures. Therefore, participants’ stories of trans emergence were responsive to the associated power structures at play. An interviewing practice was adopted that emancipated participants and helped to make their narratives more coherent and valid. Such a process was facilitated by a focus on the specific event of transition rather than on participants’ wider life experiences, and by the practice of active listening and empathy, which empowered participants to tell their stories.¹⁵ Nevertheless, there remained a tension with this approach because transsexual stories were not easy to tell.¹⁶

The research interview is understood as a site of knowledge production, so the resulting discourse may be sociologically conceptualized as a joint production. However, the interview is situated in the wider negotiated social world of institutional heterosexuality and its set of discourses, and this potentially mediates the emergent story of transition.¹⁷ Fortunately, transition is an example of Plummer’s genre of *coming out* stories, which offers

¹² C Ingraham, *Thinking Straight: The Power, the Promise and the Paradox of Heterosexuality* (Routledge 2005).

¹³ SE Chase, ‘Narrative Inquiry: Still a Field in Making’ in NK Denzin and YS Lincoln (eds), *The Sage Handbook of Qualitative Research* (Sage 2011) 421–433.

¹⁴ Elliott (n 9).

¹⁵ W Hollway and T Jefferson, *Doing Qualitative Research Differently, Free Association, Narrative and the Interview Method* (Sage 2000); T Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-structured Method* (Sage 2001).

¹⁶ K Plummer, *Telling Sexual Stories: Power, Change and Social Worlds* (Routledge 1995); G Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in CS Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge and Kegan Paul 1984) 143–179.

¹⁷ Plummer (n 16); C Linde, *Life Stories: The Creation of Coherence* (Oxford University Press 1993); E Ochs and C Taylor, ‘The “Father Knows Best” Dynamic in Dinnertime Narratives’ in K Hall and M Bucholz (eds), *Gender Articulated: Language and the Socially Constructed Self* (Routledge 1995) 97–120; JF Gubrium and JA Holstein, ‘Narrative Practice and the Coherence of Personal Stories’ (1998) 39 *Sociological Quarterly* 163; Elliott (n 9); J Potter and M Wetherell, ‘Analysing Discourse’ in A Bryman and RG Burgess (eds), *Analysing Qualitative Data* (Routledge 1994) 47–66.

a further way of understanding the narratives in the context of contemporary Western society.¹⁸ Plummer and Czarnawska's guidelines were used to analyse the participants' emergent biographical narratives.¹⁹ NVivo was employed to record the categories and codes within the framework of theoretical understandings and the research questions associated with the participants. In addition, the disclosing of my experience of transition to participants facilitated the telling of their stories, allowing access to their subjectivity.²⁰

An understanding of the social construction of identities with their processional, ethereal and transient nature allowed better accounts of transition. Furthermore, as a researcher I was reflexively positioned within a hybrid mix of critical feminism, the deconstructive epistemology and politics of queer theory, transgender studies, and sociology.

Due to the political and logistical difficulties of gaining access to participants through gender identity clinics (GICs) in my original study, I abandoned this strategy in favour of access through support, information and campaigning internet-based groups for trans people and their intimates. This chapter draws on the data obtained from my thesis. The issues of harm, confidentiality, consent for participants and self-protection from psychological distress are discussed in my thesis.²¹ Furthermore, the tension between the risk of pain/suffering and the avoidance of producing an anodyne account of transition was addressed, mindful of the political precariousness of trans people and their intimates.

The two couples included in this paper were selected because they provide a representation of trans families during social transition. Before transition started, Nigel (female to male, FTM) and Beth (female) publicly appeared to be lesbian female partners. Kimberly (male to female, MTF) and Christina (female) originally appeared to be a husband and wife. Their family constellations and transitional identities will be introduced as the chapter unfolds.

4.3. Nigel and Beth

The first couple presented in this paper are Nigel and Beth. At the time of interview, Nigel was a 25-year-old FTM trans man of East Asian origin who lived during his medical transition with his lesbian partner Beth (also 25). They had been together for 6 years. Nigel began his transition 3 years

¹⁸ Plummer (n 16).

¹⁹ B Czarniawska, *Narratives in Social Science Research* (Sage Publications Ltd. 2004).

²⁰ A Oakley, 'Interviewing Women: A Contradiction in Terms' in H Roberts (ed), *Doing Feminist Research* (Routledge Kegan Paul 1981) 30–61.

²¹ Jenkins (n 1).

before my interview, and Beth identified as queer. They lived in a UK city; however, Nigel's mother and sister (both significant in Nigel's story) lived in East Asia.

4.3.1. *Oscillating identities*

Beth explains how one summer holiday when Nigel was at university, he went home to see his mother and sister in East Asia. He grew a culturally appropriate female hair style and tried to be more feminine for the occasion, despite realising that this might compromise his transitional project in the UK. He was struggling between, on the one hand, his need to be male and, on the other, his family's need to be reassured that he was female, a situation exacerbated by the fact that the emerging Nigel was the only child of a traditional heterosexual family where girls do not become boys.

Nigel was used to oscillating in this way: in his early professional life he had presented as androgynous, tending more towards male; at medical school he humorously played with this gender ambiguity whilst he explored variation in his embodiment. He moved between being male socially with friends and female professionally at work. Nigel had the advantage as a trans man of being able to integrate socially into society far more easily than trans women; often the birth-assigned sex of trans men is 'virtually undetectable'.²²

Nigel did not use testosterone at the beginning of his transitional story;²³ however, as he was of East Asian origin, Beth told me that she perceived his body to be androgynous. I would suggest that her gaze reflected a Western understanding of sexed bodies. Furthermore, a GIC advised him that he should protect his career and register professionally as female before he transitioned. Paradoxically this advice by the gender clinicians assumed that the medical establishment might adopt a conservative perception of trans medical practitioners. He described his situation:

I had the usual short hair. I tried to grow my hair longer to please my mother and not give her a heart attack and I did try and conform in a female role as much as I can when I am back in East Asia. I used to get hauled up, when I was in hospitals, with old style consultants dragging me to one corner and going, 'Son, where is your shirt and tie?' 'I'm a girl', [and they said,] 'Oh, I am sorry'. With close friends I could be comfortable with being much more androgynous in a male role [...].

²² J Green, 'Look! No, Don't! The Visibility Dilemma for Transsexual Men' in S Stryker and S Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) 499–508.

²³ In my doctoral study I found that the period of transition varied from 1 year to 22 years post-disclosure of trans identity. See Jenkins (n 1).

In university and with family I presented myself as something a bit more palatable. The other advice they [I think it was the GIC] had given me was that to make life a little bit easier for myself, in terms of my career, was to get myself professionally registered first of all and then consider transitioning. Well, I thought that that was sound advice because, I suppose in my head, my career came first before anything else. So, I was in limbo for years [moving between the genders], but I had registered professionally. And I thought let's get something sorted and I went to the GIC and was advised to go full time as male and that meant *coming out*.

Nigel oscillated between the dichotomous genders for several years, presenting both as male and female (although mostly he enacted a male gender). He was able to do this quite easily because his East Asian embodiment was perceived as androgynous in Western culture. He adopted a female gender for his distant traditional family, primarily his mother, so that he could orally start to negotiate his new male identification with them in their East Asian cultural setting. Moreover, he oscillated for professional reasons because he felt a strong attachment to his career. This chapter shows that Nigel was balancing the demands of his family and career against his need to express himself as male.²⁴

4.3.2. *Negotiating new sex/gender identities*

When Nigel was beginning testosterone injections at the start of his medically supervised transition, he ritualized the event by involving his partner Beth, who told me:

He had said something in a text like 'this is your transition as well and I don't mind waiting if it makes you feel more comfortable about it', which I thought was really good. I am sure a lot of people would have been just excited about it. They would have wanted to get it done straight away, regardless of what other people felt about it. So yeah, I was there for the first injection, and I was glad that I was there, but it wasn't really a big deal, I suppose, because nothing changes at that instant.

Nigel was thus effectively negotiating his new identification with his partner by enlisting her presence during his first testosterone injection. In

²⁴ This tension between Nigel's present reality and his family commitment is illustrated by Smart (n 6).

this way they engaged in the endless series of negotiated choices associated with contemporary heterosexual intimates as posited by Giddens in his detraditionalization thesis.²⁵ Nigel involved Beth proactively in managing the parameters of their changing intimate landscape by enlisting her participation in the medical process.²⁶ He felt that this strategy was important for realizing his emerging male identity.²⁷

Beth told me that Nigel had found the negotiation of his new identity with his mother and sister more difficult:

His family is all in East Asia. He made a special trip home to speak to his mum before he started the hormones. I don't think it was a huge surprise, in a sense, because he had always been kind of boyish, but she probably just thought that he didn't mean to do anything about it. It is very much sort of, put your family first, put your career first and your happiness isn't important. I suppose it's a kind of Eastern outlook on life.

I argue that Nigel had adopted Western values of individualism and self-autonomy, which meant that his attempts to change his sex/gender identifications were in tension with his family's more traditional East Asian understandings of the *self* based on 'family duties and intergenerational reciprocity'.²⁸ Nevertheless, his efforts were successful because, later in the interview, Beth was able to tell me that his mother had responded to his opening negotiations:

This summer his mother is apparently coming to visit us. I have never met her before and that is a big deal. It will be the first time that she has seen him since he has started transitioning, so it will be a big deal for her too. Well, at least if she is coming to stay with us that is a massive step forward. I think Nigel was expecting it to be much worse and that none of his family would talk to him again, which luckily hasn't happened.

He was fearful and anxious because of the tensions between his needs and what he perceived to be those of his traditional family. Even so, he was

²⁵ A Giddens, *The Transformation of Intimacy: Love, Sexuality and Eroticism in Modern Societies* (Polity 1992).

²⁶ Z Bauman, *Liquid Love: On the Frailty of Human Bonds* (Polity 2003).

²⁷ GIRES, *Guidance for GPs and Other Clinicians on the Treatment of Gender Variant People* (COI for Department of Health 2008).

²⁸ D Chambers, *A Sociology of Family Life: Change and Diversity in Intimate Relations* (Polity 2012) 187.

competently managing negotiations with Beth and his mother by putting considerable effort into actively engaging them in the initial stages of his transition to a new male identity. His effort was worthwhile, and they were responding positively. Nigel's negotiations with Beth reflect medical research and clinical findings concerning the viability of relationships between trans men and their partners. Lev puts it like this:

Although transsexual men (FTMs) and their relationships have been studied less frequently, the literature has often noted the longevity and stability of relationships between FTMs and their female partners [...] and that partner involvement implies positive outcome for transition [...].²⁹

However, Brown³⁰ refined Lev's findings by arguing that most studies of FTMs and their partners were post-transition, whilst Devor³¹ reported that only 50 per cent of FTM pre-transition relationships survived transition. Nevertheless, other researchers support this finding of the long-term stability of these relationships.³² Nigel and Beth were doing well at this early stage of his transition, but it remains to be seen how Beth ultimately responded to her public loss of lesbian identity in relation to Nigel.

4.3.3. *Confidence in new identities*

Nigel was open about his change in identification at work and confident in his male identity, since he no longer felt it necessary to hide his female past. He told me:

²⁹ A Lev, *Transgender Emergence: Therapeutic Guidelines for Working with Gender-variant People and Their Families* (The Hawthorn Clinical Practice Press 2004) 278.

³⁰ NR Brown, 'The Sexual Relationships of Sexual-minority Women Partnered with Trans Men: A Qualitative Study' (2010) 39 *Journal Archives of Sexual Behavior* 561.

³¹ H Devor, *FTM: Female-to-male Transsexuals in Society* (Indiana University Press 1997).

³² M Fleming, B MacGowan and D Costos, 'The Dyadic Adjustment of Female-to-male Transsexuals' (1985) 14 *Journal Archives of Sexual Behavior* 47; G Kockott and E M Fahrner, 'Transsexuals Who Have Not Undergone Surgery: Follow-up Study' (1987) 16 *Journal Archives of Sexual Behaviour* 511; L Lothstein, *Female-to-Male Transsexualism: Historical, Clinical, and Theoretical Issues* (Routledge and Kegan Paul 1983); I Pauly, 'Female Transsexualism I and II' (1974) 3 *Journal Archives of Sexual Behaviour* 487; BW Steiner, 'Transsexuals, Transvestites, and Their Partners' in BW Steiner (ed), *Gender Dysphoria: Development, Research, Management* (Plenum 1985) 351–364; BW Steiner and SM Bernstein, 'Female-to-Male Transsexuals and Their Partners' (1981) 26 *Canadian Journal of Psychiatry* 178.

I am open at work because people at work know I am trans; I can't be bothered after a while. When they say, 'What school did you go to?' [I reply,] 'I studied in a convent when I was in primary school'. How do you go about covering that one up?

Nigel worked in a prestigious medical occupation that gave him the power that institutional heterosexuality bestows on masculinity;³³ he felt secure and confident in his perceived male identity.³⁴ This positioning enabled Nigel to enact what Connell might describe as a stereotypically dominant masculinity, which involves not worrying about how he is perceived.³⁵ In his work context Nigel confidently integrated his newly synthesized male identity into his social interactions, a finding supported by Lev in her clinical practice.³⁶

4.3.4. *Spatial separation from cis intimates facilitates transition*

Nigel grew up in East Asia with his mother and his sister, and they were a small nuclear family.³⁷ He repeatedly told me that his relationship with his mother and sister was important, and he frequently considered this relationship:

Currently, with the two of them they are just saying, 'Well, you are still our medical clinician and sister'. They accept it in so far as this is something that makes me happy, but they will not accept that I am their son or brother. I have not seen them since before I took the hormones; they have only seen the occasional photos and they are beginning to recognise my [masculine] voice on the phone. My mum has finally decided to come to visit me in a couple of weeks' time. I suppose in a way they have relaxed a little bit. The only thing they did ask of me was that I remain open with them with regards to what I was doing and when I was going to do it.

Elsewhere during the interview Nigel referred to his mother and his sister collectively as 'them', but I interpreted from his narrative that he really meant

³³ RW Connell and JW Messerschmidt, 'Hegemonic Masculinity: Rethinking the Concept' (2005) 19 *Gender and Society* 829.

³⁴ J Cromwell, 'Queering the Binaries: Trans-situated Identities, Bodies, and Sexualities' in S Stryker and S Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) 509–520.

³⁵ Connell and Messerschmidt (n 33).

³⁶ Lev (n 29).

³⁷ The term 'cis' is used to refer to most of the population who identify with their birth-assigned sex and gender.

his mother because he never directly referred to his sister. This might have been because, as described by Gillis, he saw his absent family as the imaginary heterosexual notional traditional family he lived by rather than the reality of family he actually had.³⁸ This distinction offers insight into the interiority of his intimate relationships. Nigel was situated at the intersection of his emerging trans family in the UK and his more traditional heterosexual family in East Asia. Furthermore, as Smart points out about family relationships,³⁹ Nigel and his familial intimates, though geographically separated, were able to actively engage in the maintenance of this intimate relationship – in fact, the separation could be said to have facilitated this maintenance. He was not present in their public daily lives or in their community, which enabled him to develop his male/masculine identifications free from the social and cultural implications that these changes might have in their East Asian milieu. They were all able to adjust their emotions gently at their own pace, free from such implications. Nigel was gently maintaining his relatedness to his distant family through frequent telephone contact. He was sensitively building with them his new sex/gender identifications. As Beth told me previously, Nigel's mother's pending visit to the UK validated the success of his approach.

4.3.5. Beth's healing of her transitional grief

In my wider study, I found that the change in sex/gender identification during transition was experienced as a loss by the intimates of the transitioner and that they consequently grieved. There was direct evidence of this grief in 87 per cent of the transitional cases I studied.⁴⁰ For Beth, Nigel's change in sex/gender had similar repercussions: he was moving from a female identity to a male identity, and this entailed a change to Beth's social positioning as a lesbian, which she experienced as a loss.

Beth involved herself in a trans internet care/support group composed of a wide range of gender-variant people; she explains:

I suppose some people would not want to get into the whole politics of everything, but for me that really made sense. Because I had always gone to Pride marches as a lesbian; so, kind of understanding how transgender people fit in the community and the history and everything, that really helped me, and joining Trans One,⁴¹ which is

³⁸ J Gillis, *A World of Their Own Making: Myth, Ritual, and the Quest for Family Values* (Harvard University Press 1996).

³⁹ Smart (n 6).

⁴⁰ Jenkins (n 1).

⁴¹ I use the anonymized name Trans One for the internet group to protect Beth's confidentiality.

mostly trans people – there are partners from time to time. But just being able to speak to trans men who had already started hormone therapy and find out what I should expect or what I was just being paranoid about. I think that really helped and I actually felt that I was kind of involved in the transgender community in a way. I am now a moderator on the forum and it makes it all seem a bit more normal. We have got a good mixture. I would probably say that there are still more trans women, but we do get quite a lot of trans men now, especially like younger guys, and then sometimes cross-dressers and gender-queer people as well.

Beth was inspired by her experience at Pride marches to get involved in the trans community, which she did through Trans One. It is a support network, information and media archive, that has a forum and links to other trans issues-related resources. Trans One is used by trans people, their intimates and the caring professionals of trans people. The group's activities helped Beth to better understand her situation as the partner of a trans man, and her involvement in the group supported her in grieving for the loss of her lesbian identity.

In my study I found that transgender-focused care and support groups helped some of the participants deal with their losses. These groups have similar functions to groups used in bereavement care. Walter refers to the latter as mutual help groups (MHGs).⁴² He explains that, in a traditional village or local community, the grieving person is supported by people they know: other locals and family members.⁴³ However, in contemporary late modern anonymous societies, MHG members meet and/or virtually communicate independently of family and acquaintances. By attending these groups, participants thus exploit the anonymity and convenience of the internet. Anonymity is important: research shows that having a trans identity is still a stigmatized phenomenon,⁴⁴ so participants may welcome the public and personal privacy offered by the internet. Furthermore, in my research thesis I pointed out that using

⁴² T Walter, *On Bereavement, The Culture of Grief* (Open University Press 1999).

⁴³ Ibid.

⁴⁴ VK Namaste, 'Undoing Theory: The "Transgender Question" and the Epistemic Violence of Anglo-American Feminist Theory' (2008) 24 *Hypatia* 11; T Sanger, 'Beyond Gender and Sexuality Binaries in Sociological Theory: The Case for Gender Inclusion' in S Hines and T Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 259–276; RL Stotzer, 'Violence against Transgender People: A Review of United States Data' (2009) 14(3) *Aggression and Violent Behavior* 17; S Whittle, 'Where Did We Go Wrong? Feminism and Trans Theory – Two Teams On the Same Side' in S Stryker and S Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) 194–202.

internet-based care/support groups allows trans people to have virtual contact with other supportive group members despite their geographical separation. In this way, the groups create a virtual village, which echoes Walter's earlier understanding.

Trans One served similar functions to Walter's bereavement MHGs.⁴⁵ During transition, sex/gender identities are situated outside the heterosexual schema and identities became unstable. Weeks et al noted that friendships become important when normative arrangements become inadequate.⁴⁶ Trans One provides a supportive virtual friendship network for its members, who not only include trans women but also trans men and other less known gender-variant people. Scholars have established that groups like Trans One facilitate trans people's recognition and alleviate transitional distress – a function identified as important for trans people.⁴⁷ Furthermore, such groups model good ethical care for trans people.⁴⁸

Nigel more fully explained Beth's role in Trans One:

She has done more research and reaching out into the trans community than I ever did, and I suppose it's her way of trying to understand me and being trans and what to expect. When I started to transition, I think she was just preparing herself for that, but she is also quite selfless and she does what she can to help other people as well. This has probably led to her continuing her work in the trans community.

Beth used the care/support group to research transition and the trans experience and to gain mutual support from its members. Moreover, Trans One is similar to the non-heterosexual community spaces identified by Weeks et al⁴⁹ in that it offers an environment that enables trans people to gain self-awareness, acquire trans information, receive support, and explore their identity in safety. Nigel suggested that Beth's involvement in the group was an attempt to understand him, but I argue that it might also have been because she was grieving the loss of her lesbian relationship with a female partner. Nigel had previously told me that Beth had struggled with his transition:

⁴⁵ Walter (n 42).

⁴⁶ Weeks, Heaphy and Donovan (n 7).

⁴⁷ Ibid; Lev (n 29); K Rachlin, 'The Questions We Ask, Conducting Socially Conscious Research with Transgender Individuals' in W Meezan and JI Martin (eds), *Handbook of Research with Lesbian, Gay, Bisexual, and Transgender Populations* (Routledge 2009) 261–279; E Shapiro, *Gender Circuits: Bodies and Identities in a Technological Age* (Routledge 2010); Whittle (n 4).

⁴⁸ Ibid.

⁴⁹ Weeks, Heaphy and Donovan (n 7).

She had trouble, she found it quite difficult at first because she [...] I think the worst thing for her was to lose her lesbian identity. She had been through a lot at school to establish her lesbian identity and being proud of being lesbian despite the nonsense that was going on there. Then comes along me, we are going out, we are holding our hands, and we looked like a heterosexual couple, which annoyed her. She did question her own sexual identity and my heterosexual identity, which she cannot accept. So, I think that it was quite difficult in terms of the relationship at that point.

This extract supports my argument that Beth was angrily grieving the loss of lesbian identity. Drawing on the grief work of Kübler-Ross⁵⁰ as revisited by Small,⁵¹ anger and disorientation are two symptoms of grief. Because of this, Beth followed the conventional wisdom that active engagement in work, trans activism in this case, eases grief. However, Walter is uncertain about the potential of engagement in work and makes the powerful point that there is no empirical research evidence to validate its efficacy as a means of dealing with grief.⁵² Furthermore, he observes, from a postmodern perspective, that there are a multitude of paths through grief and the end point is unclear, which I argue reflects Beth's trajectory through her transitional experiences.⁵³

4.3.6. *Life at the borders of heterosexual theory for Nigel and Beth*

Research demonstrates that the positioning of trans people beyond the discourse of gender, sex and sexuality is theoretically problematic.⁵⁴

⁵⁰ E Kübler-Ross, *On Death and Dying* (Tavistock 1970); E Kübler-Ross, *Death: The Final Stage of Growth* (Prentice Hall 1975).

⁵¹ N Small, 'Theories of Grief: A Critical Overview' in JL Hockey (ed), *Grief, Mourning and Death Ritual* (Open University Press 2001) 1–19. See also Kübler-Ross (n 50): the author originally identified grief as manifesting through step-by-step stages of denial, anger, bargaining, depression and finally acceptance. Small demonstrates that these stages might not be linear, that not all stages are visited, and that a final closure is not universally desired by mourners. However, stage models of grief, such as Kübler-Ross', are useful to identify when grief occurs because they indicate some of the key emotions that might be expressed.

⁵² Walter (n 42) 94.

⁵³ Ibid, 161–164.

⁵⁴ J Cromwell, *Transmen and FTMs: Identities, Bodies, Genders and Sexualities* (University of Illinois Press 1999); S Monro, 'Towards a Sociology of Gender Diversity: The Indian and UK Cases' in S Hines and T Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 242–258; Gabb (n 3); T Sanger, 'Trans Governmentality: The Production and Regulation of Gendered Subjectivities' (2008) 17 *Journal of Gender Studies* 41.

Trans people disrupt the usual heterosexual relationships between the biologically sexed body and socially performed gender, described by Ingraham as ‘thinking straight’.⁵⁵ Trans people challenge the institutional set of patterned behaviours and rituals that constitute what it means to be ‘straight’ in thought and action – the basis for hegemonic heterosexuality. Nevertheless, in my research, familial intimates found that the negotiation of this repositioning was not easy; however, some achieved and lived with it.

Nigel told me that Beth had initially struggled to accept their new intimate coupledness as a woman and a trans man. However, their relationship settled, and he told me that:

We look like a heterosexual couple, and she doesn’t mind it so much now. Whenever people ask, right from the start, I have been happy to say that Beth is a lesbian and people give quizzical looks. I am trans and it doesn’t make sense, but we work.

Beth struggled to reconcile her lesbian identity with Nigel’s shift from being publicly perceived as a woman towards being seen as a man. Brown, in her study of the lesbian partners of trans men, reported that their sexuality shifted significantly in the course of their partner’s transition.⁵⁶ Beth reflected on being perceived as a heterosexual woman because of Nigel’s public changes. There was the possibility that their sexual activities might have been open to some change,⁵⁷ but she did not discuss this with me. As previously argued, their lived reality was beyond both everyday and contemporary heterosexual theoretical understandings of coupledness. However, they may be understood as engaging in the negotiation of reconfigured traditional family forms and sexual life as described by a range of scholars.⁵⁸ Nigel and Beth’s evolving relationship reflects Sanger’s finding that trans people may be accommodated in the day-to-day lived experience of intimate relationships,⁵⁹ in this case Nigel and Beth’s lived reality.

⁵⁵ Ingraham (n 12).

⁵⁶ Brown (n 30) 561–572.

⁵⁷ Cromwell (n 54); S Whittle, ‘Gender Fucking or Fucking Gender? Current Cultural Contributions to Theories of Gender Blending’ in R Ekins and D King (eds), *Blending Genders: Social Aspects of Cross-Dressing and Sex-Changing* (Routledge 1996) 115–129; Brown (n 30); T Sanger, *Trans People’s Partnerships* (Palgrave Macmillan 2010); Lev (n 29).

⁵⁸ See e.g. Gross (n 8); Jamieson (n 8); Williams (n 8); Roseneil and Budgeon (n 8); S Hite, *The Hite Report on the Family: Growing up under Patriarchy* (Bloomsbury 1994).

⁵⁹ Sanger (n 57).

4.3.7. *The public–private dichotomy of intimacy*

This section considers how the public dimension of changing sex/gender identities relates to the more intimate negotiation taking place in private. Identity is forged by social interaction within various networks of others rather than being an intrinsic core property of the self. We are dependent on one another in that the various identifications that we take up are socially and politically important as a basis for self-recognition.⁶⁰ Moreover, the process of identification facilitates the conceptualisation of the interface between the personal and the social.⁶¹

Beth considered the effect that Nigel's changes in embodiment (male-pattern hair growth and muscular development) had upon their relationship:

I suppose in time he got more muscle and, well, he has even now not much facial hair, so they [East Asian men] don't tend to be very hairy, and he said his dad was not very hairy, so we were not expecting it to grow a big beard or anything – that has been quite slow, I suppose, the facial hair. I don't feel any less attracted to him; like I said, that was something that worried him, and I don't think it has really made a big difference to me. It is just like the same person, it is still, you know, who I find attractive.

In the assertion that East Asian men do not tend to be too hairy, Beth appears bemused about the stereotypical embodiments of Eastern and Western expectations.⁶² However, she maintained that she still saw Nigel as the same person and that it was important that the core aspect of Nigel's personality did not change despite his slow embodied metamorphosis. They both appeared to be able to maintain their intimacy despite the transition. In his relationship with Beth, Nigel moderated his public masculine identification and presented to Beth a more feminized male embodied identity, and he emphasized the dichotomy to preserve their intimate relationship. However, as a couple they appeared to contradict normative expectations. Identifications based on sex/gender were decentred and given less prominence while identifications based on other personal social characteristics were foregrounded – a phenomenon found in another study of transition.⁶³ Moreover, Alcoff argues, quite rightly I think, that in reality neither the public identity nor the lived private

⁶⁰ S Lawler, *Identity Sociological Perspectives* (Polity Press 2008); RW Connell, *Confronting Equality: Gender Knowledge and Global Change* (Polity Press 2011); N Rose, *Governing the Soul: The Shaping of the Private Self* (Routledge 1991).

⁶¹ K Woodward, *Boxing, Masculinity and Identity, the I of the Tiger* (Routledge 2006).

⁶² K Louie and L Edwards, 'Chinese Masculinity: Theorising Wen and Wu' (1994) 8 *East Asian History* 135.

⁶³ Roseneil and Budgeon (n 8).

subjectivity of the person is entirely separate and distinct but that they are more subtly interdependent.⁶⁴

4.3.8. *Authoritative sources of knowledge*

In the early 2000s it was argued that transsexuality is caused by aspects of biology and that the established psycho-medical treatment for transsexuality is based on this understanding.⁶⁵ However, the contemporary understanding is described in a recent report by Hilary Cass, who recognizes that '[m]any authors view gender expression as a result of a complex interplay between biological, cultural, social and psychological factors'.⁶⁶ In Cass's final report, she goes into more detail about this, saying that 'prenatal androgen levels, external genitalia, sex of rearing and sociocultural environment all play a part in eventual gender identity'.⁶⁷

Nevertheless, the more simplistic causal explanation of transsexuality was used by Nigel to support his mother and sister in coming to terms with his transition:

I did sort of call them up and say, 'This is what is happening, I am going to transition, I have sent some information for you in the post – recommended reading should you want it'. And I said, 'If you want to disown me, well, it's entirely your right but I hope you don't, because at the end of the day I am still the same person'.

Nigel supplemented his telephone announcement by sending his mother and sister a simplified biological and medical explanation for his changes:

I just sort of mentioned about the changes in maternal hormones and things like that. It is due to medication and environmental hormones. I knew my mum wasn't using any hormones at the time, but the other thing I mentioned was about brain development and how it is hardwired and all that, and the research from the Netherlands^[68] – that was it, and I distilled it quite a bit so that they could understand it.

⁶⁴ LM Alcoff, *Visible Identities: Race, Gender, and the Self* (Oxford University Press 2006).

⁶⁵ GIRES (n 27); T Dean, *A Gender Trust Guide to Transsexualism, Transgenderism and Gender Dysphoria* (The Gender Trust 1998).

⁶⁶ H Cass, *Independent Review of Gender Identity Services for Children and Young People: Interim Report* (2022) 28.

⁶⁷ *Ibid*, 32.

⁶⁸ JN Zhou, MA Hofman, LJ Gooren and DF Swaab, 'A Sex Difference in the Human Brain and Its Relation to Transsexuality' (1995) 378(6552), *Nature* 68.

Nigel was medically qualified, so this gave him institutional power that enabled him to explain the biomedical causation of transsexuality and use it to advance his transitional project. He hoped this alleviated his traditional family's concerns about his transition and that it might facilitate their acceptance. I felt that his frequent nervous laugh during the interview suggested that he was worried; he feared that his family would abandon and reject him because he was transitioning. The possibility of rejection was frightening, as identified by Green,⁶⁹ but he decided to risk the possible pain and social stigma of transitioning. He took care not to blame his transsexuality on his mother by avoiding the 'mother-blame' psychoanalytic thesis.

Nigel tried to normalize transsexuality as a natural biological variation, thereby opposing its perception as a cultural deviation:

In East Asia this [transsexuality] is a deviant culture, whereas I am just trying to, I suppose in a way, trying to normalise it as a sort of variation, of being human, at the end of the day.

He told me on another occasion that his family were aware of 'lady boys' – well-known gender-variant women in Thailand who are an especially stigmatized East Asian group.⁷⁰ He wanted to avoid offending his family and counter their traditional understandings of dichotomous sex/gender. Nigel later told me that his approach seemed to have a positive effect on his mother's acceptance. Nigel and Beth's stories illustrate how they have been trying to form new trans families; this is further developed in the final discussion of this chapter.

4.4. Christina and Kimberly

The second couple presented are Christina and Kimberly. Kimberly was 36 years old at the time of interview and a MTF trans woman who began transition 4 years before. She lived in the North of England and identified as a lesbian. Christina was Kimberly's wife, and they did not want to get divorced to preserve their Christian marriage. This couple was different from Nigel and Beth in that they were legally married as a husband and wife during transition, which presented problems for both the civil and religious authorities, as will be seen as their story unfolds.

⁶⁹ Green (n 22).

⁷⁰ S Long, *Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide* (Human Rights Watch 11 June 2009) IV Asia and the Pacific.

4.4.1. *Negotiating new sex/gender identities*

Christina told me how she and Kimberly incidentally introduced the topic of Kimberly's MA dissertation in social work to initiate discussion of Kimberly's trans identity with her family and her concurrent movement towards being a woman:

When Kimberly was doing her dissertation, which was on the social construct of gender, we began to talk to family about the social construct of gender and about people who were transgendered. When we had a couple of conversations with people, we then say, 'Actually I have something personally invested in this research', and use that as a way of beginning to explore with family what was really going on.

This intimate couple were using Kimberly's MA work as an argument to facilitate her social reincorporation into their traditional family with her new identity.⁷¹ They used the academic understanding of the social construction of gender to negotiate Kimberly's changes. In everyday understanding, sex and gender were usually understood as one.⁷² Kimberly had similarly initiated in a previous discussion with Christina the confusion she experienced concerning her hidden trans identity. Christina explains this:

Kimberly did some drawings, self-portrait drawings, when she was struggling with herself, something she has often done in artwork. She showed me this work which displayed her as having the sexual characteristics of both male and female, which was quite interesting. We didn't really talk about it very much but said, 'That's interesting'. At that point, we didn't really understand anything about sexuality and gender as being different; I suppose many people don't.

I continued to probe this more in the interview to find out if Kimberly's gender and sexual confusion was an intersex⁷³ condition because of Christina's reference to the sexual characteristics of both male and female:

Me: Is there any biological basis for that?

C: No.

Me: I mean the physical features.

⁷¹ On social reincorporation, see Plummer (n 16).

⁷² Shapiro explains that they were not separated until they began to be scrutinized, primarily by feminists in the mid-twentieth century. See Shapiro (n 47).

⁷³ 'Intersex' is now a dated term and is referred to as differences in sexual development (DSD).

- C: Yeah.
 Me: So, it was more a feeling she had then?
 C: Yeah.

I was intrigued to find out if there was any biological basis to Kimberly's trans identity – in other words, whether she was intersex – whilst simultaneously trying to unravel some of the confusion that they seemed to be experiencing as Christina explored Kimberly's identity. During their interviews, I, as the researcher, began to realize that they did not articulate understanding of the differences between sex, gender and sexuality, as shown by the preceding extract where Christina refers to sexuality and gender as being conflated. Lev found, in her clinical practice, that sex/gender/sexual identity confusion is not unusual at the early stages of exploring gender variance.⁷⁴ Furthermore, trans people, in this case Kimberly, disrupt the usual linkages of institutional heterosexuality, which position male-masculine-heterosexual and female-feminine-heterosexual as fixed, with males erotically attracted to females and vice versa.⁷⁵ It might also have been that Kimberly was trying to use a biologically essentialist brain sex theory⁷⁶ – that the cause of MTF transsexuality is due to differences in brain structure – to locate her bewildered feelings about her emerging understandings; she was struggling to find a coherent explanation.⁷⁷ In addition to the uncertainty there was also an early attempt to disclose to Christina her inner desires concerning her trans identification as female.

4.4.2. *Accommodating the new sex/gender identifications*

Christina initially struggled over Kimberly's transition into a woman, as she felt she was losing her identity as the wife of her husband:

I don't know if I find labels particularly helpful. I remember when Kimberly was looking at the construct of gender. We looked at one author's book, I can't remember who it was now, but they used something which I think they called the pan identity wheel. It was like a circle divided into 32 different segments like a pie chart and each of

⁷⁴ Lev (n 29) ch 7.

⁷⁵ Ingraham (n 12) 1–11.

⁷⁶ F Kruijver, JN Zhou, CW Pool, MA Hofman, LJG Gooren and DF Swaab, 'Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus' (2000) 85 *Journal of Clinical Endocrinology and Metabolism* 2034; Zhou, Hofman, Gooren and Swaab (n 68); GIREs (n 27); GIREs, *Medical Care for Gender Variant Children and Young People: Answering Families Questions* (Department of Health 2008).

⁷⁷ As discussed previously, a more contemporary understanding is articulated by Hilary Cass. See Cass (n 66).

those was starting from straight heterosexual going all the way around through lesbian, gay, transgendered, whatever, and I didn't feel actually that there was one of those particular labels which actually fitted me.

One reason why Christina may have struggled was that she initially denied that identity was important. The confusion about sexuality experienced by Christina at the early stages of Kimberly's transition has been theoretically identified by Brown⁷⁸ and empirically confirmed by Sanger.⁷⁹ Christina's confusion might have been because she assumed Kimberly's pre-transition sex/gender identifications to be fixed, coherent, and stable. Certainty had been replaced by doubt and uncertainty, and heterosexuality's schema was disrupted.⁸⁰ Christina later recognized Kimberly's new sex and gender because she considered Kimberly's other identities and aspects of their intimacy to be more important. Christina moved from initial confusion and grief about identity to accommodating the benefits of a different relationship with Kimberly, as a woman:

I have discovered since Kimberly's transition that I am perfectly happy living in a relationship with a woman. There have been many benefits to living with a woman: one of the wonderful things that I love now is when we go shopping, instead of me having to go into the changing rooms, put something on, come out, show Kimberly what I look like, we can go into the changing rooms together and that's just lovely. I suppose my assumption is that people who see us assume that we are in a relationship and that we are a lesbian couple.

She was bemused by her new status of being publicly assumed to be in a lesbian relationship or, as she said, 'in a more complex relationship' with Kimberly as a trans woman. Conventional language fails even though, as Sanger points out,⁸¹ novel words for trans people and their intimacies are developing. When the interviews took place, this transition was in its preliminary stages, and it appeared that Christina had arrived at a temporal resolution of Kimberly's changes in sex/gender identification as identified consistent with Lev's framework.⁸²

Christina continued to tell me about the extent of her loss of institutional heterosexual status:

⁷⁸ GR Brown, 'Women in the Closet: Relationships with Transgendered Men' in D Dallas (ed), *Current Concepts in Transgender Identity* (Garland 1998) 353–371.

⁷⁹ Sanger (n 57).

⁸⁰ Woodward (n 61).

⁸¹ Sanger (n 57).

⁸² Lev (n 29) ch 7.

What I have experienced as the biggest loss, practically tangibly, is the ability to walk down the street holding hands [...] the loss of the perception, by others, that I am part of a heterosexual marriage.

She expressed her loss movingly in terms of heterosexuality, romance, marriage, and the comparative acceptability in everyday situations of being perceived as a couple with a heterosexual identity as described by Ingraham.⁸³ This new arrangement was set against what would be perceived as their new same-sex coupledness. By not holding hands they demonstrated how the boundaries of institutional heterosexual identity were policed by heterosexual hegemony.⁸⁴ Two women holding hands are often perceived as a lesbian couple and are not usually considered acceptable in most situations. Furthermore, they behaved as Foucault predicted by self-monitoring their behaviour so that it appeared to conform to heterosexual ideology – in doing this, they were avoiding possible ridicule and hostility. They are unusual in that they are legally married as husband and wife, from a public perspective, even though privately they have reconfigured and negotiated their intimacy.

Christina next referred to another loss in how others perceived her new relationship with Kimberly. She told me that she was going through the selection process for ordination in the Church of England when Kimberly's transition emerged and disrupted her plans:

When all this blew up, I was just about to go off to selection conference for ordination and wasn't allowed to go forward for ordination. There is a whole pile of stuff in there for me. How our relationship would be perceived? It would be perceived as a lesbian relationship and therefore it wasn't felt appropriate for me to go forward for ordination.

The challenge to institutional heterosexuality was revealed by the Anglican church's prevention of Christina, now perceived to be a lesbian, from realizing her calling to the priesthood; the church policed institutional heterosexuality.⁸⁵ The church authorities inaccurately labelled their relationship as lesbian when in fact it was a re-forming of their married relationship as a husband and wife into one between a woman and another woman with a trans history.⁸⁶

⁸³ Ingraham (n 12).

⁸⁴ N Rose, *Governing the Soul: The Shaping of the Private Self* (Rose 1991).

⁸⁵ Ingraham (n 12) 1–11.

⁸⁶ At the time of Kimberley and Christina's interviews, the Anglican church would have been confused by their novel situation, and there would have been no clear guidance concerning Christina's ordination. In the meantime, the approach of the Church to homosexuality has changed, and their marriage would now be considered as a same-sex marriage, and as such Christina might be ordained as long as she did not have sexual relations with Kimberley.

They told me in the interview that they remained married after Kimberly's transition (I happened to meet this couple ten years later and they were still together). Their married relationship became a reconfigured form of intimate partnership; however, not normatively recognized but identified by researchers.⁸⁷

4.4.3. Life at the borders of heterosexual theory for Christina and Kimberly

Christina and Kimberly's life was novel, and they had no road map to follow in navigating on transition as a married couple. However, Christina had psychodynamic training as a counsellor and insisted that Kimberly go for counselling help whilst transitioning. Christina told me:

That really helped us in the trans-journey. It gave her a space where she could begin to explore all the issues that came up, and she was able to articulate what was going on, and that was really good.

Christina also told me that Kimberly suffered from an emotional breakdown and was under the care of a consultant psychiatrist, but I think – drawing on my own experience – the cause of her distress might have been more complex. Nevertheless, Christina's training enabled her to see the value of counselling for Kimberly. Counselling would allow Kimberly to articulate her transitional story and to make it real for her by narrating the loss of her previous identification as a man. Furthermore, counselling might have reduced Kimberly's transitional distress, facilitated communication with Christina, and increased their intimacy.

Christina initially grieved Kimberly's transition into a woman because it entailed the loss of her identity as a wife; their new relationship was seen publicly as a lesbian relationship. She explained what she thought about this public perception:

I don't do anything to disillusion them most of the time. Sometimes, when we get to know people much better, then we, if they haven't already worked out questions about what is going on, might choose to explain. But I just choose to let people think what they want, really. If we are comfortable in our identities together and our individual identities, then we are quite happy.

⁸⁷ Gabb (n 3); Plummer (n 16); S Hines, *Transforming Gender, Transgender Practices of Identity, Intimacy and Care* (Polity Press 2007); Sanger (n 57).

Christina grieved over her loss but later recognized that their relationship together was more important. She moved to accommodate the benefits that were offered by a different intimacy with Kimberly. Their arrangement was not explainable in everyday terms, but it worked for Christina and Kimberly: it was their lived reality. Nevertheless, they struggled to identify themselves within a wider contemporary understanding. They reflected Nigel and Beth's experience; they were all adapting to a new, more inclusive understanding of families as articulated by scholars.⁸⁸ Whittle alerts the reader to the struggle and the disruption that trans people cause for everyday sex and gender understandings.⁸⁹ Both of the couples studied here lived with the tension between theoretical understandings and their everyday lived reality. Unlike heterosexual and gay/lesbian couples, they had no road map to follow in this novel situation as married and partnered trans couples.

4.5. Discussion

This discussion extends the theoretical analysis of institutional heterosexuality, its associated intimate relationships, and marriage. It shows how this normative regulatory social structure is challenged and extended by both Nigel/Beth and Christina/Kimberly as they manage the tensions of liminal living with innovative post-transition relationships. The venture contributes to the sociology of transgender and family studies by exploring how trans people might occupy positions beyond the hegemonic normative binaries of sex, gender, and sexuality, which are all the constituents of the framework of heterosexuality. Furthermore, the study develops the work of other contemporary scholars working in the field of intimacy by revealing how the two couples, often with difficulty, developed new sexualities and novel familial arrangements.⁹⁰

The methodological approach used enabled understanding of the messy experiences and complexities of transition for familial intimates. It critically allowed conceptualization of the interface between the personal and the social experiences of intimates, and it illuminated their personal and psychic investment in conventional sex/gender identifications. In this way it develops the use of the psychologically informed approaches of Holloway and Jefferson⁹¹ and Wengraf,⁹² which sociologists such as

⁸⁸ Giddens (n 25); K Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press 1991); L Spencer and R Pahl, *Rethinking Friendship: Hidden Solidarities Today* (Princeton University Press 2006).

⁸⁹ Stryker and Whittle (n 4).

⁹⁰ Jamieson (n 8); Roseneil and Budgeon (n 8); Williams (n 8); Gross (n 8).

⁹¹ Holloway and Jefferson (n 15).

⁹² Wengraf (n 15).

Gabb⁹³ are beginning to use to study intimacy. More concretely, the methodology embedded this knowledge in the materiality of the pre-emergence discomfort experienced by trans people. The structural positioning of the research within the hegemony of institutional heterosexuality made it a sensitive undertaking, which is evinced by the fact that nearly half of familial relationships do not survive transition.⁹⁴

The research revealed several significant findings with regard to how Nigel and Kimberly's transitions were negotiated with Beth and Christina.

Firstly, Beth and Christina foregrounded their trans partners' other public identifications over sex/gender identifications; this was counter to the normative practice of giving relations of the body, especially those associated with reproduction, social and political primacy above all other forms of human interactions and values, as theoretically identified by Shapiro⁹⁵ and Woodward.⁹⁶ This finding suggests that Beth, who has a non-heterosexual lesbian experience, can accept trans emergence and continue intimacy – a finding that supports my thesis that those with this experience accept transition more easily. In Christina's situation, recognition was made easier by decentring identities predicated on sex, gender and sexuality, as theorized by Woodward and Shapiro⁹⁷ and empirically identified by Roseneil and Budgeon.⁹⁸ It is unfortunate that, during the interviews for this research, neither couple spoke of their intermate sexual relationships, so I have no knowledge of the private sexual intimacies of either couples and how this might impact transition.

Secondly, both Beth and Christina reacted emotionally to the disclosure of their partners' trans identity: this was because they experienced the loss of their previous, pre-transition public identifications with their trans intimate, in Beth's case as a lesbian partner and in Christina's as the wife of her husband. This change in normative sex/gender identification is grieved by both. Such grief was a novel empirical finding in my thesis and was experienced in 87 per cent of the transitions I studied. The extent of the grief, in that study across cases (and its depth in particular cases), illustrated the hegemony of the

⁹³ Gabb (n 3).

⁹⁴ G De Cuypere, E Elaut, G Heylens, G Van Maele, G Selvaggi, G T'Sjoen et al, 'Long-term Follow-up: Psychosocial Outcome of Belgian Transsexuals after Sex Reassignment Surgery' (2006) 15 *Sexologies* 126; S Whittle, L Turner and M Al-Alami, 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination' (2007) *The Equalities Review* https://www.ilga-europe.org/sites/default/files/trans_country_report_-_engenderedpenalties.pdf accessed 27 February 2025; Brown (n 30).

⁹⁵ Shapiro (n 47).

⁹⁶ K Woodward, 'Gendered Bodies: Gendered Lives' in D Richardson and V Robinson (eds), *Introducing Gender and Women's Studies* (Palgrave Macmillan 2008) 128–143.

⁹⁷ Ibid; Shapiro (n 47).

⁹⁸ Roseneil and Budgeon (n 8).

structural forms of institutional heterosexuality. However, while transition was found to precipitate identity uncertainty and instability for Beth and Christina, the adoption of innovative post-transitional identifications mitigated this precariousness in a private sense. At the same time, these identifications posed institutional difficulties in terms of marriage/partnerships and with religious authorities.

Third, Nigel balanced the need to transition against his commitments to his traditional family and career, which is consistent with Hines' empirical research and my personal experience.⁹⁹

Fourth, the change in Kimberly's sex/gender identification is accompanied by an associated and apparent counter-normative public sexuality – lesbianism – that disrupts the institutional heterosexual structural linkages between sex, gender and sexuality, a mess-up identified by other scholars.¹⁰⁰ Furthermore, both couples illustrate how gender identity is constructed and brought into being at an interpersonal level through discursive social interaction with their respective intimates, confirming the understandings of other scholars.¹⁰¹

Fifth, the spatial separation of Nigel from his mother and sister during transition allowed their relatedness to be retained.

Finally, recognition of Nigel's new sex/gender identification was facilitated through his use of the psycho-medical model of transsexualism, reflecting Landen's empirical research amongst younger trans people who also adopted this model of causation for social acceptance.¹⁰²

In conclusion, the understanding of trans people and their intimate relationships needs to be extended by further research, which would enable those affected by transition to reflect on their experiences and 'anticipate the way ahead'.¹⁰³ However, it is hoped that this paper will increase understanding of trans familial intimacies, allowing those working in the field of family law a greater understanding of transitioning and its effect on families and public institutions.

⁹⁹ Hines (n 87).

¹⁰⁰ CJ Heyes, *Self-Transformations: Foucault, Ethics, and Normalized Bodies* (Oxford University Press 2007); Sanger (n 54); MJ Hird, 'For a Sociology of Transsexualism' (2002) 36 *Sociology* 577; S Monro, 'Transmuting Gender Binaries: The Theoretical Challenge' (2007) 12(1) *Sociological Review Online*; S Hines, '“I Am a Feminist But [...]”: Transgender Men and Women and Feminism' in J Reger (ed), *Different Wavelengths: Studies of the Contemporary Women's Movement* (Routledge 2005) 57–77; Sanger (n 57).

¹⁰¹ J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990); RW Connell, *Gender and Power: Society, the Person and Sexual Politics* (Stanford University Press 1987); K Kosik, *Dielectics of the Concrete* (Reidel 1976).

¹⁰² M Landen, 'Attitudes toward Transsexualisms in a Swedish National Survey' (2000) 29 *Journal of Archives of Sexual Behavior* 375.

¹⁰³ Brown (n 30) 123.

PART II

**Regulating Personal Relationships
through and beyond Marriage**

Marriage and Family Formation at the Intersection of Law and History

Mary Jo Maynes

5.1. Introduction: Recent Contests over Marriage Laws

In May 2011, the Republican-controlled Minnesota State Legislature voted to place a referendum on the November 2012 ballot. Voters would be asked: ‘Shall the Minnesota Constitution be amended to provide that only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota?’ Minnesota was not the first state to vote on a ballot measure concerning marriage law, specifically same-sex marriage. At this point in time, the few states where same-sex marriage was legal had achieved it through legislative acts. Until 2012, referenda had all gone against advocates of marriage equality. According to journalist Peter Callaghan: ‘Thirty-two times the issue had been presented to a state’s voters and 32 times they had opted to limit marriage to one man and one woman. The streak ended on Nov. 6, 2012, when three states (Maine, Maryland and Washington) legalized same-sex marriage at the ballot, the first such popular vote legalizations in the United States’.¹ On the same day, Minnesotans rejected the referendum that would have made same-sex marriage unconstitutional: ‘the amendment [...] received just 47.4% yes votes’.² The mood was shifting, but it was in

¹ P Callaghan, ‘How “Love and Commitment” Led to Legal Same-sex Marriage in Minnesota 10 Years Ago’ *Minnpost* (Minneapolis, 18 January 2023) <https://www.minnpost.com/state-government/2023/01/how-love-and-commitment-led-to-legal-same-sex-marriage-in-minnesota-10-years-ago/> accessed 9 January 2026.

² Ibid.

the courts that the definitive steps were taken. In 2015, a landmark decision by the US Supreme Court, in the case of *Obergefell v. Hodges*, set federal precedent that effectively required that all states recognize same-sex unions.³ Taking the route through the courts at this point in time offered advocates of marriage equality a national strategy.⁴

It is significant that the Court's decision drew upon specifically *historical* arguments about the varied and changing nature of marriage. A large group of experts on the history of marriage in the United States filed an amicus brief in support of the marriage equality plaintiffs; even more significantly, the brief was co-signed by the American Historical Association, the historical discipline's largest professional organization in the United States.⁵ Historians had already been active in the writing of similar briefs at the state court level. Michael Grossberg, one of the co-authors of a Massachusetts brief filed in 2002 in the case of *Goodridge v. Department of Public Health*,⁶ points to historians' rejection of the state's claim that: 'marriage had been a fundamentally unchanging institution in Massachusetts and, therefore, to allow same-sex unions would be a radical innovation sanctioned neither by the past nor by the actions of any other state'.⁷ Historians, in response, assembled evidence to counter this claim.⁸

The Goodridge amicus brief 'argued that historical scholarship demonstrated unequivocally that marriage and marriage law had changed over time and thus the law could, and we asserted should, change again'.⁹ The brief evoked many telling and ethically powerful examples:

Throughout the history of Massachusetts, marriage has been in a state of change. In the 17th, 18th, and 19th centuries, blacks were forbidden from marrying whites, and women lost their legal identity on their wedding day. Massachusetts courts and lawmakers remedied these injustices by reforming marriage laws, at times radically, to reflect contemporary views of racial and gender equality and fundamental fairness. That marriage remains a vital and relevant institution is a

³ (2015) 576 US 644.

⁴ American Historical Association, 'AHA Signs on to Amicus Curiae Brief in Obergefell Case on Same-Sex Marriage' (2015) <https://www.historians.org/wp-content/uploads/2015/03/Amici-Curiae-on-Same-Sex-Marriage-2015.03.06.pdf> accessed 26 November 2025.

⁵ Ibid.

⁶ (2003) 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

⁷ M Grossberg 'Friends of the Court: A New Role for Historians' (2010) 48(10) *Perspective on History* <https://www.historians.org/perspectives-article/friends-of-the-court-a-new-role-for-historians-november-2010/> accessed 26 November 2025.

⁸ Ibid.

⁹ American Historian Association (n 4).

tribute to the law's ability to accommodate changing values, not the rigid adherence to rules and practices of another time.¹⁰

The Goodridge brief was one of a series of recent attempts by US historians to influence family law by calling attention to historically variable answers to the question: 'What is a family?' and to the historical forces that have shaped and changed the institution over time. Historical evidence makes clear that, while people have always formed families and lived in families, what that means has varied dramatically over time and across cultures.¹¹ The recent 'historic' changes in marriage law to allow same-sex unions have drawn our attention to the sex of the partners as a legal prerequisite for legitimate marital unions, but this is just one of the many dimensions of marriage law and practice that have varied across time and place.¹²

This chapter will examine the intersection between family history and law through a specific focus on the history of family formation through sexual union – that is, 'marriage' and its variants. The recent legal debates about same-sex marriage have centred on the question of who may marry whom? This question provides a good start for delving into the broader history of legal traditions around marriage.

Laws and practices regulating the choice of marriage partners have not been limited to the sex of the partners, of course. Other characteristics of marriage partners have figured into definitions of legitimate marriage and have been challenged and changed over time, including degree of kinship; age; race; caste, class or property; and religion. Even larger foundational questions point to societal frameworks that have shaped the relationship between law and marriage, going well beyond the specific designation of acceptable characteristics of marriage partners. How have processes of family formation been defined and constrained by law, and in whose interests? Who

¹⁰ Grossberg (n 7).

¹¹ For an introduction to the broad contours of family history, see MJ Maynes and A Waltner, *The Family: A World History* (Oxford University Press 2012).

¹² Current debates over the sexual identity of marriage partners did have some historical precedents. G Houbre's research on legal cases in nineteenth-century France provides intriguing examples. French courts ruled on requests for marriage annulments by husbands and wives who complained after marriage of having been deceived about the sex of their spouses. The disputes were based on divergent interpretations of the sex of the offending spouse because of ambiguous biological characteristics. These trials provoked debates among jurists and physicians. Physicians often supported marriage annulments in such cases, whereas jurists – more conservative and closer to Catholic understandings of marriage as indissoluble – often opposed annulments. See G Houbre, 'An individual of ill-defined type' ('Un individu d'un genre mal défini'): Hermaphroditism in Marriage Annulment Proceedings in Nineteenth-Century France' (2015) 27(1) *Gender and History* 112.

lawfully controls decisions about the selection of marriage partners, and how has that varied over time and place? What rituals and processes have been required to make a marriage legitimate? I will address these questions by offering a few specific historical case studies that illustrate the wide range of practices within Western history and comparatively across world regions. While tracking variations across time and place, these examples will also call attention to connections among marriage, power dynamics, and social structures in any given context. This brief examination of the history of laws regulating marriage will serve to demonstrate the variability over time of answers to the question ‘What is a family?’.

5.2. The Changing Politics of Marriage Law: State, Religion, Household

5.2.1. Marriage and power relations in the earliest known law codes

Marriage law embodies understandings of marriage as seen by those holding power. Specific laws and their variations and changes over time are inseparable from frameworks of power. Power over families – the question of which individuals and groups have a say in defining and legitimating family relationships – has also varied dramatically across time and cultures. Historians of the family have therefore explored the connections between family and developments in other realms such as government and law, the economy, culture and religion, and the social hierarchies of class, race and gender.

I will start with a case from ancient history that illustrates how specific power configurations among kin groups, political authorities, and religious authorities have structured marriage since the earliest eras for which we have evidence. Law codes, including laws regulating marriage and family relations, have existed for several millennia. Over time, the particular provisions of these codes have varied, but the idea that law should govern family relations has been baked into notions of civilization in and beyond the West.

One of the earliest known law codes – the Code of Hammurabi – dates from the eighteenth century BCE. The Code of Hammurabi was promulgated in the city-state of Babylon, which had become the capital of much of the ancient region of Mesopotamia (present-day Iraq). Power centres like this one had begun to grow as local rulers expanded their claims to surrounding territories, becoming more like kingdoms. The Code was produced as an integral part of the process of state building in ancient Mesopotamia, a process that the pioneering feminist historian Gerda Lerner called, significantly, the ‘creation of patriarchy’¹³.

¹³ G Lerner, *The Creation of Patriarchy* (Oxford University Press 1987).

The close connection between religious and political authority in Babylon was characteristic of this region and time.¹⁴ Royal authorities acted as priests and priestesses of the city's deity cults. Authorities undertook massive projects of land regulation, construction, and irrigation.¹⁵ These developments of urban civilization required state-level structures that went far beyond the kin-based household and encouraged much more social stratification than had existed previously.¹⁶ In this case, given the close association between political and religious authority, dominant religious and ethical beliefs about the family were closely associated with and supported the emergence of the state and state law.¹⁷ The introduction of the Code of Hammurabi is significant for historians of law and the family in three ways:

1. It was the first substantial law code for which the evidence still exists, 'carved in stone' (actually clay), as it were.
2. It offers a historically unprecedented form of evidence about the family.
3. It spelled out many aspects of the working relationships within families and between the family and the state.

According to Lerner, the historical developments involved in state building and lawmaking in Mesopotamia produced greater inequalities *between families* in terms of occupation and wealth but also *within families* in terms of generational and gender relations: hence 'the creation of patriarchy'.¹⁸ In essence, the regime was built on the premise of control over property, control that was vested in patriarchs who held legal rights to pass on their property to their heirs. Regulating female sexuality was linked to these rights, since patriarchs needed to be secure in their paternity, to be certain that their heirs were indeed their own offspring. Law thus embodied principles of the rule of fathers over women and children – including presumptions that families would supervise their daughters strictly in order to ensure premarital chastity, and that fathers had the ultimate say in the selection of their children's spouses.¹⁹ When we examine the Code's provisions in detail, its concern with the family emerges as a major preoccupation. Of the 282 provisions of the Code, about a quarter pertained directly to family law. Most of the remaining provisions concerned property and personal injury. The Code institutionalized gender and class differences, defined sexual propriety and regulated many aspects of family life including marriage. There were

¹⁴ Ibid, 144–145.

¹⁵ Ibid, 153–158.

¹⁶ Ibid, 54–58.

¹⁷ Ibid, 102–104.

¹⁸ Ibid, 22, 101–122.

¹⁹ Ibid, 106–110.

laws focused explicitly on generational relations, including parents' control over children and their children's marriages; relations between husbands and wives; and the status of slaves and concubines in the household and their relationships to their owners. For example, the Code specified that:

- 'If a man take a woman to wife, but have no intercourse with her, this woman is no wife to him.'²⁰
- 'If a man violate the wife (betrothed or child-wife) of another man, who has never known a man, and still lives in her father's house, and sleep with her and be surprised, this man shall be put to death, but the wife is blameless.'²¹
- 'If a man marry a woman, and she bear sons to him; if then this woman die, then shall her father have no claim on her dowry; this belongs to her sons.'²²

Although this Code recognizes property transmission to both sons and daughters through dowries and inheritance, Lerner examines various codes between the late second through the late first millennium BCE and argues that they moved toward both increasing the power of fathers over family members and family wealth and cementing the social position of elite families by keeping property and sexual unions under tight family control.²³ So, in ancient Mesopotamia (often viewed as the fount of many Western legal and cultural traditions), there was a close connection between lawmaking and the solidification of the power of the state in alliance with patriarchal control over property, family, marriage and sexuality.

5.2.2. Marriage between secular and religious law during Europe's Christianisation

In contrast to the Mesopotamian case, where political and religious authority and law were closely connected, in the medieval German kingdoms, we observe a growing conflict between religious and secular authority and law. The early Germanic legal system was rooted in kin groups. Pre-Christian legal principles initially regarded kin groups (clans) as collectively responsible for the actions of their members (debts, punishment for bad behaviour,

²⁰ LW King (tr), 'Code of Hammurabi, c. 1780 BCE' (Internet History Sourcebooks Project 1996) <https://sourcebooks.fordham.edu/ancient/hamcode.asp#text> accessed 26 November 2025, s 128.

²¹ Ibid, s 130.

²² Ibid, s 162.

²³ Lerner (n 13) 108.

etc).²⁴ By around the fifth century CE, kings were emerging, claiming and consolidating power beyond the kin group, and increasingly asserting their responsibility for punishing wrongdoing, including over matters once handled by kin-enforced justice. But the logic still presumed and supported close links between marriage and kinship, on the one hand, and political authority, on the other.²⁵

Evidence suggests that early Germanic practices and laws treated marriage as a union agreed to by kin groups and created by cohabitation rather than by following a specific ritual. Household heads, typically fathers, had significant influence over their children's marriages.²⁶ While the evidence suggests various ways of forming unions, such as actual or ritualistic capture, bride price payment, or even mutual consent without capture or bride price, historians remain sceptical of some of these claims and cautious about inferring that the latter necessarily involved the consent of both parties rather than of their families.²⁷ Children of all types of union were recognized to some degree, and children born outside of marital relations were sometimes able to claim inheritance of goods or titles. Germanic law required consummation for all forms of marriage to be recognized in practice. There were relatively few legal limits on whom you could marry except very close relatives; since marriages cemented kinship alliances, first cousins were ideal matches. Divorce was possible for men on certain grounds and not impossible, if more difficult, for women.²⁸

The spread northward of Christianity brought the first of many clashes in Europe between secular and Church law. In particular, new Christian beliefs about marriage contradicted many of the widely varying Germanic marriage laws and practices. State and church remained separate institutions that simultaneously needed each other to expand and thrive but also competed with each other. Without going into detail here about this centuries-long interaction, I do want to point to a particular area of marriage law that has been the focus of debate: the question of what makes a marriage legitimate. Between the ninth and the twelfth centuries, Christian Church authorities redefined marriage as a religious rite, a sacrament – that is, a ritual act that left an indelible mark on the soul. Conversion to Christianity thus entailed converting to a new understanding of marriage as well as

²⁴ See LM Bitel, *Women in Early Medieval Europe, 400–1100* (Cambridge University Press 2002) 66–73.

²⁵ Ibid, 66–73.

²⁶ Ibid, 164–178.

²⁷ Ruth Karras has also discussed marriage processes in medieval Europe, as well as the ambiguities and historical misinterpretations of and debates about them, in RM Karras, *Sexuality in Medieval Europe: Doing unto Others* (3rd ed, Routledge 2017).

²⁸ Bitel (n 24) 164–189.

the acknowledgment of the Church's authority in marriage processes and disputes.

One focus was consent. After much debate, the Roman Catholic Church decided that the consent of the parents was not required for a legitimate marriage, introducing one of the most controversial of the developing Christian ideas. The free consent of the couple came to be more important, in opposition to many earlier regional laws and practices that had emphasized the choice of marriage partners as a family affair. Consent of the two marrying parties was established as a Christian legal provision throughout much of Europe by around the twelfth century; in disputed cases, resort to Church courts was an option for marrying parties.²⁹

The clash between secular and religious marriage laws, first introduced through the process of Christianization in the early medieval era, persisted as a significant site of contention, and even violent confrontations, throughout European history. The disputes came to a head again during the early sixteenth-century Protestant Reformation. There were many theological issues at stake in the rebellion against the Catholic church that Martin Luther launched. But for our purposes, it is important to note that marriage was among the most significant.

In 1532, Luther reflected back on the central goals of the religious Reformation that he had set in motion in 1517: 'The Lord God has wanted three things made right again before the Last Day: the ministry of the Word, government, and marriage.'³⁰ Lutherans rejected the Catholic view of marriage as a religious sacrament that was validated primarily by the free exchange of marriage vows between a man and a woman and that produced an insoluble sacramental bond. They thought of it as a human social status which ought to be regulated by parents and secular authorities. Furthermore, they held that the mere consent of the couple should not automatically make a marriage binding; parents should have the right to forbid a marriage of which they did not approve. Laws in states that adopted Lutheranism and other Protestant religions altered marriage laws accordingly.³¹

²⁹ There is a discussion of the debates and, specifically, the move toward new ideas about consent in Europe in R Karras, *Unmarriages: Women, Men, and Sexual Unions in the Middle Ages* (University of Pennsylvania Press 2012) 54–57. For a discussion of the somewhat different process of redefining Christian marriage in the Middle East, see LE Weitz, *Between Christ and Caliph: Law, Marriage, and Christian Community in Early Islam* (University of Pennsylvania Press 2018).

³⁰ L Roper, 'Luther: Sex, Marriage and Motherhood' (1983) 33(12) *History Today* <https://www.historytoday.com/archive/luther-sex-marriage-and-motherhood> accessed 26 November 2025.

³¹ *Ibid.*, 36–37.

Moreover, even in Catholic countries, couples were not always granted the freedom to consent or withhold consent in practice. On the one hand, there is evidence that in some regions of Catholic Italy in the sixteenth century, sons and daughters could call upon Church law and courts to resist unwanted marriages.³² However, if such legal options were available in some eras and regions, they were the exception. In other Catholic states such as France, the courts represented the desires of elite families to control their children's marriages; there was little space for protest by calling on Catholic laws invoking consent.³³ Even if the balance of power between the forces of state, Church, and family varied across premodern Europe, it was very difficult for a daughter or son to successfully navigate among these powers in order to resist a marital partnership they did not want.

5.2.3. *Not over yet: the ongoing debates over consent*

A third case study is taken from the 'age of revolutions' in and beyond Europe (ca. 1750–1850), when new notions of human rights, legal personhood, and gender roles led to questions concerning sexual consent and spousal selection. Legal, religious and familial institutions reflected varying principles regarding these questions. Moreover, the words and actions through which consenting to marry (or have sex) were performed were often ambiguous and changed with evolving notions of legal personhood.

In the eighteenth century, most European family laws still continued to presume patriarchal power: families still played a dominant role in marriage decisions, and marriage still negated a woman's legal status as an individual as she moved from her father's to her husband's control. Nevertheless, new understandings of gender relations and marriage were becoming more prominent, and an important form of agency – namely, participating in marriage negotiations – was increasingly granted to girls in legal principles and in practice.³⁴

³² For a discussion of cases involving intergenerational contests over marriage in Italy, see D Lombardi, 'Marriage in Italy' in SS Menchi (ed), *Marriage in Europe, 1400–1800* (University of Toronto Press 2016) 94–121; L Ferrante, 'Marriage and Women's Subjectivity in a Patrilineal System: The Case of Early Modern Bologna' in MJ Maynes, A Waltner, B Soland and U Strasser (eds), *Gender, Kinship and Power: A Comparative and Interdisciplinary History* (Routledge 1996) 115–130.

³³ S Hanley, 'Engendering the State: Family Formation and State Building in Early Modern France' (1989) 16(1) *French Historical Studies* 4.

³⁴ On changing understandings and practices around gender, selfhood and consent in this era, see, for example, C Pateman, *The Sexual Contract* (Stanford University Press 1988); L Steinbrügge and PE Selwyn, *The Moral Sex: Woman's Nature in the French Enlightenment* (Oxford University Press 1995); A-L Head-König, 'Forced Marriages and Forbidden Marriages in Switzerland: State Control of the Formation of Marriage in Catholic and

Legal case records of disputed marriage decisions from this era offer intriguing evidence about the fluid understandings and performance of consent. The two cases I draw on here are from records of various secular and church-state courts in southwestern Germany. The first case is from 1762.³⁵ The plaintiff, Georg Gleich, claimed that the defendant Maria Magdalena Dieterich had promised to marry him, but then reneged on her promise. Gleich wanted the authorities to compel her to marry him. Dieterich admitted in court that Gleich had visited her one evening at the farm where she worked and had made her an offer of marriage. But, she claimed, ‘she had only given him her left hand, and had accepted the *Thaler* (coin) he offered her without thinking’.³⁶ Besides, she asked, if he held a good opinion of her, ‘why didn’t he come in the daytime and to her parents’ home’ to make the offer? The hearing involved testimony from Dieterich’s brother-in-law, who told the court that her parents had not consented to the marriage and that he himself had advised against it. In the end, the court released Dieterich from her promise because she seemingly had acted thoughtlessly and also because her family opposed the match. In this case the court deemed the young woman’s performance of consent rituals as necessary but insufficient and reversible.

The second case, from 1802, also concerns the dissolution of a marriage promise.³⁷ The parties, Johann Rapp and Sibylle Scheit, contracted an engagement that had entailed a dispensation because the groom was underage and the two were close cousins. The promise in this case was made with parental consent. However, just after the marriage banns had been first announced, the two were at a church fair and Sybille danced with other men, whereupon Johann’s brother (also his guardian) announced to all present that the wedding was off.

Legal proceedings to break the marriage promise began when the Sybille’s father complained to the pastor that he no longer wanted to pursue a union for his daughter with such distrustful people. Then Johann’s brother went to the pastor with a request to end the match. He noted that Sibylle ‘had made clear through her behaviour that she didn’t like his brother at all and that she had given her consent to the marriage only because of her parents’

Protestant Cantons in the Eighteenth and Nineteenth Centuries’ (1993) 8(3) *Continuity and Change* 441.

³⁵ All evidence (including quotes) from this case is from Ludwigsburg, Staatsarchiv Ludwigsburg B114 Bü 8556. 1762. Aufhebung des Eheversprechens zwischen Georg Christoph Gleich zu Oberrot und Maria Magdalena Dieterich zu Glashofen.

³⁶ The acts discussed refer to ritual actions – the offering of hands, the exchange of gifts or tokens – that were associated with the exchange of promise to marry.

³⁷ All evidence from this case is from Hauptstaatsarchiv Stuttgart A 238 a Bü 189.

persuasion'. In the presence of her intended, he testified, she had been kissed by an unknown dancer and had kissed him back.

In this case, a ritualized performance of consent was followed by a more spontaneous and public performance of refusal. It later became clear that the bride's performance of consent was not unambiguous in the first place. According to court testimony, the two had promised marriage to each other and formally offered each other their hands in the bride's house. But when the groom was asked if he had freely consented to the match, he responded that he and the bride consented on the occasion of the announcement (*Ausrufen*), but, he noted, on the occasion of the formal promise (*Verspruch*): 'she was not there and only her parents had expressed consent for her'. When asked what they had exchanged to pledge the marriage, Johann replied that on the way home from a fair, they had stopped in a tavern where he gave Sybille a Ducat coin, which 'she took readily and stated that she wanted to marry him'. In this case too, the marriage promise was deemed invalid.

These cases provide some evidence on how expressions of consent to marry were performed in circumstances where families still held a great deal of influence over their children's choices but were not definitive. They make clear that courts could sometimes function as sites for the articulation of a young woman's wishes vis-à-vis those of her family. In the first case, there is at least a suggestion that Dieterich made her own match, perhaps somewhat spontaneously, and then withdrew her promise, perhaps under pressure. The case of Sibylle Scheit is somewhat contrary – she seemingly unmade a match she had perhaps not wanted to consent to in the first place. Her informal 'performance' at the dance brought her ambivalence to the surface and made it public. Although the legal testimony cannot tell us definitively what was going on in either of these cases, it does record and interpret practices and debates around consent, and offers evidence of the seriousness with which these young women's consent was taken by this moment in time, even in courts in a Protestant state.

These cases suggest that the legal order that prevailed in some regions of Europe around 1800 treated marriage as a public matter subject to varying degrees of parental and state authority and intervention, although the implication concerning consent could still vary widely. Cultural discourses at the time³⁸ were redefining marriage as a sentimental union that ought to be freely contracted between individuals on the basis of mutual attraction and compatibility, in some respects positing a liberal model for marrying

³⁸ These discourses are documented in popular novels such as Frances Burney's 1778 epistolary novel *Evelina* as well as in more elite sources such as letters discussing marriage by Caroline Michaelis, a German professor's daughter in E Schmidt, *Caroline: Briefe aus der Frühromantik* (vol 1, Insel Verlag 1913).

that obfuscated the material considerations and power relations involved. The records of young women's contentious expressions of consent reflect and document these ambivalences and contradictions.

Even the pointed debates over the laws governing relationships between parents and children and between husbands and wives in the context of the French Revolution did not bring definitive resolution to questions about legal personhood in marriage law. The more egalitarian moments during the Revolution explicitly connected the critique of monarchy with a critique of patriarchal family relations. Many revolutionaries saw in the principles of liberty, equality, and fraternity the replacement of the hierarchical model based on father–son relationships with a model of relationships among equals as suggested by the brotherhood ideal.³⁹ Still, many legal reformers were not willing to take on gender inequalities in citizenship rights; the 1791 Constitutional Assembly was chosen by ‘active’ citizens, men whose annual taxes equalled the local wages paid for three days of labour.⁴⁰ All women were excluded. One famous dissenter was the actor Olympe de Gouges, a woman who had the audacity to rewrite the Declaration of Rights of Man and Citizen to include women. According to the original 1789 Declaration, ‘Men are born and remain free and equal in rights. Social distinctions may be based only on common utility.’ De Gouges's 1791 version made gender equity explicit: ‘Woman is born free and remains equal to man in rights. Social distinctions may only be based on common utility.’⁴¹

We can also see that family laws in France were revised in the early 1790s in ways that reflected more egalitarian impulses, reducing the power of fathers over children and bringing more equality among children and between husbands and wives. For example, the revolutionary era laws eliminated primogeniture, giving all sons and daughters equal rights to inherit, and eliminated the distinction between legitimate and illegitimate children in terms of inheritance rights. The new French Constitution instituted civil (rather than religious) processes to validate marriages and legalized divorce on similar grounds for men and women.⁴²

³⁹ For analyses of the history of the family and family law in the French revolutionary era, see L Hunt, *The Family Romance of the French Revolution* (University of California Press 1992); S Desan, *The Family on Trial in Revolutionary France* (University of California Press 2004).

⁴⁰ ‘The Constitution of 1791’, *The Constitutions and Other Select Documents Illustrative of the History of France 1789–1907* <https://www.originalsources.com/Document.aspx?DocID=ZVK21Q2EQ91NQDA> accessed 26 November 2025.

⁴¹ O de Gouges, ‘The Declaration of the Rights of Woman (September 1791)’ in L Hunt (ed), *The French Revolution and Human Rights: A Brief Documentary History* (St. Martin's 1996) 125–128.

⁴² Desan (n 39) chs 3 and 4.

Over the next few years, far more women than men sued for divorce, suggesting that there had been a pent-up need among women to exit from undesired marriages.⁴³ However, once again reiterating the close connections between political regimes and family law, Napoleon's coup at the end of the 1790s restored both a monarchical form of rule and patriarchal legal relations as well. The Napoleonic Code specified that '[t]he husband owes protection to his wife, and the wife obedience to her husband'.⁴⁴ Married women's legal personhood was subordinated to their husbands. Parental consent to marry was required for male children under the age of 25 and females under the age of 21.⁴⁵ Divorce was still permitted, but the grounds for divorce were made much more difficult for wives than for husbands.⁴⁶

Even if subsequent legal reforms in Europe and much of the rest of the world eventually recognized female legal personhood, including within marriage, debates over how that personhood is practiced and challenged in sexual matters and how to defend a woman's right to consent to sexual relationships continue into the present. For example, the widespread controversies over definitions of consensual sex and rape, and institutional and legal responses to them (or failures to respond) are well exemplified in the recent Yes Means Yes and MeToo movements.

5.3. Political Economy and Marriage Law in the Context of State Building and Economic Modernization: A Comparison of Europe and China

The previous section focused on the variety of and changing power configurations among state, religious and family forces that have contextualized laws about marriages and sexual unions more generally. I will now turn to a different sphere – namely, economic history – to offer a brief comparison of the evolving economies of two world regions in the early modern era (roughly, 1500–1800 CE), China and Europe, as examples of the historical evolution of state building and its impact on family/household economic strategies and the consequences for marriage rules and practices. These cases lend themselves to comparison because their early modern economies were rooted primarily in smallholder agriculture, but both regions were also experiencing significant growth of market-economic

⁴³ Ibid, 99–105.

⁴⁴ Code Napoléon 1804, art 213.

⁴⁵ A Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (C Fitzgerald tr, Cambridge University Press 2017) ch 31 <https://www.cambridge.org/core/books/history-of-law-in-europe/codifications/F15C8E5764994393C13F3FD72574BBDE> accessed 26 November 2025.

⁴⁶ Desan (n 39) chs 7 and 8.

activities. The right to control land for farming was essential to household survival. Laws and practices linked control over marriage with control over land and were thus challenged as household strategies changed in the face of economic developments.

In many regions of Europe in the early modern era, household heads controlled the right to farm specific tracts of land, even if they were not outright owners in the more modern sense.⁴⁷ These rights were inheritable. Inheritance laws and practices varied across Europe, but, in many regions, control over farmland was typically passed down to sons unless there were no male heirs. Daughters tended to be endowed with movable possessions such as farm and household equipment and animals, and/or money.⁴⁸ In much of Central, Western, and Northern Europe, such approval was only forthcoming once the couple had assembled enough assets through inheritance or dowry from their families, or earnings, to set up a farm and a home of their own, often in the village of the parents of the partner with land (most often the groom).⁴⁹ These transfers were often marked ritually by bridal processions or other rituals that moved the bride and her goods to her husband's village, thus creating a public display of the couple's assets.⁵⁰ Farm property was of the essence in marriage formation; this is what historian Pierre Goubert means when he says of peasants in grape-growing regions of Northern France, 'it is tempting to say that rows of vines are making alliances with other rows of vines'.⁵¹

Beyond the families' interest in carefully planning each marriage, and the oversight of local communities, states became increasingly involved in marriage procedures. When marriage agreements were settled, the occasion was often marked with a written contract, publicly witnessed, sealed by a notary, and filed in the notary's 'study'.⁵² Initially these contracts would have been family affairs, but, as part of state building in regions such as southern

⁴⁷ For analyses of a range of practices relating to family and inheritance, see H Medick and DW Sabean, *Interest and Emotion: Essays on the Study of Family and Kinship* (Cambridge University Press 1988); D Kertzer and M Barbagli, *History of the European Family* (Yale and Laterza 2002).

⁴⁸ AB Waltner and MJ Maynes, 'Family History as World History' in BG Smith (ed), *Women's History in Global Perspective* (vol 1, University of Illinois Press 2004) 49–91.

⁴⁹ For analysis of local rituals of community 'approval' see D Hopkin, 'Love Riddles, Couple Formation, and Local Identity in Eastern France' (2003) 28(3) *Journal of Family History* 339.

⁵⁰ See MJ Maynes and A Waltner, 'Women's Life-Cycle Transitions in World-Historical Perspective: Comparing Marriage in China and Europe' (2001) 12(4) *Journal of Women's History* 11.

⁵¹ P Goubert, *The French Peasantry in the Seventeenth Century* (Cambridge University Press 1986) 68.

⁵² N Zemon Davis featured disputes involving the southern French notarial archive of marriage agreements in *The Return of Martin Guerre* (Harvard University Press 1983).

Germany, these notarized inventories had become a legal requirement for marriage by the eighteenth century – one mark of increased state involvement in the surveillance over and regulation of marriage with an eye toward assuring that new households would be consistent with state aims regarding population and economic development.⁵³

Looking to China in the same era, we see some similar marriage practices, but also some important differences. In China, patrilineal inheritance practices – especially as they pertained to land inheritance – were stronger than in Europe. Even more significantly, marriages were generally patrilocal – that is, the brides usually moved not just to the groom’s village but into the household of the groom’s father. They took dowry wealth with them, as in Europe, often in a procession that suggested what the bride was bringing into her husband’s lineage. Because marrying did not require setting up a new household, the marrying couple did not have to wait to inherit land and a house. Marriages could and did happen at younger ages. Formal division of the landed property typically took place at the death of the father rather than at the marriage of the sons. The whole process remained largely in the control of the patriarchs of local extended families. The Chinese state kept at a distance, maintaining relations of governance based on the family/household but not intruding to track or regulate its decisions.⁵⁴

In both cases, marriages were not just or primarily a decision involving a man and a woman; the decisions were markedly the result of processes that involved the extended family and the village community. In the early modern era, states increasingly concerned themselves with household strategies including those concerning family formation, but the state seems to have been far more interventionist and exploitative in Europe than in China.

Ravi Palat, in his analysis centring on a comparative global history of the Indian Ocean, points to elements of state-building logics that framed these different approaches to the legal regulation of families and households.⁵⁵ Briefly, Palat argues that, in contrast with states in South Asia and China, European states were increasingly dependent on merchant-financiers for consolidating power and conducting the continental and colonial wars that were so critical to success.⁵⁶ In turn, their dependency on financiers

⁵³ For an analysis of state involvement in overseeing the transfer of property through dowries in Southwestern Germany, see DW Sabeen, *Kinship in Neckarhausen, 1700–1870* (Cambridge University Press 1998).

⁵⁴ MJ Maynes and A Waltner, ‘Textile Work, Gender, and the Female Life Course in Europe and China since the Beginning of the ‘Great Divergence’ in J Ehmer and C Lentz (eds), *Life Course, Work, and Labour in Global History* (de Gruyter 2023) 179–201.

⁵⁵ R Palat, *The Making of an Indian Ocean World-Economy, 1250–1650: Princes, Paddy Fields, and Bazaars* (Palgrave Macmillan 2015).

⁵⁶ *Ibid.*, 7–8.

often led European state builders to offer concessions to encourage capital accumulation and thus the commodification of property relations throughout their realms.⁵⁷ Because of the aggressive competition among many competing state centres that characterized early modern European political life, many rulers scrambled to find new sources of revenue and power – including new forms of taxation and public debt.⁵⁸

The impact of state policies across Europe in the early modern era was felt powerfully at the household and family levels. Increasing tax burdens and conscription were added to older forms of extraction of income and labour in the form of vestiges of feudal rents and labour obligations. Moreover, the encouragement of market-oriented production for domestic sale and export – all part of the pacts between states and merchant capitalists – brought new risks to small producers. But even more significantly in many regions of Europe, the growing market economy also brought protoindustrial ventures into agricultural communities.⁵⁹ In these regions, what might have begun as supplemental employment in spinning or weaving during the off-season soon became the basis of entirely new household economies. In this way, family and household formation became less and less dependent on the cross-generational transfer on land. Family control over marriage also diminished. Some historians have seen this as a form emancipation in the sense that young people began entering sexual unions earlier and without the blessing of family, church, or state.⁶⁰ However, others have argued that evidence of increasing impoverishment, and sexual victimization of young women in particular, who often ended up pregnant but unable to wrest resources or promised marriages from their sexual partner, could hardly be seen as emancipatory.⁶¹ By the early nineteenth century, Central European states were using courts to intervene directly in couples' decisions, sometimes to prevent them from marrying (for example, where the judgment was

⁵⁷ Ibid, 8.

⁵⁸ Ibid, 11–19.

⁵⁹ For a detailed analysis of the transformation of family life and intergenerational relations resulting from protoindustrialization in southern Germany, see H Medick, *Weben und Überleben in Laichingen: Lokalgeschichte als allgemeine Geschichte* (Vandenhoeck & Ruprecht 1996); S Ogilvie, *State Corporatism and Proto-industry: The Württemberg Black Forest, 1580–1797* (Cambridge University Press 1997).

⁶⁰ For a classic articulation of the debate between historians arguing the emancipatory versus the oppressive consequences of changing sexual and marital practices associated with the breakdown of peasant family control over inheritance and marriage, see LA Tilly, JW Scott and M Cohen, 'Women's Work and European Fertility Patterns' (1976) 6(3) *The Journal of Interdisciplinary History* 447.

⁶¹ Ibid, 463–470.

that their resources were inadequate) and sometimes to force a marriage (most often in the case of pregnancy).⁶²

State building in China in the same era looked very different. In contrast with Europe, taxes on agricultural land continued to be the mainstay of the Chinese imperial budget, and, as Richard von Glahn has argued, ‘the Qing state, like the Ming before it, remained dedicated to the Confucian principle of minimal taxation’.⁶³ In contrast with most major European states, the Qing state did not rely on borrowing or on tacit bargains with merchant-entrepreneurs. Jürgen Kocka reiterates this contrast: ‘The merchants who supported capitalism in Europe, or, at least their leading representatives, exercised direct influence on politics. ... By contrast, merchants in China, as well as in Arabia and India, were confined to the antechamber of power and were much less engaged in financing state formation than was the case in Europe.’⁶⁴

The relatively non-interventionist approach to taxation was echoed in a similarly hands-off approach to household and family decision making in family matters such as marriage. This comparison – I think – underscores the historically varying paths to state building and economic development that had quite different consequences for household and kin control over property and marriage, as well as for varying patterns of evolution of marriage law.

5.4. The History of Race as a Site of Legal Contests over Marriage

5.4.1. *Marriage laws and practices in European colonial regimes*

The historically important but varied relationship between state building and family law and practice in the early modern era sets the stage for many modern developments. The politics of marriage in modern Europe and European empires were especially ambitious in terms of intervention into family formation to align it more closely with state goals and policies. The previous section looked at varying regimes’ interventions into household control over land and inheritance as a factor in marriage and family formation. Here the emphasis will be on family formation in the context of the historically evolving politics of race in the imperial context. European states had shown themselves to be interventionist when it came to what officials saw as the economic consequences of marriage; in the context of empire, marriage took on even more politically charged dimensions.

⁶² See Head-König (n 34).

⁶³ R. Von Glahn, *The Economic History of China: From Antiquity to the Nineteenth Century* (Cambridge University Press 2016) 315.

⁶⁴ J Kocka, *Capitalism: A Short History* (J Riemer tr, Princeton University Press 2016) 50–51.

Marriage and other forms of sexual unions between European settlers and colonial subjects were contentious from the very beginnings of European empire building in the fifteenth century. In their review of research on the gender dynamics of European colonization in early modern Atlantic world, Susan D. Amussen and Allyson M. Poska argue that colonial authorities grappled with policies regarding sexual unions and marriages from the earliest days: 'As early as Columbus' third voyage, the Spanish crown expressed its desire for women to accompany their husbands in the settlement of the Caribbean. Even before it understood the scope of its American involvement, the crown knew that women's reproductive abilities were central to the success of any colonization.'⁶⁵

Informal unions in New Spain between European men and Indigenous people were common but discouraged. In response to increasing rates of illegitimacy, 'authorities attempted to enforce stricter sexual and gender expectations. The Spanish and Portuguese Inquisitions regulated sexual activity by pursuing bigamists, fornicators, and men who had sex with other men'.⁶⁶ The appropriate rituals for legitimizing a sexual union were also sites of contention. The first Christian wedding in Mexico occurred in 1526: Don Hernando, the brother of the Aztec ruler of Texcoco, and seven of his closest associates married Indigenous wives in a Christian ceremony. The Franciscan priest Diego Durán, writing a few decades later, commented on the ways in which the new ceremonies of marriage did not simply replace the old ones: 'After I married some young men and women, with all the solemnity and ceremony the sacrament demands, after leaving the church, they were taken to a house of the old people and were married again, with the ancient ceremonies and rites.'⁶⁷

Evolving understandings of race and its significance for European political domination in the colonies became more prominent in imperial marriage law and practice. The first colonial era laws that specifically criminalized interracial marriages were passed in several English North American colonies in the late seventeenth century.⁶⁸ The context here was distinctive because of the increasing presences of enslaved Africans in the colony. According to Jessica Viñas-Nelson:

⁶⁵ SD Amussen and AM Poska, 'Restoring Miranda: Gender and the Limits of European Patriarchy in the Early Modern Atlantic World' (2012) 7(3) *Journal of Global History* 342.

⁶⁶ Ibid, 358–359.

⁶⁷ S Kellog, *Law and Transformation of the Aztec Culture* (University of Oklahoma Press 2005) 202–203.

⁶⁸ J Viñas-Nelson, 'Interracial Marriage in 'Post-Racial' America' (2017) *Origins: Current Events in Historical Perspective* https://origins.osu.edu/article/interracial-marriage-post-racial-america?language_content_entity=en accessed 26 November 2025.

In 1664, Maryland sought to stanch potential interracial marriages by threatening enslavement for white women who married black men. Two years earlier, Virginia had enacted legislation to profit from white men's sexual relationships with black women. Children would inherit the social status of their mother, not their father, meaning the children of slave women would be born slaves regardless of the father's status. Virginia then outlawed interracial marriage entirely in 1691.⁶⁹

Viñas-Nelson emphasizes that these were the first instances of laws that restricted access to marriage partners solely on the basis of race, not class or condition of servitude, and these laws were eventually followed by the passage of laws banning interracial marriage in forty-one states.⁷⁰

Marriage practices became even more contentious in the context of competitive imperialism in the nineteenth century. There seemed to be no effective empire building without increasingly interventionist policies regarding sexual unions, even if the particular controversies took different forms from one imperial regime to another. Ann Stoler has documented changing policies and practices in the Dutch Empire in Southeast Asia and elsewhere.⁷¹ She argues that, in this context, control over sex, and policies aimed at suppressing sexual relations between European colonial settlers and Indigenous people, were significant in terms of practice but also metaphorically as a reflection of the distanced and hierarchical relationships between Europeans and colonized Others.⁷² If concubinage was tolerated in the early days of empire building – that is, informal 'mixed-blood' unions established by the Dutch traders who first arrived in Indonesia – these unions brought consequences that soon became intolerable in the metropole. Such unions drew moral critique because they were illegitimate according to Dutch state religion. In addition, they produced another problem that was growing more urgent in light of increasing racial and eugenicist consciousness: mixed-blood offspring who were a threat to the colonial racial hierarchies the Dutch needed to establish.⁷³ This interplay between policies regarding sexual unions in the Dutch colonies echoes what Asmussen and Poska had seen in earlier colonial ventures.⁷⁴ The issue was pervasive under imperialist regimes, especially in settler colonies. Lora Wildenthal's analysis of

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ AL Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (University of California Press 2010).

⁷² Ibid.

⁷³ BW Andaya, 'From Temporary Wife to Prostitute: Sexuality and Economic Change in Early Modern Southeast Asia' (1998) 9(4) *Journal of Women's History* 11.

⁷⁴ Amussen and Poska (n 65).

the practices and laws around family formation in German Southwest Africa is an especially telling example, highlighting the complexities of imperialist marriage policies and the thinking behind them.⁷⁵ Initially, after the German government first laid claim to this region in the late nineteenth century, most of the initial settlers were men; relatively few Germans actually migrated over the period of German control (1884–1918). Around 1900, German-born residents comprised only about 1–2 per cent of the population, although their numbers tripled over the next decade. After German men arrived in the colony, they often established informal sexual unions with African women who were colonial subjects.⁷⁶ As German authorities determined that the colony was to become a place of permanent German settlement, the question of marriage policy became more urgent. As was happening in colonized regions throughout the world beginning in the late decades of the nineteenth century, there were efforts in this colony to address questions of family formation and to attempt to recreate European-style domestic life for colonial administrators, military officials and other male settlers. For many colonial administrators, this would entail the encouragement of immigration of German women as suitable wives and servants, and the displacement of older practices of concubinage relationships with Indigenous women. However, not all German men agreed. As German authorities in Berlin and in the colonies increasingly disapproved of existing informal inter-racial unions, many of the early male settlers pushed back.⁷⁷ These debates pitted the ‘rights’ of German men in the colonies to establish sexual relationships with whomever they wanted, as opposed to the efforts of the colonial state to police the intimate boundaries between European and Indigenous people.

As in Indonesia, German colonial authorities and many settlers feared the prospect of children from mixed unions demanding German citizenship or inheritance rights, as indeed some of them did. Ulrike Lindner documents several legal cases of disputed racial and citizenship claims among the various immigrant groups in southern Africa and even between the German and British imperial governments.⁷⁸ Despite the pushback from some settler men, many Germans at home and in the colonies were opposed on principle to ‘mixing’ of Europeans and Africans in any form.⁷⁹ Already in the last decades of the nineteenth century, modern ‘scientific’ concepts of race and related eugenicist arguments were being developed. But until the question

⁷⁵ L Wildenthal, *German Women for Empire, 1884–1945* (Duke University Press 2001).

⁷⁶ Ibid.

⁷⁷ For analysis of debates over mixed marriages in the colonies, see U Lindner, ‘Contested Concepts of “White”/“Native” and Mixed Marriages in German South-West Africa and the Cape Colony, 1900–1914: A histoire croisée’ (2009) 6 *Journal of Namibian Studies* 57.

⁷⁸ Ibid.

⁷⁹ Ibid.

of cross-racial sexual unions became a focus of contention in the colonies, the concept of 'race' had never been defined in German law. It is historically significant, then, that it was in this setting of an African colony that the first German policies and laws specifically discussing family formation in terms of race were formulated.

Not coincidentally, the push to outlaw cross-racial unions coincided in time with anti-colonial uprisings that would have disastrous consequences for Indigenous people. In 1904, in response to increasingly oppressive colonial rule in German Southwest Africa, the Herero people, the largest Indigenous people in the colony, rebelled. The suppression of the rebellion by the German colonial state was brutal – the eventual strategy was to push rebels into the desert area of the colony and trap them there, cutting them off from food and poisoning wells. The policy to defeat the rebels spared no one. Between 1904 and 1908, 60–80 per cent of the Herero people died as a direct result of German military actions or as an indirect result of forced relocations into 'tribe-specific' settlement areas. Forty per cent of the Nama people also died.⁸⁰

Historians argue that this suppression constituted the first genocide of the twentieth century, and it was a genocide deliberately undertaken by and in the name of settler colonialism in a context where race lines were hardening.⁸¹ And the hardening of racial lines also directly affected family law and policy. The first European legal bans on interracial unions were passed in German Southwest Africa and German East Africa between 1905 and 1906, at a point when such bans were unique among European colonial powers.

With Germany's defeat in WWI, its colonies were taken away. In the case of German Southwest Africa, the territory was turned over to South Africa, which was by this point a self-governing affiliate of the British Commonwealth and also under white minority rule. The British argued in taking over former German colonies that they were better and more humane colonizers, but within decades South Africa moved toward the apartheid system of radical racial segregation. The South African Prohibition of Mixed Marriages Act of 1949 prohibited marriages between white people and people of other races, and the Immorality Amendment Act of 1950 went on to prohibit extramarital sex between white and Black people.⁸² In the same year, further acts were passed to create a register that would

⁸⁰ For a general history of the genocide in German Southwest Africa, see J Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers* (James Currey 2011).

⁸¹ Ibid. See also ED Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton University Press 2005); AA Blackler, *An Imperial Homeland: Forging German Identity in Southwest Africa* (Pennsylvania State University Press 2022).

⁸² See Prohibition of Mixed Marriages Act 1949 (Act No 55 of 1949, South Africa) and Immorality Amendment Act 1950 (Act No 21 of 1950, South Africa).

record every South African person's race; subsequent forced removals and relocations aimed to create geographic separation among races as well. It would take decades more for anti-colonial opposition to bring an end to South African rule of the former German colony, as well as for opposition within South Africa to end Apartheid there. Apartheid laws, of course, had economic and political aims, but at their core and origins was European colonial suppression of cross-racial sexual relations or family formation, one of the longest-lasting consequences of imperialist marriage laws.⁸³

5.4.2. *Marriage redefined in Nazi law*

In Germany, the exaggerated emphasis on racially inflected biological and reproductive aspects of state policy was evident not just in the colonies. This thinking became especially explicit in the early days of the Nazi movement. The Party's first program, proclaimed by Hitler in 1920 in Munich, demanded 'the unification of all Germans in the Greater Germany on the basis of the right of self-determination of peoples'.⁸⁴ The program further specified that '[o]nly a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race [...]'.⁸⁵ In *Mein Kampf*, Hitler spelled out the eugenicist theory that would be soon put into practice: 'The *völkisch* State has to make up for what is today neglected in this field. [...] It has to put the race into the center of life in general. It has to care for its preservation in purity. [...] It has to take care that only the healthy beget children. [...] [O]n the other hand this has to be looked upon as objectionable: to keep healthy children from the nation.'⁸⁶ Once the Party seized power in 1933, one of its first measures was the Law for the Encouragement of Marriage. This law stated that newly married couples of the Aryan race could get a government loan, a portion of which would be forgiven at the birth of each child. In contrast to its encouragement of marriage and reproduction among the Aryan racial elite, the regime passed measures to prevent reproduction among those deemed biologically or racially inferior. Thus the Nazi government also enacted the Law for the Prevention of Offspring with Hereditary Diseases shortly after taking

⁸³ For a summary of the Apartheid laws in the mid-twentieth century, see W Beinart, *Twentieth-century South Africa* (Oxford University Press 2001) 114–164.

⁸⁴ United States Holocaust Memorial Museum, 'The Nazi Party Platform' *Holocaust Encyclopedia* (Fall ed, 2015) <https://encyclopedia.ushmm.org/content/en/article/nazi-party-platform> accessed 26 November 2025.

⁸⁵ *Ibid.*

⁸⁶ A Hitler, 'Excerpts from *Mein Kampf*' in J Somerville and R Santoni (eds), *Social and Political Philosophy: Readings from Plato to Gandhi* (Anchor 1963) 455.

power in 1933. This law reflected the opinion of those scientists of the time who advocated eugenic policies – that is, programs designed to ‘improve’ the genetic qualities of a population. German medical personnel, lawyers and scientists cooperated with the law and sat on the boards determining whether or not a person would be sterilized. Most of the early victims of the sterilization policy were poor women who were categorized as Aryan but deemed to be otherwise unfit.⁸⁷

However, this early eugenic sterilization was a precedent for the explicitly racist sterilization and other medical experiments later undertaken at the concentration camps that imprisoned Jews, homosexuals and Gypsies – all deemed as racially or genetically inferior populations – along with political prisoners. Following these initial marriage and sterilization laws, the Nazi state passed two additional laws in 1935 to regulate marriage and reproduction. The Marital Health Law banned sexual unions between the ‘hereditarily healthy’ and the ‘unfit’. The Blood Protection Laws, also known as the Nuremberg Laws, criminalized marriage or sexual relations between Jews and non-Jews in particular, although in formulating the law, there was discussion over whether other ‘non-Aryan’ races should also be included in the ban.⁸⁸

5.4.3. *Race and marriage in the twentieth-century United States*

The Nazi state was not alone in its legal restrictions on marriage based on race. Some American eugenicists applauded the Nazi sterilization and marriage laws as the logical development of earlier thinking by German racial scientists.⁸⁹ As mentioned earlier, there had been laws that prohibited interracial marriage since the colonial era, and these laws remained on the books until they were challenged and banned in the wake of the 1967 *Loving v Virginia* Supreme Court case.⁹⁰ This important legal case established a legal precedent that still prevails in the present.⁹¹

Mildred and Richard Loving were an interracial couple who had gotten married in Washington, DC, in 1958 and then returned to their home in Virginia. In Virginia, interracial marriage was illegal, and the couple was criminally charged and ended up leaving the state to avoid imprisonment.

⁸⁷ For an analysis of the Nazi Family Laws and their enforcement, see M Mouton, *From Nurturing the Nation to Purifying the Volk: Weimar and Nazi Family Policy, 1918–1945* (Cambridge University Press 2007).

⁸⁸ Ibid.

⁸⁹ S Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford University Press 2002) 36.

⁹⁰ Viñas-Nelson (n 68).

⁹¹ *Loving v Virginia*, 388 US 1 (1967).

With support from the American Civil Liberties Union (ACLU), they sued the state of Virginia for violation of the Fourteenth Amendment's Equal Protection Clause, which specifies that no state can deny any person within its jurisdiction equal protection under the law. Their case was successful. According to the majority opinion, written by Chief Justice Earl Warren:

Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.⁹²

This landmark case signalled the end in the United States of state collaboration in the prohibition of interracial marriage, a collaboration with long roots in slavery and the imperial imposition of racial inequities.

5.5. Conclusion: Back to the Present-day Debates over Same-sex Marriage

With the case of *Loving v Virginia*, which declared as unconstitutional marriage restrictions based on race, we circle back to where this overview of the long history of marriage law began. As mentioned earlier, arguments deployed by historians in recent challenges to US laws restricting marriage to 'one man and one woman' rested in part on parallels between marriage restrictions based on sex and marriage restriction based on race. The more recent debates over who may marry whom in fact echo many of the historical dynamics explored throughout this historical survey: evolving relations of power over marriage, changing understandings of what is necessary to make marriage valid, and the varied histories of institutions that have long held a stake in controlling marriages – families, religious authorities and states.

Examples of clashes among these three forces continue to emerge in the present moment in local, national and global debates. For example, the Vatican's recent declaration allowing the blessing of same-sex couples – though not recognition nor even endorsement of such unions – caused a stir around the globe but also a backlash, especially among African bishops.⁹³ As noted in a 2024 article in the *New York Times*:

⁹² Ibid.

⁹³ N Winfield and D Crary, 'Pope Approves Blessings for Same-sex Couples That Must Not Resemble Marriage' *AP Online* (19 December 2023) <https://apnews.com/article/vatican-lgbtq-pope-bfa5b71fa79055626e362936e739d1d8> accessed 9 January 2026.

In one statement after the next, bishops in several [African] countries spoke of the fear and confusion the declaration has caused among their flocks, and said it was out of step with the continent's culture and values. The bishops also harbored a deeper fear: that in a place where the church is growing faster than anywhere else in the world, and where many forms of Christianity are competing for worshipers, the declaration could slow the church's expansion on the continent.⁹⁴

In another global arena, that of migration, marital status and laws regulating it have also come into play in recent legal battles. For example, in the United States, marriage to a citizen has long been a path to citizenship for non-citizens who meet specified criteria. Some recent US debates have centred on the citizenship status of the undocumented marital partners of US citizens, for example. Others raise questions of citizenship rights as they apply to same-sex marriage partners.⁹⁵ US immigration law had long included formulas that could be used to exclude people the state deemed transgressive or undesirable by way of their gender and sexuality. In 1952 the US Congress passed a regulatory policy that attacked 'the homosexual' specifically as undesirable.⁹⁶ However, in 2013, after the US Supreme Court struck down the laws that had limited marriage as a union solely between a woman and a man, laws relating to access to citizenship for same-sex partners also changed: 'While discriminatory policies and hurdles still exist for these binational couples, lesbian, gay, bisexual, transgender, and queer (LGBTQ) foreign nationals may now qualify for green cards in the United States.'⁹⁷

As these recent changes in marriage law make clear, the family and family law continue to be sites of contention, reminding us of the diversity and variability over time of views about marriage, family formation, sexuality and reproduction. This brief historical survey, through its focus on historically varied understandings of marriage and marriage laws in particular, makes it clear that that marriage is far from being 'a fundamentally unchanging institution',⁹⁸ as opponents of same-sex unions tried to argue in 2002 in the case of *Goodridge v Department of Public Health*. On the contrary, marriage laws and practices have varied tremendously across time and place, subject to the changing power dynamics and evolving cultural values.

⁹⁴ J Eligon, 'Blessing of Same-sex Couples Rankles Africa's Catholics' *The New York Times* (7 January 2024) <https://www.nytimes.com/2024/01/07/world/africa/blessing-same-sex-couples-africa-catholics.html> accessed 26 November 2025.

⁹⁵ J Capó, 'Queer Border Crossings' (2019) 2(1) *Modern American History* 59.

⁹⁶ Ibid.

⁹⁷ Ibid, 62.

⁹⁸ Grossberg (n 7).

What Is a ‘European Family’?

Jens M. Scherpe

6.1. An Introduction and an Assumption Based on Two Things

This book very pertinently asks the question ‘What is a family?’ This chapter¹ takes a more regional look at the question, focusing on Europe only. Given that even individuals from similar backgrounds, living in a similar environment, and in the same local area will often have vastly divergent views of what a family is, asking this question for an entire continent consisting of more than 50 jurisdictions with different laws,² different cultures, and different traditions seems almost pointless. Yet something makes this question worth pursuing, or rather two things.

The first is that almost all³ European jurisdictions are Members of the Council of Europe and thus contracting states of the Convention for the Protection of Human Rights and Fundamental Freedoms (generally referred to as European Convention on Human Rights [ECHR]).⁴

¹ This chapter is based on my previous publications, including ‘Epilogue to the Family in EU Law – Is There a European Family Law?’ in ML Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024); ‘Marriage and the Family’ in L Corrias and R Tinnevelt (eds), *European Ways of Life. Legal and Philosophical Perspectives* (Edward Elgar 2025); JM Scherpe, ‘Is There a “European Family Law”?’ (2023) 54(1) *Victoria University of Wellington Law Review* 317.

² Some of the European states consist of several jurisdictions.

³ The Russian Federation was excluded from the Council of Europe and subsequently ceased to be party to the European Convention on Human Rights on 16 September 2022, see <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights> accessed 27 November 2025. Belarus, Kazakhstan, Kosovo and the Vatican are not Member States of the Council of Europe.

⁴ Signed 4 November 1950 and effective 3 September 1953, with currently 46 Contracting States.

'Family' is mentioned twice in the Convention, namely in Article 8, which guarantees the right to respect for private and family life, and in Article 12, which guarantees the right to marry and to found a family. The ECHR also establishes the European Court of Human Rights (ECtHR) and thus a supranational European court that is the ultimate arbiter regarding the Convention's interpretation – of course, including the term 'family' for these purposes.

The second is that 27 European jurisdictions are also members of the European Union (EU)⁵ and as such are subject to decisions by the Court of Justice of the European Union (CJEU) for matters that fall within its jurisdiction. Importantly, even though the European Union does not have any express legislative competence in the field of family law – and therefore this area of law remains firmly in the hands of the Member States – many of the legislative acts of the European Union, including the various treaties that have created the European Union, have an impact on families and family laws. The key 'gateways' via the treaties are the principles of equality and non-discrimination,⁶ the guarantee of the free movement of workers, and the legal competences with regard to cross-border issues through private international law instruments. These frequently require engaging with the concept of 'family'.

In light of this, it would not be unreasonable to assume that there has been some kind of development towards a more unitary legal definition, or at least understanding, of what a 'family' is in Europe or what a 'European family' is. While this assumption is not completely wrong, it is not completely right either. On the one hand, there has been some convergence of what is perceived by the law as 'family' in the European jurisdictions. In the following (Section 6.2), this is exemplified by looking at what often constitutes the end of a family, namely divorce. On the other hand, we can also observe deliberate and often contentious divergences, for example with regard to the acceptance of same-sex families, which is looked at in the next part (Section 6.3). This chapter will then briefly examine how the European Union and the Council of Europe have reacted and are reacting to this divergence (Section 6.4) before concluding that, while there certainly is no unity on the understanding of 'family', there are elements of a unitarian understanding of 'family' in the European jurisdictions (Section 6.5).

⁵ Signed 4 November 1950 and effective 3 September 1953, with currently 46 Contracting States. https://european-union.europa.eu/principles-countries-history/facts-and-figures-european-union_en#paragraph_2408 accessed 19 November 2025.

⁶ Also contained in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.

6.2. Divorce as a Unifying Factor?

The key influence on the perception of what a family is in Europe undoubtedly has been Christianity. While, of course, today people of many faiths live in Europe, the legal rules applying to families are largely still based on Christian notions. Traditionally this meant that a family could only be established through marriage – defined as ‘a voluntary union for life of one man and one woman, to the exclusion of all others’⁷ – or through birth (or adoption). But even birth (and thus a genetic link, referred to as ‘blood-tie’ at the time) in itself was not good enough in many cases, as children born out of wedlock were generally not seen as full family members.⁸ Marriage truly defined what family was – and that in a way was what defined a ‘European family’ – and the almost universal understanding of marriage as previously quoted remained the same for a very long time. Interestingly, when it came to bringing a marriage to an end through divorce, by contrast there was a significant divergence in Europe until fairly recently. Indeed, divorce was only legalized in Italy in 1970, in Spain in 1981, in the Republic of Ireland in 1996, and in Malta only in 2011.

Given that over the centuries the state increasingly withdrew from regulating marriage as such, and thus on how married couples ought to live, much of this ‘moral guardianship’ was taken over by the law of divorce.⁹

⁷ As defined by Lord Penzance in the English case of *Hyde v. Hyde and Woodmansee* (1865–69) L.R. 1 P. & D. 130 [1861–73]; All E.R. Rep. 175; [1866] 3 WLUK 76, decided on 20 March 1866.

⁸ This really only changed after the famous decision of the ECtHR in *Marckx v Belgium* (1979–80) 2 EHRR 14. This decision held that children born outside of marriage must not be discriminated against, and many European jurisdictions consequently had to change their family laws accordingly. See e.g. Law Commission of England and Wales, *Illegitimacy* (HMSO, Law Com No 118, 1982); Scottish Law Commission, *Report on Illegitimacy* (HMSO, Scot Law Com No 82, 1984); Law Commission of England and Wales, *Illegitimacy (Second Report)* (HMSO, Law Com No 157, 1986); and Hoge Raad, case no 463, 181.1980, *Nederlands Jurisprudentie* 1980, 1460. On the Marckx case, see e.g. M Salzberg, ‘The Marckx Case: The Impact on European Jurisprudence of the European Court of Human Rights’ 1979 Marckx Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights’ (1984) 13 *Denver Journal of International Law and Policy* 283; CJ Forde ‘Legal Protection under Article 8 ECHR: Marckx and Beyond’ (1990) 37 *Netherlands International Law Review* 162; W Pintens and JM Scherpe ‘The Marckx Case: A “Whole Code of Family Law”?’ in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Hart Publishing 2011) 155–174; W Pintens and JM Scherpe, ‘Die Marckx-Entscheidung des Europäischen Menschenegerichtshofs als Keimzelle eines europäischen Familien- und Erbrechts. Ein Rück- und Ausblick nach fünfundsiebzig Jahren’ in N Witzleb, R Ellger, P Mankowski, M Hanno and O Remien (eds), *Festschrift für Dieter Martiny zum 70 Geburtstag* (Mohr Siebeck 2014) 127–146.

⁹ The history of divorce law in Europe was mapped masterly by Masha Antokolskaia, and much of the following builds on her work, especially M Antokolskaia, *Harmonisation of*

Thus divorce law, despite being the vehicle through which families 'came to an end', increasingly became a more important factor in defining (the married) 'family' as it gave (indirect) guidance on what type of behaviour was acceptable in a marriage. Failure to adhere to these rules would then create the risk of the other spouse then petitioning for divorce, and the consequences for such divorce often were much graver for the 'marital offender'.

When divorce was introduced at first after the Reformation and thus beginning with the predominantly protestant jurisdictions in the early sixteenth century, it initially could only be based on fault. Later developments in the period of Enlightenment then allowed for divorces to be based on the irretrievable breakdown of the marital relationship, based on a mutual decision and, much later, to be granted upon the request of one party.¹⁰ While today there is no uniformity in the European jurisdictions as to what the permissible legal bases for divorce are, all European jurisdictions have in common that they not only allow divorce¹¹ but also that they do not *require* the divorce to be based on the fault of one party (although a divorce in many European jurisdictions *can* still be based on fault).¹² Thus there is a general acceptance that divorce should not necessarily be understood as a 'sanction' but rather as a means to bringing an end to a specific legal relationship.

For the purposes of this chapter, it is particularly interesting to observe that originally there was a clear dividing line between the 'progressive' and predominantly Protestant North¹³ and the 'conservative' and predominantly

Family Law in Europe: A Historical Perspective (Intersentia 2006); M Antokolskaia, 'Divorce in a European Perspective' in JM Scherpe (ed), *European Family Law Vol. III – Family Law in a European Perspective* (Edward Elgar 2016) 42–81; M Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy' in M Martín-Casals and J Ribot (eds), *The Role of Self-determination in the Modernisation of Family Law in Europe* (Documenta Universitaria 2006) 33–58; M Antokolskaia, 'Convergence and Divergence of Divorce Laws in Europe' (2006) 18(3) *Child and Family Law Quarterly* 307.

¹⁰ As e.g. in the recent reforms in England and Wales, in effect since 6 April 2022, see Divorce, Dissolution and Separation Act 2020 (England and Wales). For a clear overview of the general development of divorce grounds, see the work of Antokolskaia (ibid), especially M Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy' in M Martín-Casals and J Ribot (eds), *The Role of Self-determination in the Modernisation of Family Law in Europe* (Documenta Universitaria 2006) 33–58.

¹¹ Except for the Vatican, of course.

¹² Cf. D Martiny, 'Divorce and Maintenance between Frome Spouses – Initial Results of the Commission in European Family Law' in K Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 534. For a comparative work also including the procedures that lead to divorce, see e.g. A Dutta, D Schwab, D Henrich, P Gottwald and M Löhnig (eds), *Scheidung ohne Gericht?* (Gieseking 2017).

¹³ Leaving aside the Republic of Ireland and, to a certain extent, the jurisdictions of the United Kingdom.

Catholic South. Yet today the arguably most ‘liberal’ (i.e. permissive) divorce laws that allow divorce on the mere basis that one of the spouses requests this (sometimes called ‘divorce on demand’) can be found in the North (e.g. Sweden and Finland), the South (e.g. Spain), East (e.g. Russia), and West (e.g. England and Wales) of Europe.¹⁴ Therefore, as far as the law of divorce is concerned, the original dividing line has disappeared completely, suggesting that there has been a convergence of what marriage and divorce (including its function in defining/regulating marital behaviour) ought to entail and thus a convergence in Europe on what a family and acceptable family behaviour is.

6.3. New Divisions Replace the Old Ones

The picture is starkly different when looking at the recognition of so-called ‘new’ family forms in Europe, in particular same-sex families and families outside of marriage.¹⁵

As regards the latter, while many European jurisdictions are still struggling with the idea of legally recognizing *de facto* relationships/cohabitation as an equal family form (notably Germany, England, and Wales, but also Denmark and Norway),¹⁶ other jurisdictions such as Croatia or Slovenia have put them on almost equal footing as marriages. Several other European jurisdictions at least have some form of recognition through a specific legal regime (including, for example, Sweden, the Republic of Ireland, Scotland, and Catalonia).¹⁷ However, there is no obvious geographical pattern,¹⁸ nor is there one based on the predominant religious affiliation of the citizens of a jurisdiction. Thus, when taking a bird’s eye view, unlike in the development of divorce law, there is no apparent dividing line regarding the recognition of *de facto* relationships, despite the clear differences and thus the division of the European jurisdictions.

¹⁴ For a brief comparison, see e.g. JM Scherpe and L Trinder, *Reforming the Ground for Divorce: Experiences from Other Jurisdictions* (Nuffield Foundation 2019) <https://www.nuffieldfoundation.org/wp-content/uploads/2019/12/Trinder-Reforming-the-Ground-for-Divorce-Mar-191.pdf> accessed 9 January 2026. For further reflections on the developments in England and Wales, see Brown, Chapter 3, this volume.

¹⁵ Of course, neither of these family forms are actually new, what is ‘new’ is that in many jurisdictions they are recognized by the law.

¹⁶ On *de facto* relationships, see the comparative studies by JM Scherpe and A Hayward (eds), *De Facto Relationships – A Comparative Guide* (Edward Elgar Publishing, forthcoming 2026) as well as by II Kroppenberg, D Schwab, D Heinrich, P Gottwald and A Spickhoff (eds), *Rechtsregeln für nichteheliches Zusammenleben*, Beiträge zum europäischen Familienrecht (vol 12, Gieseking 2009).

¹⁷ On all the jurisdictions mentioned, see the contributions in Scherpe and Hayward, *ibid*.

¹⁸ Apart from the aggregation of strong recognition regimes on the territory of the former Yugoslavia, which also had such a recognition, this was continued by the successor states.

By contrast, there is a fundamental and very strong demarcation line between Eastern and Western European jurisdictions when it comes to the recognition of same-sex relationships, especially in the form of permitting same-sex marriage.¹⁹ The legal recognition of relationships between persons of the same legal sex began in Sweden with the emphatic statement of the committee on legal affairs (*lagutskottet*) in 1973 that 'from society's point of view, two persons of the same sex living together as a couple is a perfectly acceptable form of family life'.²⁰ This led to the recognition of such relationships as *de facto* partnerships/cohabitants (*sambo* in Swedish) on equal footing with the same type of relationship between persons of different legal genders, but it fell short of extending marriage or providing a comparable legal framework. The latter was achieved in 1989 by Denmark, which became the first country in the world to provide a registered partnership as a functional equivalent to marriage for same-sex couples²¹ – an approach that was followed by many European jurisdictions. Others, however, took a different approach, allowing same-sex couples to access some but not all rights that were available to married different-sex couples. Then in December 2000 (effective from 1 April 2001), The Netherlands was the first jurisdiction to open up marriage to same-sex couples. Again, many jurisdictions in Europe and beyond followed suit. Interestingly, with

¹⁹ For the legal developments, see e.g. K Boele-Woelki and A Fuchs, *Same-sex Relationships and Beyond* (Intersentia 2017); S Cretney, *Same Sex Relationships – From 'Odious Crime' to 'Gay Marriage'* (Oxford University Press 2006); G Willems, 'All Paths Lead to Equality? Same-sex Couples and Rainbow Families under European Law', in Öberg and Tryfonidou (n 1) 151–180. For brief overviews, see, for example, JM Scherpe, 'Same-sex Relationships' in J Basedow, K-J Hopt and R Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012) 1522–1525; JM Scherpe, 'From 'Odious Crime' to Family Life – Same-sex Couples and the ECHR' in A Verbeke, JM Scherpe, C Declerck, T Helms and P Senaevé (eds), *Confronting the Frontiers of Family and Succession Law – Liber amicorum Walter Pintens* (Intersentia 2012) 1225–1240; JM Scherpe, 'The Legal Recognition of Same-sex Couples in Europe and the Role of the European Court of Human Rights' (2013) 10 *The Equal Rights Review* 83; I Curry-Sumner, *All's Well That Ends Registered? The Substantive and Private International Law Aspects of Non-marital Registered Relationships in Europe* (Intersentia 2005).

²⁰ Original text: 'Utskottet vill dock betona att en samlevnad mellan två parter av samma kön är från samhällets synpunkt en fullt acceptabel samlevnadsform.' See *Lagutskottets betänkande* (LU) 1973:20 http://www.riksdagen.se/sv/dokument-lagar/arende/betankande/lagutskottets-betankande-i-anledning-av-kungl_FW01LU20/html accessed 27 November 2025, 116.

²¹ JM Scherpe, 'The Past, Present and Future of Registered Partnerships' in JM Scherpe and A Hayward (eds), *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia Publishing 2017) 561–586; JM Scherpe, 'Why Registered Partnerships? A Comparative Overview' in R Probert and S Thompson (eds), *Research Handbook on Marriage, Cohabitation and the Law* (Edward Elgar 2024) 215–225; JM Scherpe, 'A Comparative View on Registered Partnerships and Formal Family Recognition beyond Marriage' (2019) 6 *Journal of International and Comparative Law* 273.

very few exceptions in Europe,²² what frequently has been called ‘marriage equality’ was not brought about by legal/constitutional challenges but rather by parliamentary and political initiatives.²³ The underlying reason for the opening up of marriage to same-sex couples in Europe therefore generally is the result of an extended understanding and acceptance of what constitutes a family and thus was born from the desire to end the discrimination of same-sex couples and families.

However, this extended understanding and acceptance was and still is far from universal in Europe and in fact has created a new fault line of division in Europe, this time between East and West. While in Western European jurisdictions, same-sex marriage is accepted both in the North (Nordic Countries, Republic of Ireland, Scotland, England, and Wales), the centre (e.g. Netherlands, Belgium, France, Germany, Austria) and the South (e.g. Spain, Portugal, Greece), there is an almost universal rejection of same-sex marriage in Eastern European jurisdictions (with the notable exceptions of Estonia and Slovenia). Indeed, many jurisdictions in Eastern Europe went even further in their attempts to prevent same-sex marriages from being voted in by future parliaments that they changed their constitutions and in them defined marriage as a union between a man and a woman only.²⁴ The sole purpose of these amendments was to prevent the redefinition of marriage through a simple act of parliament but rather require a further constitutional amendment and thus a greater majority, making it significantly less likely for this to happen. Sadly, in several Eastern European jurisdictions the discussion on recognition of same-sex relationship has been ‘weaponized’ to further other political means, with overblown rhetoric and supposedly to maintain a ‘national identity’,²⁵ as a counterpoint to what is portrayed

²² E.g. Austria and Slovenia.

²³ Unlike in many jurisdictions outside Europe, most notably the United States (*Obergefell v Hodges* (576 US 644 (2015))); Canada (*Halpern v Canada (AG)*, [2003] O.J. No. 2268 (10 June 2003), followed by *Reference Re Same-Sex Marriage* [2004] 3 S.C.R. 698, which led to the Civil Marriage Act being passed in 2005; South Africa (*Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19); and Taiwan (Judicial Yuan Interpretation No. 748 of 24 May 2017).

²⁴ See, for example, Article 46 of the Constitution of Bulgaria; Article 28 of the Constitution of Lithuania; Article 18 of the Constitution of Poland; Article 110 of the Constitution of the Republic of Latvia; Article 62 of the Constitution of Serbia; Article L of the Constitution of Hungary; Article 62(2) of the Constitution of Croatia; Article 41 of the Constitution of Slovakia.

²⁵ See e.g. V Todorova, ‘Gender Wars in Bulgaria’ in JM Scherpe and S Gilmore (eds), *Family Matters – Essays in Honour of John Eekelaar* (Intersentia 2022) 245–261; L Vaige, *Cross-border Recognition of Formalized Same-sex Relationships* (Intersentia 2022).

as 'Western' values.²⁶ 'Othering' people and attacking minorities for one's own political gain, of course, are age-old and well-known strategies but incredibly damaging not only to the groups concerned but ultimately also to the societies concerned as a whole.

Be that as it may, European states currently are at least as divided on the issue of same-sex marriage and same-sex families as they were in the past on divorce – except that the dividing line is now between the East and the West. The widely divergent views in this particular area mean that, at least with regard to same-sex families, there is no common pan-European understanding of what a 'family' is.

6.4. (Dead) Pan-Europeanism

The clear and open hostility towards same-sex couples and their families, as well as other minorities, poses a huge challenge for Europe, and particularly for the European Union and the Council of Europe.

As far as the EU is concerned, at first glance it may not seem that 'family' is very high on the agenda, which is hardly surprising, given the absence of any express legislative competence. The then candidate for the presidency Ursula van der Leyen only used the word 'family' twice in her 2019 election manifesto, and even then only in the contexts of work–life balance and health.²⁷ However, after her election, the Commission President made it more than clear in her State of the Union Address 2020²⁸ that she considers all families, including same-sex families and families of transpersons, as part of her mission to 'build the world we want to live in', with surprising candour and vigour:

Honourable Members,
I will not rest when it comes to building a Union of equality.
A Union where you can be who you are and love who you want – without fear of recrimination or discrimination.
Because *being yourself is not your ideology.*
It's your identity.

²⁶ The 'weaponization' certainly is not limited to same-sex couples and their families but extends to different gender identities and other minority groups as well.

²⁷ European Commission, Directorate-General for Communication, U von der Leyen, 'A Union That Strives For More – My Agenda for Europe – Political Guidelines for the Next European Commission 2019–2024' (Publications Office 2019) <https://data.europa.eu/doi/10.2775/018127> accessed 27 November 2025.

²⁸ European Commission, U von der Leyen, State of the Union Address 2020, 'Building the World We Want to Live in: A Union of Vitality in a World of Fragility' (16 September 2020) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655 accessed 27 November 2025.

And no one can ever take it away.

So I want to be crystal clear – *LGBTQI-free zones are humanity free zones. And they have no place in our Union.*

And to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights.

As part of this, I will also push for mutual recognition of family relations in the EU. *If you are parent in one country, you are parent in every country.*²⁹

For present purposes, the last statement in particular needs to be understood to mean that, as far as the EU is concerned, if you are a *family* in one country in the EU, you are a family in all countries of the EU. This agenda was followed up in the EU's human rights-based LGBTQI Equality Strategy 2020–2025.³⁰ This strategy at its core aims to ensure that 'everybody in the European Union should be safe and free to be themselves' and be able to move freely within EU territory. It thus effectively mandates the recognition of these families. This undoubtedly is a huge and difficult challenge for the European Union given the open resistance to this by many of its Eastern Member States. That von der Leyen's words regarding being a pan-European parent were not meant to be empty political rhetoric can be seen in the subsequent 'Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on the Creation of a European Certificate of Parenthood', which includes the recognition of parenthood for same-sex families.³¹ However, passing this Regulation would require unanimity amongst the Member States, which, given the fierce resistance of some Eastern European jurisdictions to recognizing same-sex families, currently appears highly unlikely.

In the absence of specific legislation, the recognition of same-sex families has come up in several cases before the CJEU in the context of specific issues for which the EU currently has competence and some form of recognition of either the adult relationship or a parent–child relationship is required under EU Law. In all these cases, an Eastern European jurisdiction refused the recognition, and the Court was called upon to ensure it. Examples pertaining to parent–child relationships³² are

²⁹ Ibid, 22–23 (emphasis in original).

³⁰ COM (2020) 698 final.

³¹ COM (2022) 695 final.

³² On the issue, see e.g. A Tryfonidou, 'The ECJ Recognises the Right of Rainbow Families to Move Freely between EU Member States: The V.M.A. Ruling' (2022) 47 *European Law Review* 534; D Thienpont and G Willems, 'Le droit à la libre circulation des familles homoparentales consacré par la Cour de justice de l'Union européenne' (2022) 132 *Revue*

*V.M.A.*³³ and *Rzecznik Praw Obywatelskich*,³⁴ while for adult relationships *Coman*³⁵ is the paradigm case.³⁶ Ultimately, these cases all concern the free movement of persons, specific entitlements under certain Directives and the principle of non-discrimination. It is evident that the issue is causing great tension within the European Union, and this is of great concern for the Union as a whole. As the author of this chapter has written elsewhere:

[...] the very best one currently can hope for – and even that seems doubtful – is the acceptance or tolerance of other jurisdictions’ ‘ways of life’. The Gordian knot of course is that both sides of the debate claim this acceptance. The sword that is most likely to cut the knot is wielded by the human rights obligations of the European nations, but the danger is that it might cut too deeply for the Union to prevail.³⁷

The European Union is not the only body that has been confronted by these issues in recent times: The European Court of Human Rights also has been called upon numerous times by same-sex couples and individuals to protect their rights.³⁸ Famously, in its decision in *Schalk and Kopf v Austria*, the ECtHR stated that Article 12 ECHR cannot ‘in all circumstances be limited to marriage between two persons of the opposite sex’ and, crucially, that same-sex couples are protected by the right to respect for family life under Article 8 as:

[...] the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot

trimestrielle des droits de l’Homme 925; L Bracken, ‘Recognition of LGBTIQ+ Parent Families across European Borders’ (2022) 29 *Maastricht Journal of European and Comparative Law* 399.

³³ Case C-490/20 *V.M.A. v Stolichna obshtina, rayon ‘Pancharevo’* EU:C:2021:1008.

³⁴ Case C-2/21 *Rzecznik Praw Obywatelskich* EU:C:2022:502.

³⁵ Case C-673/16 *Coman, Hamilton and Asociația Accept v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385.

³⁶ On this, see A Tryfonidou, ‘The ECJ Recognises the Right of Same-sex Spouses to Move Freely between EU Member States: The *Coman* ruling’ (2019) *European Law Review* 663; and DV Kochenov and U Belavusau, ‘After the Celebration: Marriage Equality in EU Law Post-*Coman* in Eight Questions and Some Further Thoughts’ (2020) 27 *Maastricht Journal of European and Comparative Law* 549. See also A Tryfonidou, ‘What Is a ‘Family’ in EU law? Do EU Policies Sufficiently Address Family Diversity and Its Consequences?’ in Öberg and Tryfonidou (n 1) 19–36; G Willems (n 19); N Palazzo, ‘The EU Family: Surviving Ideological Familism in Times of Illiberalism’, in Öberg and Tryfonidou (n 1) 227–248.

³⁷ JM Scherpe, ‘Marriage and the Family’, in Corrias and Tinnevelt (n 1).

³⁸ For an overview see the ECtHR factsheet on ‘Sexual Orientation Issues’ https://prd-echr.coe.int/documents/d/echr/FS_Sexual_orientation_ENG accessed 20 July 2024.

enjoy ‘family life’ for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would.³⁹

Subsequently the ECtHR has consistently held that Contracting States of the Convention must provide a protective framework for same-sex families, although this does not necessarily have to be in the form of opening up marriage to same-sex couples.⁴⁰

Thus it is abundantly clear that, in principle, all Member States of the European Union and all Contracting States of the European Convention on Human Rights are obliged to provide some recognition of same-sex families. Yet there is little evidence that this obligation is complied with by the European States concerned, as same-sex families (still) are not recognized there. Nor is there evidence that the (admittedly limited) sanctions that the European institutions have at their disposal to ensure compliance with these obligations are being utilized. Without such compliance, the notion of a ‘European family’ remains a fractured one, and the idea of a pan-European family at best a lame duck and at worst a dead one.

6.5. Despite All That: Elements of a ‘European Family’ Exist

There has been considerable debate, with many contributions, on whether a convergence of family law in Europe exists, whether a harmonization is feasible or desirable, and thus ultimately whether there is a European Family Law.⁴¹ The author of this chapter has always maintained that a European Family Law already exists, but not as a coherent set of rules but rather in

³⁹ *Schalk and Kopf v. Austria* (Application No. 30141/04) Judgment of 24 June 2010, [94].

⁴⁰ *Vallianatos and Others v. Greece* (Application Nos. 29381/09 and 32684/09) Judgment of 7 November 2013 (GC); *Oliari and Others v. Italy* (Application Nos. 18766/11 and 36030/11) Judgment of 21 July 2015; *Orlandi and Others v. Italy* (Application No. 26431/12) Judgment of 13 December 2017; *Fedotova and Others v. Russia* (Application Nos. 40792/10, 30538/14 and 43439/10) Judgment of 17 January 2023 (GC); *Buhuceanu and Others v. Romania* (Application Nos. 20081/19 and 20 others) Judgment of 23 May 2023; *Maymulakhin and Markiv v. Ukraine* (Application No. 75135/14) Judgment of 1 June 2023; *Przybyszevska and Others v. Poland* (Application Nos. 11454/17 and 9 others) Judgment of 12 December 2023.

⁴¹ See e.g. Öberg and Tryfonidou (n 1); M Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia* (Intersentia 2006); M Antokolskaia, *Convergence and Divergence of Family Law in Europe* (Intersentia 2007); K Boele-Woelki (ed), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Intersentia 2003).

fragments and pieces.⁴² These 'islands' of family law are created in two ways: as Organic European Family Law and as Institutional European Family Law.

Organic European Family Law is created by those parts of national family laws that have 'grown' together, i.e. have become similar enough in the European jurisdictions to be considered 'European'. Due to the way it came about, this type of European Family Law could also be called 'bottom-up' European Family Law. An example for this is the development described in [Section 6.2](#) concerning the law of divorce. That in other areas (as described in [Section 6.3](#), concerning same-sex family recognition) no such 'growing together' has taken place does not detract from the finding of commonality in the other area.

Institutional European Family Law are areas of family law where competent bodies such as the Court of Justice of the European Union or the European Court of Human Rights, as well as treaties and European institutions, have created binding family law rules that apply to many or (almost) all European jurisdictions. In a way, this therefore is a 'top down' European Family Law. However, it should not be forgotten that this top-down 'imposition' usually is based on a previous 'bottom-up' development, i.e. some Organic European Family Law. A typical example for this is the recognition of the preferred gender of transgender persons.⁴³ That said, in many cases, and particularly where the institutionally developed law is based on human rights considerations, there may be a (much) weaker organic development and a stronger institutional one, as the case of the recognition of same-sex couples outlined in [Sections 6.3](#) and [6.4](#) shows.

What was just said about 'European Family Law' applies equally to the notion of a 'European family'. Some cornerstones that define what a 'European family' have been laid, either organically or institutionally. The previously mentioned recognition of children born out of wedlock as family may serve as an example here, and perhaps also the recognition of non-marital families more broadly, albeit to a much more limited extent. In other areas, such as the described recognition of same-sex families, there is – for now – no (pan-) 'European family', although there may well be in the future. Families and family law will in some (and often good) ways always be somewhat chaotic and ever-changing,⁴⁴ both in Europe and beyond. Attempting to create a definite and final definition of what a 'family' is,

⁴² See e.g. JM Scherpe, *The Past, Present and Future of European Family Law* (Edward Elgar Publishing 2016); JM Scherpe, 'Is There a "European Family Law?"' (n 1).

⁴³ Cf. JM Scherpe, *The Past, Present and Future of European Family Law* (Edward Elgar Publishing 2016) 119 ff; JM Scherpe, *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015). See also Brown, [Chapter 3](#), this volume.

⁴⁴ Cf. J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467.

let alone a 'European family', would therefore be futile. Identifying common elements of what constitutes 'family' in Europe, on the other hand, is not futile but necessary for the interpretation of legal instruments using the term – as long as one accepts that the concept is and will always be subject to change over time.

Why Should the State Recognize Non-conjugal Unions? An Analysis of the Debate around their Legal Recognition

Nausica Palazzo and Daniel Cardoso

7.1. Introduction

Non-conjugal unions among friends, relatives and other non-sexual relationships are a fascinating subject for study in relation to the questions posed by this book project. The chapter¹ borrows the term ‘non-conjugal’ from a strand of legal scholarship in North America that uses it to identify committed relationships between people (usually friends or relatives) that are non-conjugal.² While this may seem like a circular definition, it is the

¹ The chapter was written for the nEUfam project (Jean Monnet Module in EU Family Law, ref. no. 101085117), funded by the European Commission.

² N Cahn, C Huntington and E Scott, ‘Family Law for the One-Hundred-Year Life’ (2023) 132 *Yale Law Journal* 2023; E Scott and R Scott, ‘From Contract to Status: Collaboration and the Evolution of Novel Family Relationships’ (2015) 115(2) *Columbia Law Review* 293; JG Culhane, ‘After Marriage Equality, What’s Next for Relationship Recognition?’ (2015) 60(3) *South Dakota Law Review* 383; ND Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press 2009). As to Europe, see N Palazzo, *Legal Recognition of Non-conjugal Couples: New Frontiers in Family Law in the US, Canada and Europe* (Hart 2021); A Gross, ‘The Burden of Conjuality’ in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013) 265–292; N Barker, ‘After the Wedding, What Next? Conservatism and Conjuality’ in N Barker and D Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015) 220–236; N Barker, ‘Rethinking Conjuality as the Basis for Family Recognition: A Feminist Rewriting of the Judgment in *Burden v. United Kingdom*’ (2016) 6(6) *Oñati Socio-Legal Series* 1249.

product of the continuing lack of definition of what ‘non-conjugality’ means in practice and law, which in turn stems from the lack of a clear definition of ‘conjugality’.³ At times, it stands for situations where the relationship does not have a sexual component, a legally defining feature of conjugal relationships.⁴ In the present work, we adopt this definition.

The academic debate introduces alternative terms to identify such unions, including ‘non-couple relationships’, ‘caring relationships’, ‘non-intimate relationships’ and ‘domestic relationships’.⁵ US media streamlined some non-conjugal relationships as platonic relationships or marriages.⁶ The variety of terms often reflects a variety of arrangements, with ‘non-conjugal unions’ acting as an umbrella term to capture these different relationship types. In fact, we are talking about a complex and multifaceted concept that encompasses different relationships: it can include platonic/romantic partnerships and non-romantic ones (like two cohabiting siblings), relationships in which people are related by blood and others in which they are not, and so on.

As one of us previously explored with respect to a similar topic,⁷ creating ‘umbrella terms’ (hypernyms) is a conceptual move imbued with power:⁸ negative terms (here, *non*-conjugal) create a circular-definition problem and risk erasing or downplaying the specificities of the things they encompass. However, this is exactly why our study is relevant – the only thing that binds the relationships encompassed by the literature we cover is their non-conjugality, and therefore we cannot truly escape this definition by

³ See generally K Brook, ‘Comeos from the Margins of Conjugality’ in R Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 99–114.

⁴ Cambridge Dictionary ‘conjugality’ (2020) <https://dictionary.cambridge.org/dictionary/english/conjugal> (‘connected with marriage or the relationship between two married people, especially their sexual relationship’) accessed 27 November 2025; B Cossman and B Ryder, ‘What Is Marriage-Like Like? The Irrelevance of Conjugality’ (2001) 18(2) *Canadian Journal of Family* 270 (‘while debates have raged over the question of who the law should consider to be a spouse, the definition of conjugality remains elusive’); L Harder, ‘The State and the Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada’ (2009) 34 *Signs: Journal of Women in Culture and Society* 633.

⁵ As to the latter, see Domestic Relationships Act (ACT) 1994 [AUS]; The Law Commission | Te Aka Matua o te Ture, *Review of the Property (Relationships) Act 1976* (Report 143 2019) at [7.88]–[7.89] (NZ).

⁶ See e.g. E Pearson, ‘Platonic Marriages: Why Women Are Getting Hitched to Their Besties’ (Forbes, 14 June 2024) <https://www.forbes.com/sites/elizabethpearson/2024/06/14/platonic-marriage-why-women-are-getting-hitched-to-their-besties/> accessed 27 November 2025.

⁷ D Cardoso, ‘Reframing the Role of Communication in Consensual and/or Ethical (Non)Monogamies: A Proposal for a Change in Academic Terminology’ (2024) 4 *Open Research Europe* <https://open-research-europe.ec.europa.eu/articles/4-167/v1> accessed 27 November 2025.

⁸ V Alia, ‘The Politics of Naming: A Personal Reflection’ (2007) 55 *Names* 457.

negation, only be aware of its implications. With this aim in mind, our work will reflect on the impact of onomastic politics underlying these proposals.

Family law scholars, and other strands of academia, have critiqued the ongoing centrality of the sexual family in law, as well as the idea that unions must have some form of sexual attachment to deserve legal recognition, from a variety of angles. Michel Foucault addresses the role of sex (and sexuality) in the establishment of the bourgeois family in Europe as a hegemonic template of family.⁹ Foucault explored the way certain sociocultural transformations¹⁰ have resulted in the centrality of sex as a way of keeping ‘family’ alive¹¹ (with family understood as a set of ties of blood and property) but also as a way of constituting contemporary forms of identity and subjectivity.¹² More recently, Martha Albertson Fineman’s scholarship discussing the ‘sexual family’ is one of the most impactful contributions to the field. Fineman boldly argues that the replacement of sex with care would entail moving beyond family law altogether to enter the realm of contract law.¹³ Jonathan Herring also wishes to replace sex as the omnibus referent in family law, in order to replace it with care¹⁴ – or at least to create an additional framework that protects caring relationships in addition to conjugal ones.¹⁵ In 2001, the landmark report of the Law Commission of Canada ‘Beyond Conjuality’ marked a pivotal shift toward recognizing interdependent relationships beyond the boundaries of sexual involvement.¹⁶

Non-conjugal unions raise fundamental questions in family law regarding the recognition of adult–adult relationships. The debate unpacks certain

⁹ M Foucault, *História Da Sexualidade 1: A Vontade de Saber* (Relógio d’Água 1994).

¹⁰ These sociocultural transformations are encapsulated in the partial transition from the alliance *dispositif* to the sexuality *dispositif*. According to Foucault, familial and conjugal relationships started being framed more and more through the lens of sexuality (and hence the pathologizing of same-sex acts and relationships, for instance), rather than just through the lens of blood ties and alliances between families. See generally Foucault (ibid).

¹¹ Ibid. Although a detailed exploration of this is out of scope for this chapter, the emergence of sexual orientation as a prime organizer of conservative political discourse about ‘the family’ is a prime example of this. In sum, while the up-and-coming bourgeoisie was fiercely against the established nobility’s blood ties as a way to monopolize political and economic power, the bourgeois family itself kept and reinforced the role of inheritances and wealth accumulation as part of its distinct social and moral self-identification.

¹² Foucault (n 9).

¹³ M Albertson Fineman, *The Autonomy Myth: Lies We Tell Ourselves about Dependency and Self-Sufficiency* (The New Press 2004).

¹⁴ J Herring, ‘Sexless Family Law’ (2009) 11(3) *Lex Familiae, Revista Portuguesa de Direito da Família* 20. See also Jonathan Herring, [Chapter 13](#), this volume.

¹⁵ J Herring, ‘Making Family Law More Careful’ in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2013) 43–58.

¹⁶ Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (2001).

assumptions in family law by asking crucial questions spanning ‘What is the state trying to achieve when regulating personal relationships?’ and the corollary question of ‘Why does it prioritize one family form over other family forms?’. It then moves to advance different arguments regarding why a state should recognize non-conjugal unions. Ultimately, if the idea that non-conjugal should also be protected in law is put forward, what are the underlying motives sustaining such a groundbreaking idea?

This chapter conducts a content analysis of seminal scholarly reflections on the legal recognition of non-conjugal unions. Scholarship has advanced distinct arguments to support the cause of their legal recognition. The work identifies the following arguments:

1. One pivoting on the promotion and defence of individual *autonomy*.
2. An argument pivoting on seeking *equality through comparison* (between conjugal and non-conjugal unions).
3. One pivoting on the *utility* of recognizing non-conjugal relationships.
4. An *empirical* argument pointing to the gap between the reality of families and the law and the need to fix it.
5. A *historicising* argument that aims to put into perspective the contingent nature of contemporary modes of legal recognition.
6. An argument about fundamental *sociolegal values* that cannot be attained without, or are better attained through, the recognition of non-conjugal relationships.

Interestingly, these different strands of literature tend to focus on non-conjugal relationships as holding either or both normative and non-normative potential – that is to say, arguments for recognition are not all in agreement about whether such an act would be disruptive, or even if it should be. Regardless, these relationships operate on the margins of the non-normative (such as two committed friends), the anti-normative (such as platonic partners who challenge the heteronormative paradigm of family) but also normative (the extended family of relatives grounded in tradition). Overall, because they encompass such a variety of relationships and potentially involve a range of governmental, social, and political objectives, non-conjugal relationships are instructive about the various reasons why societies should move beyond the ‘nuclear family’ model, or, as Gayle Rubin aptly put it, outside the ‘Charmed Circle’ of sexuality.¹⁷

¹⁷ G Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in R Parker and P Aggleton (eds), *Culture, Society and Sexuality: A Reader* (2nd ed, Routledge 2007) 160.

7.2. Methodology

The chapter offers a content analysis of some leading works in family law on non-conjugal unions and the law. The study focuses on prominent voices in the field of family law and stems from around five years of doctoral research on the topic. These are, we argue, the authors that have promoted the view that family law should expand its reach to protect unions that, by and large, exist without a sexual component, or where that sexual component is not germane to the relationship, or where it exists in a way that might not be perceived as such.¹⁸ Thus our research question can be phrased as: *What arguments are used in the relevant legal literature in the Global North to support the recognition of non-conjugal relationships?*¹⁹

Content analysis is a research method that is especially suited to the objectives of the chapter, as a flexible method for analysing text data.²⁰ In recent years, both quantitative and qualitative content analysis have come into wide use in several disciplines, including family law.²¹

Unlike quantitative content analysis, which adopts a deductive approach, qualitative content analysis adopts an inductive approach to the analysis of text data.²² This chapter looks at three types of academic outputs – scholarly articles, books and book chapters. Our research has looked at the scholarship produced around relevant clusters identified in the course of five years of research, mostly focusing on Global North legislation and academic debate. These clusters are connected to either (1) a major event that has triggered a scholarly debate around these families' legal recognition or (2) recurring conceptual categories within legal scholarship, which prompted a debate on non-conjugal unions' recognition. Examples of conceptual categories that are catalysing attention towards the issue of non-conjugal unions' recognition are friendship and siblings. Examples of major events are the *Burden* case litigated in the UK and before the European Court of Human Rights, the publication of the seminar report 'Beyond Conjugality' in Canada, and the passage of laws recognizing caring relationships in Australia.

¹⁸ R Bauer, 'BDSM Relationships' in BL Simula (ed), *Expanding the Rainbow: Exploring the Relationships of Bi+, Polyamorous, Kinky, Ace, Intersex, and Trans People* (Brill | Sense 2019) 135–148.

¹⁹ Royal Geographical Society, 'A 60 Second Guide to ... The Global North/South Divide' <https://www.rgs.org/schools/resources-for-schools/global-north-south-divide> accessed 26 November 2025.

²⁰ S Cavanagh, 'Content Analysis: Concepts, Methods and Applications' (1997) 4 *Nurse Researcher* 5.

²¹ L Kessler, 'Family Law by the Numbers: The Story That Casebooks Tell' (2020) 62(4) *Arizona Law Review* 921.

²² BL Berg, *Qualitative Research Methods for the Social Sciences* (3rd ed, Pearson 1998) 233–252.

Data collection was done between 12 March and 17 October 2023 and involved the first author and the collaboration of five law students.²³ In total, we collected 39 scholarly works.

Geographically, the selected authors are based in jurisdictions situated in the Global North,²⁴ namely in the Euro-American context and Oceania. Within this geographical space frame we have sought to feature the work of leading voices with affiliations from different countries spanning Canada,²⁵ the United States,²⁶ the UK,²⁷ continental Europe,²⁸ Australia and New Zealand.²⁹ While the geographical scope is narrow and only covers the Euro-Anglo sphere, this methodological choice allowed for an analytically tighter comparison.

The selection of works was, as mentioned, limited to those in favour of the legalization of non-conjugal relationships. However, this is not to say that we have limited our analysis to those documents that have that as the central objective. While some works are explicitly focusing on recalibrating the target of family law to include non-conjugal unions, others are pursuing different research goals.³⁰ In the latter case, the recognition of non-conjugal unions may emerge as an ancillary topic, as something, for example, worth contemplating in the future.³¹ From these works it is, however, still possible to identify passages that contribute to the objective of mapping the arguments that support the legal recognition of non-conjugal unions. The dividing line between relevant and non-relevant scholarly works is therefore drawn not based on whether the recognition of such unions is the central topic addressed by the work but whether the arguments in favour of the legal recognition of non-conjugal unions are sufficiently clear as to allow for coding and analysis.

When conducting qualitative content analysis, researchers develop codes from the text through an inductive process and then interpret the codes into

²³ We would like to thank the following students for their work and commitment to this research: Constança Mota, Filipe Gama, Maria Ribeiro, Ana Reis and Madalena Lima (who contributed until 16 May). The data collection and analysis was carried out within the project nEUfam – 101085117 (Jean Monnet Module in EU family law), funded by the European Commission.

²⁴ Royal Geographical Society (n 19).

²⁵ E.g. Law Commission of Canada (n 16); Cossman and Ryder (n 4).

²⁶ E.g. Cahn, Huntington and Scott (n 2).

²⁷ E.g. Barker (n 2); Herring (n 14); Herring (n 15).

²⁸ E.g. Palazzo (n 2).

²⁹ E.g. M Briggs, 'Rethinking Relationships' (2015) 46 *Victoria University of Wellington Law Review* 669.

³⁰ As an example of the former, see Law Commission of Canada (n 16); LA Rosenbury, 'Friends with Benefits?' (2007) 106 *Michigan Law* 189; Palazzo (n 2).

³¹ See e.g. Cahn, Huntington and Scott (n 2).

overarching analytically relevant categories that allow for novel insights.³² In our approach to coding, we took care to minimize inferred meanings, choosing to base our coding on the manifest content articulated by the authors. For the same reason, we chose not to code arguments that are presented as adversarial or attributed to other sources and authors. Under the same guiding principle, we have at times created different subargument codes to reflect the rhetorical and linguistic emphasis given to certain aspects of an argument, even in situations where those different aspects can be said to implicate each other logically, empirically, or legally.

The paper then adopts a qualitatively focused content analysis, known as framework analysis.³³ The method is especially apt, considering that the arguments are frameworks of meaning-making deployed by legal scholars. We undertook the following post-collection steps:

1. With the supervision of the first author, the student group collected the most relevant passages from the selected works, which serve as coding units or data units.
2. Following a first read-through of the material, the first author identified a series of broad-scope initial frameworks (i.e. types of arguments).
3. The student group connected each passage to one or more of those initial frameworks (i.e. data units could be multicoded), all the while receiving feedback and guidance from the first author.
4. The second author received the coded material, and critically analysed it to check for the internal consistence of the frameworks and their distinctiveness.
5. The second author proposed minor changes to the categorization and naming of the frameworks originally identified, and proposed a series of subcategories, used to identify specific facets of each argument.
6. The proposed changes were discussed between both authors, until consensus was reached that the current coding scheme reliably represented the source material, while still providing new empirical and critical insights on it.

While we acknowledge the ongoing methodological debate about issues of quality and reliability in qualitative analysis, especially the idea of ‘data saturation’,³⁴ we maintain that this coding scheme constitutes an

³² BM Lindgren, B Lundman, UH Graneheim, ‘Abstraction and Interpretation during the Qualitative Content Analysis Process’ (2020) 108 *International Journal of Nursing Studies* 2.

³³ MD Kiernan and M Hill, ‘Framework Analysis: A Whole Paradigm Approach’ (2018) 18 *Qualitative Research Journal* 248.

³⁴ V Braun and V Clarke, ‘To Saturate or Not to Saturate? Questioning Data Saturation as a Useful Concept for Thematic Analysis and Sample-Size Rationales’ (2021) 13 *Qualitative Research in Sport, Exercise and Health* 201; U Flick (ed), *The Sage Handbook of Qualitative*

encompassing, fair, independently reproducible and academically useful systematization of the arguments present in the surveyed literature.

The legal recognition of non-conjugal unions, while becoming more popular in Western academia in the last two decades, continues to be a relatively ‘niche’ topic. By niche, we refer to the fact that the contours of the debate themselves are more easily drawn compared to other topics (e.g. the legal recognition of same-sex couples, or cohabitating couples). This is not to say that few people have participated in the debate. The contention is that the selected voices – while not representing a systematic literature review – are exemplary of the principal strains of debate on the legal recognition of non-conjugal unions due to their varied origin, number, academic salience and overall impact on the state of the debate.

As to the variety of structures of relationship that we collected as falling under the hypernym of ‘non-conjugal’, the authors of the works analysed have focused either on the notion of friendship,³⁵ extended families,³⁶ siblings,³⁷ caring unions,³⁸ or personal adult relationships beyond conjugality.³⁹ The variety of labels also reflect a partially different focus, as well as variety in our dataset. Notwithstanding that, the selected authors have all advocated for an understanding of family as a union in law that moves beyond the sexual element. These proposals and arguments are not mutually exclusive.

Hence, although we make no claim to systematic comprehensiveness, we are still able to provide a sufficiently reliable snapshot of the debate over the legal recognition of non-conjugal unions and the motives behind their legal recognition.

Data Collection (Sage Reference 2018); V Braun and V Clarke, ‘One Size Fits All? What Counts as Quality Practice in (Reflexive) Thematic Analysis?’ (2021) 18 *Qualitative Research in Psychology* 328.

³⁵ Rosenbury (n 30).

³⁶ C Draghici, ‘Adult Children and Elderly Parents in Strasbourg Proceedings: A Misconstrued Approach to ‘Family Life.’ (2018) 32 *International Journal of Law, Policy and the Family* 42.

³⁷ JE Hasday, ‘Siblings in Law’ (2012) 65 *Vanderbilt Law Review* 897; R Zafran, ‘Reconceiving Legal Siblinghood’ (2020) 71 *Hastings Law Journal* 749.

³⁸ Barker (n 2); Herring (n 14); Herring (n 15).

³⁹ F Swennen, ‘Un-coupling Family Law: The Legal Recognition and Protection of Adult Unions outside of Conjugal Coupledness’ (2020) 28(1) *Feminist Legal Studies* 39; Law Commission of Canada (n 16) 35.

7.3. Results

7.3.1. *Overall structure of arguments*

Following the iterative and reflexive coding process just outlined, we arrived at six major types of arguments, with varied numbers of subtypes. These results are summarily outlined in [Table 7.1](#).

As mentioned in the Methodology section, the coding units were multiple-coded, meaning that any given excerpt could belong to one or more of the lower-level codes (herein, subarguments). This methodological choice is, in the face of the results obtained, productive: many of the arguments used exist at the intersection of various subarguments, which are combined in different ways and even (as is more evident in the Equality through Comparison argument) sometimes antithetical ways.

It is also possible to see that, while some arguments are more directly related to evidence-based approaches (namely those under the Empirical argument), others are also indirectly so (e.g. some of those under the Historicizing argument); on the other hand, others are more abstract and values-based (e.g. Human Dignity).

Below, we provide a critical summary and analysis of these six arguments, using examples and explicating methodological-analytical choices that underpin these results.

7.3.2. *Autonomy*

The first argument we have identified is that of Autonomy. This argument stems from a contemporary understanding of the state as being in service to its constituent citizens and on private (and privatized) forms of self-determination. We are reminded here of the work of Ken Plummer, who talked about intimate citizenship as a contemporary aspect of the evolution of politics.⁴⁰ According to his view, intimate citizenship was a sign that ‘a radical, pluralistic, democratic, contingent, participatory politics of human life choices and difference is in the making’.⁴¹

Under this argument, we have selected three main sub-components: well-being, choice and self-determination. While one could argue that they are overly similar to one another, we observe that they point towards different social dynamics and, as we will see in the Discussion section, these differences carry weight.

The excerpts we coded under ‘well-being’ emphasize the results that would come out of the recognition of non-conjugal relationships: they

⁴⁰ K Plummer, *Telling Sexual Stories: Power, Change and Social Worlds* (Routledge 1995).

⁴¹ *Ibid*, 147 (emphasis in the original).

Table 7.1: Typology of arguments and subarguments in favour of the legal recognition of non-conjugal relationships

Main argument	Subarguments	Short definition
Autonomy	Self-fulfilment/well-being	Promoting the well-being of citizens
	Choice	Defending individuals' right to make choices about their private lives
	Self-determination	Asserting individuals' rights to self-determine their life objectives
Equality through comparison	Differentiation from coupledness/marriage	NCUs' differences from marriage as necessitating legal specification
	Functional similarity with coupledness/marriage	NCUs' similitude with marriage as a basis for legal recognition
Utility	Fostering care	Facilitating care relationships
	Recognizing interdependence	Legislating around existing interdependent relationships
	Promoting social stability and order	NCU legislation creates the conditions for more social stability and order
	State self-interest in privatized care	The state has self-interest in regulating NCUs to foster individual-based care
	Increased nuance/coherence of the legal regime	Regulating NCUs as a way to create a more self-coherent legal system
Empirical	Existing social complexity	The law must address existing social complexity in how people create bonds
	Evolution of socioeconomic structures	The law must keep up with fast-paced changes pertaining to intimate dynamics
Historicizing	Global North traditions	Historical evidence from Global North contexts as precedent for legislating NCUs
	Othered traditions	Subordinated cultures and countries as a basis for the relevance of NCU legislation
	Evolutionary psychology/essentialism	The 'nature' of human psychology or evolution as a basis for regulating NCUs
	Changing legal role of consummation	Critique on the overemphasis on sexual intercourse in legislating relationships

Table 7.1: Typology of arguments and subarguments in favour of the legal recognition of non-conjugal relationships (continued)

Main argument	Subarguments	Short definition
Sociolegal values	Protection from discrimination for some marginalized groups	Legislating NCU as anti-discriminatory for some minorities
	Undoing marriage's hierarchical supremacy	Marriage is unjustly prioritized, and this could be corrected via legislating NCUs
	Gender equality	Legislating NCUs is a necessary step for gender equality
	Advancing labour rights	Legislating NCUs would advance labour rights
	Democratization	Legislating NCUs is necessary for furthering the values underpinning democracy
	Human dignity	Legislating NCUs is necessary for upholding human dignity

are more connected to autonomy as a means to an end, and see in Autonomy a net good only if it results in that self-fulfilment and well-being. In this sense, the role of the state is one of procuring the conditions to allow for, or to encourage, the attainment of well-being for as many people as possible. This is connected to, as we will see, a comparative perspective towards marriage; one that usually leads to a valuing of non-conjugal relationships. For instance, Beatrice Gusmano echoes the words of a research participant identified as Edoardo, a gay cisman: 'I feel more satisfied by my friends [...]. Friendships are much more reliable'.⁴² Various other authors also noted that many non-conjugal relationships are conducive to various forms of well-being – be it psychological or material – and that this alone makes those relationships valuable and worthy of recognition.

Choice and self-determination, however, operate somewhat differently. The first one pertains to the ability to make choices:

The value of autonomy requires that governments put in place the conditions in which people can freely choose their personal relationships. The state must also avoid direct or indirect forms of

⁴² B Gusmano, 'Ohana as a Way of Life: Queer Friendship in the Mediterranean Regime' in JA Redding and N Palazzo (eds), *Queer and Religious Alliances in Family Law Politics and Beyond* (Anthem Press 2022) 100.

coercive interference with adults' freedom to choose whether or not to form, or remain in, close personal relationships.⁴³

By contrast, the second one pertains to the various contexts under which those choices occur (which, in turn, is also different from self-fulfilment, where the focus is on the results of those choices).

However, these two subarguments also converge in emphasizing a right to the exercise of liberty by individuals and in asserting that the multiple choices (either voluntary or created by circumstances) should be a main driver of how the law adapts to contemporary circumstances.

We have gathered under this overall topic all the references that treat the idea of autonomy as self-evident, or as an end in itself, or something that is a cornerstone of contemporary legal systems. While autonomy can still factor in the arguments presented next, it comes across as an assumption or as subtext, not as the argument itself.

7.3.3. *Equality through comparison*

William Eskridge argues that utilitarianism led to a shift from rigid family law rules to individual choice, creating an 'unprecedented baseline of nondiscrimination'.⁴⁴ The state can still differentiate relationships but only with reasonable and objective justification. Courts across the Global North increasingly reject moral bias as a basis for discrimination.⁴⁵

The principle of equality and nondiscrimination can hence act as a force behind the legal recognition of non-conjugal unions. However, it can take two different directions: it can support their legal recognition in that these unions share the same characteristics and/or functions of marital-like unions (already recognized in law) or because they are different and hence equality would require a tailored approach to ensure that they are not assimilated into the prevailing family model, marriage.

7.3.3.1. *Functional similarity with coupledness/marriage*

At times, the reason for recognizing non-conjugal unions simply lies in the fact that they possess the same characteristics of the 'benchmark family' or perform similar functions.⁴⁶ This functional equivalence test has been pivotal

⁴³ Law Commission of Canada (n 16) 18.

⁴⁴ WN Eskridge, 'Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules' (2012) 100 *Georgetown Law Journal* 1973.

⁴⁵ Palazzo (n 2) 194.

⁴⁶ N Palazzo, 'Non-conjugal Couples and Legislated Cohabitation' in M Briggs and A Hayward (eds), *Family Property and the Law* (Research Handbooks in Family Law Series,

in law across jurisdictions in expanding legal protections for unions outside of marriage. Especially, it has been important for de facto unions, which have obtained, for example, the same property protections as married couples precisely because they were ‘substantially’ the same as married couples.⁴⁷ It has also been critical in the legal recognition of same-sex unions, who except for their sexual orientation shared all the functional characters of heterosexual unions.⁴⁸

The argument has also been employed before the European Court of Human Rights when contemplating the possibility to recognize two cohabiting sisters. The sisters argued they were in a similar situation to married and civil partners because they were also able to be emotionally and economically committed to each other.⁴⁹ While the lower court did not consider this issue in its judgment, the Grand Chamber found that the sisters were not in a functionally equivalent relationship: their relationship was held to be fundamentally different due to consanguinity, which is explicitly a disqualifying condition for marriage and civil partnerships.⁵⁰

The works under review capture a variety of qualifying features that attest to this functional similarity. For example, the Law Commission of Canada mentions how some non-conjugal relationships show an inherent ability for ‘long-term commitment’.⁵¹ The authors of the report, Brenda Cossman and Bruce Ryder, critically assessing the work carried out by the Commission, highlighted a host of features such as ‘shared residential relationship, a close emotional relationship, and an economically intertwined relationship’.⁵²

7.3.3.2. *Differentiation from coupledness/marriage*

The argument pivoting on equality seems to also support the recognition of non-conjugal unions precisely because they share only some of the

Edward Elgar 2023) 176–195; K Griffiths, ‘From ‘Form’ to Function and Back Again: a New Conceptual Basis for Developing Frameworks for the Legal Recognition of Adult Relationships’ (2019) 31(3) *Child and Family Law Quarterly* 227; VE Hamilton, ‘Mistaking Marriage for Social Policy’ (2004) 11 *Virginia Journal of Social Policy & the Law* 307.

⁴⁷ See e.g. B Atkin, ‘The Legal World of Unmarried Couples: Reflections on “De Facto Relationships” in Recent New Zealand Legislation’ (2008) 39 *Victoria University of Wellington Law Review* 793.

⁴⁸ See e.g. *Obergefell v Hodges*, 576 US 644 (2015).

⁴⁹ *Burden v United Kingdom* (Application No. 13378/05) Judgment of 29 April 2008 (GC).

⁵⁰ *Ibid*, [62].

⁵¹ Law Commission of Canada (n 16) 35.

⁵² Cossman and Ryder (n 4), cited in K Spensieri, ‘Revitalizing the Spousal Support Regime for Non-conjugal Adult Personal Relationships and the Case of Caregiving’ (2016) 36(1) *Canadian Family Law Quarterly* 123.

same characteristics or functions of marital-like couples. For example, Laura Rosenbury, in her leading work *Friends with Benefits*, notes that '[g]iven that friendship increasingly serves many of the functions traditionally reserved for family, friendship could easily fall within family law's domain'.⁵³

These authors argue that non-conjugal relationships have unique features that law must recognize instead of merging them with marital or marital-like relationships. The goal is not to compare them negatively but to ensure their distinct roles are respected. Some authors do note that this might create some disruption:

[P]articularly in its cross-household form, the concept [of non-conjugal relationships] carried a disruptive potential for the legal regulation of close relationships [...] because it created some space for relationships that are not ordinarily accorded much legal recognition, such as friendships.⁵⁴

Shakargy also highlights the potential for these unions to rethink family and personal relationships: 'A plus one relationship does not carry the traditional significance of marriage. Instead, it is a reflection of free will, self-determination and autonomy.'⁵⁵ Seen under this light, we can understand the connection between the Autonomy and the Equality arguments (as well as Utility), in that they both operate under the assumption that certain values – self-determination, protection from discrimination – should be maximized whenever possible.

7.3.4. *Utility*

The Utility argument is the one that foregrounds the perspective of the state as an actor that is pursuing its own distinctive objectives through state policy. The Utility argument is perhaps the most straightforward one we have identified. Under this argument, the state has a legitimate self-interest in legislating non-conjugal unions. This self-interest has two sides: first, recognizing these relationships supports social roles like caregiving; second, the state benefits by reducing welfare costs and minimizing social tensions caused by inequality or discrimination.

⁵³ Rosenbury (n 30) 212.

⁵⁴ S Trotter, 'Ways of Being Together during the COVID-19 Pandemic: Support Bubbles and the Legal Construction of Relationships' (2021) 6 *Frontiers in Sociology* 7–8.

⁵⁵ S Shakargy, 'Plus One: Who Decides Who is One's Significant Other?' (2021) 35 *International Journal of Law, Policy and The Family* 27.

However, again, this preliminary explanation is a thin common denominator that unites under the umbrella of ‘utility’ a variety of different arguments. We have divided the materials under five different subarguments: Fostering Care; Recognizing Interdependence; Promoting Social Stability and Order; State Self-interest in Privatized Care; and Increased Nuance/Coherence of the Legal System. While some of these may appear overly similar, we have divided them according to the emphasis given by the authors to certain objectives.

Care and Interdependence are contiguous concepts. Their difference lies on whether authors emphasize situational asymmetries or not. Scenarios involving the care of children or the elderly, whether provided by family members or friends, are two situations in which care relationships are seen as having utilitarian value and thus need to be nurtured: ‘That other persons also have duties toward children can alleviate the burdens on the primary caregiver(s) and promote all children’s well-being.’⁵⁶ On the other hand, the focus on interdependence is more closely aligned with the first argument (‘Autonomy’), as it emphasizes the ability that individuals should have when it comes to deciding how to organize their private lives.

In both cases, it is also suggested, perhaps sometimes tongue-in-cheek, that the state itself should promote the legalization of non-conjugal relationships, as this would be a quick way to reduce the economic costs of having to provide social services to those who are in vulnerable situations and have no caregivers.⁵⁷ Be it care-centred or more focused on the state’s own financial interests, the subargument operates at the conjunction of citizens’ self-determination and the state’s interest in protecting the public purse.

Parallel to this, another utilitarian subargument made is that the recognition of non-conjugal unions will lead to more social cohesion or order. The rationale here is that the law has a stabilizing effect, by allowing citizens to rationally organize their lives according to legitimate expectations about how their future will look like. This subargument emerges from the following quote by Jane Cross: ‘[A]llowing persons to share in rights afforded to married partners provides security and stability for non-traditional family arrangements’.⁵⁸

To that end, some authors also note that the reduction in socioeconomic vulnerability stemming from the mentioned reallocation of public resources would, in itself, contribute to more social cohesion and order. As Lorraine

⁵⁶ N Bakht and L Collins, ‘Are You My Mother? Parentage in a Nonconjugal Family’ (2018) 31 *Canadian Journal of Family Law* 105, 140.

⁵⁷ Courts routinely recognize this interest, that is the privatization of care, as a legitimate state interest. E.g. *State v Oakley*, 629 NW 2d 200 (Wis 2001), cert denied, 123 S Ct 74 (2002). Palazzo (n 2) 70.

⁵⁸ JE Cross, ‘Families Redefined: Kinship Groups That Deserve Benefits’ (2009) 78 *Mississippi Law Journal* 791, 823.

Johns put it: ‘First, the state must maintain social order. Individual well-being affects social order and personal relationships have a significant impact on well-being.’⁵⁹

Ultimately, whether by creating distinctions from conjugal unions or by making those distinctions unimportant, the legalization of non-conjugal unions would, it has been argued, prevent the political tension and polarization that have marred so many debates on intimate citizenship.⁶⁰

7.3.5. *Empirical*

The Empirical argument differs from the previous arguments, which were primarily concerned with projective, or idealized, ways of constructing the connective aspects of the social fabric.⁶¹ The Empirical argument comes across as more ‘self-evident’. Yet the apparent rhetorical simplicity hides a composite argument that relies on different facets of contemporary societies. Law needs to be responsive to the challenges and features of the societies it applies to, the argument goes. However, the supporting evidence for policy change is drawn from very different sources and with vastly different connotations.

We divided this argument into two main subarguments: one pivoting on ‘Existing Social Complexity’ and the other on the ‘Evolution of Socioeconomic Structures’. At a first glance, this might make little sense – after all, any manifestation of social complexity (e.g. family diversity) is, by definition, the result of ever-evolving socioeconomic structures. The first one, however, places emphasis on statistics, landmark decisions, or hypotheticals/examples on unrecognized unions (such as mentioning unspecific adopted children or friend groups).

The argument here is not that the law should or could foster change, but rather that it is failing to align with existing social configurations (to catch up with the reality of family life).

Under ‘social complexity’, friendship and blood-based familial ties (e.g. siblings) are seen as essential to modern life, requiring legal consideration.

⁵⁹ L Johns, ‘Recognising Non-Conjugal Relationships in New Zealand: Should We Extend the Rights and Responsibilities of Marriage and Marriage-like Relationships to Other Caring Relationships?’ (MA Thesis, Te Herenga Waka-Victoria University of Wellington 2010) 60.

⁶⁰ Plummer (n 40). E Scott and R Scott, ‘From Contract to Status: Collaboration and the Evolution of Novel Family Relationships’ (2015) 115 *Columbia Law Review* 369 (arguing that the absence of the sexual component creates the conditions for the legal recognition to be ‘smoother’ compared to that of sexual relationships, such as same-sex couples).

⁶¹ For further on empirical arguments on what is a family, see the chapters in [Part III](#), ‘Empirical Approaches to Defining Families’ of this volume.

Examples also include blended families and child-rearing networks beyond couples or single parents. Jonathan Herring mentions '[s]tep-parents; same-sex partners; grandparents and others might be fully regarded by the child as a parent'.⁶² The author is not commenting on any one specific case but rather making an argument that this is something that can, and does, happen, and so the law should have a way to address it, regardless of the concrete configurations of the relationships at stake.

The other subset of arguments focuses on the changes brought about by modernity. These changes, the logic goes, have been profound and, from a historical perspective, often quite sudden. It is therefore natural that the law should change in response to these changes. While it is true that both versions of this argument rely on the idea that the law is out of step with contemporary reality, this second subset seems to imply that current laws are meant for a world that no longer exists. A telling example is the following:

The functional families I have just described are but two among millions of de facto contemporary families generated from intimate affiliations outside of marriage. They represent unusually creative and successful responses to the heightened challenges, risks, and opportunities of what I have described elsewhere as the postmodern family condition. Family diversity is an irreversible feature of the postmodern family landscape.⁶³

The examples given are often organized around the need for/of care, given and received. In this sense, the empirical argument builds on the Autonomy and Utility arguments just outlined, since it reinforces (and often sits alongside) the facticity of the (more abstract) values of (personal) self-fulfilment and (interpersonal) care. This facticity in itself is taken as self-evident and therefore objective and unassailable – in a sense, asserting epistemic privilege by resorting to positivism and objectivity.⁶⁴

7.3.6. *Historicizing*

The Empirical argument emphasizes the uniqueness of the present, while the historicization argument asserts that historical patterns justify recognizing non-conjugal relationships in law. Unlike empirical arguments based on statistical data, this argument relies on broad anthropological and

⁶² J Herring, *Caring and the Law* (Hart Publishing 2013) 201.

⁶³ J Stacey, 'Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations' (2003) 32 *Hofstra Law Review* 331, 338 (emphasis added).

⁶⁴ D Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 *Feminist Studies* 575.

historiographic insights. These historical facts gain relevance not just for their accuracy but as part of a *longue durée* of social organization that legitimizes legal changes.

As with other arguments, tensions exist regarding its political positioning, especially within post-/de-/anti-colonial and feminist perspectives.⁶⁵ As shown in Table 7.1, it references both Anglo-Eurocentric and Othered traditions. Tradition, typically a conservative hallmark, is used differently here: rather than advocating a return to an imagined past, these authors argue that the nuclear family was never a historical reality, even in the Global North.⁶⁶ Instead, it became a norm post-WWII, alongside middle-class expansion, reinforcing the heterosexual reproductive family.⁶⁷ By questioning this constructed norm, these scholars challenge the assumption that heterosexual monogamy is natural. Rather than critiquing the nuclear family's supposed historical role, they refute its factuality. If non-conjugal familial arrangements have long existed in the Global North and persist today, then legal recognition is justified.⁶⁸ However, by employing strategies used by conservative legal scholars, these authors risk reactionary counterarguments.

A parallel argument highlights Othered traditions, where the nuclear family is equally absent as a universal model. We use the term 'Othered traditions' because these authors emphasize how non-Global North cultures have been legally marginalized. A legal system that truly reflects reality must recognize all forms of social organization. Ignoring these traditions perpetuates colonial epistemic violence, the argument goes.⁶⁹

A less prominent but recurring argument considers smaller-scale historical legal developments, such as the declining relevance of consummation in marriage, as signs of a shift laying the groundwork for the recognition of non-conjugal unions. Some works even adopt a quasi-ahistorical approach, suggesting that non-conjugal bonds are intrinsic to human social evolution (considering humanity *qua* biological species). A prime example of this can be found in Bakht and Collins:

⁶⁵ C Martins, *Mulheres, Raça e Etnicidades: Introdução aos Feminismos Decoloniais* (1.^a Edição, Imprensa da Universidade de Coimbra 2024) <http://monographs.uc.pt/iuc/catalog/book/438> accessed 27 November 2025.

⁶⁶ A Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press 1993); U Beck and E Beck-Gernsheim, *El Normal Caos Del Amor: Las Nuevas Formas de La Relacion Amorosa* (Ediciones Paidós 2001).

⁶⁷ KM Phillips and H Reay, *Sex before Sexuality: A Premodern History* (Polity Press 2011).

⁶⁸ Royal Geographical Society (n 19).

⁶⁹ M Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007).

The communal caring for children by numerous people [...] may also be seen as evolutionary; the practice dates as far back as the hunter-gatherer period. Anthropologist Sarah Blaffer Hrdy has argued that [...] homo sapiens could never have evolved if human mothers had been required to raise children on their own.⁷⁰

This argument grounds legality in human evolution, showing that non-conjugality is not just a modern issue. It challenges claims that it stems from contemporary movements (such as queer movements or post- or anti-identitarian politics) and instead ties it to fundamental human existence. This weakens opponents' arguments that legal recognition is unnatural or threatening.

7.3.7. *Sociolegal values*

The Sociolegal Values argument draws on legal and political principles to discuss how society should be structured and which values should guide it. Various subarguments highlight how marriage has historically excluded certain groups.⁷¹ They often begin with a historically situated reflection on how marriage has been organized and used as a device for social order or with reflections that link marriage to other historical systems, such as patriarchy.

The first subargument stresses that legalizing non-conjugal relationships will allow for the protection of various marginalized groups. Illustrative examples include older people, those without a wider network of blood relatives, and orphaned children. The second subargument stresses the hierarchy of relationship recognition that has marriage (steadily) on top. According to some authors, the hierarchy itself is undesirable as it violates the principles of equity and fairness, especially when only heterosexual relationships are visible in law.

A key claim is that this legal change would reduce gender inequality. Since unpaid care work – mainly done by women – leads to economic and social disadvantages, recognizing non-conjugal relationships would provide legal support, especially for mothers and caregivers.⁷² Connected to the economic impact of care work and other forms of interpersonal support, an additional subargument notes that recognizing non-conjugal relationships would allow for the advancement of labour rights. Care-related work absences are often only valid when tied to legally recognized family ties. This creates financial risks for carers of partners, elderly people, friends, or distant relatives. Legal

⁷⁰ Bakht and Collins (n 56) 142.

⁷¹ For more on this, see Maynes, [Chapter 5](#), this volume.

⁷² For further reflections on this issue, see Moradi, [Chapter 12](#), this volume.

recognition would improve job security by ensuring protection under law and private policies, e.g. by companies.

Many of these subarguments are used alongside a more general claim about the democratization of society. In these cases, what the authors claim is that the upholding of these socio-legal values, as well as those mentioned in Argument 1, is indicative of a society that is more democratic than our current one and that therefore the legalization of non-conjugal relationships is the pursuit of democracy in action; the underlying and unspoken assumption is that the failure to recognize them is anti-democratic.

The final subargument, Human Dignity, is simple but far-reaching. It builds on other arguments – self-determination, anti-discrimination, and care – to define dignity as essential to a democratic society. These other lines of reasoning are then placed in service of human dignity. Values like self-determination and non-discrimination constitute, for those authors, the necessary conditions or characteristics of a dignified life. This is best exemplified by Nicola Barker's quote – and underlying approval – of a UK Supreme Court finding (*Ghaidan v Godin-Mendoza*): 'Treating some as automatically having less value than others [...] violates his or her dignity as a human being ... such treatment is damaging to society as a whole.'⁷³

7.4. Discussion

Defining non-conjugal relationships is challenging due to their diverse configurations. Legal recognition must account for an unknowable range of familial forms. In focusing on the ability for the law to include an unknowable set of different familial configurations, we are pushed to an ontic politics that operates as a negative image of a hegemonic benchmark.⁷⁴ This benchmark in our case is conjugality – rooted in mononormativity,⁷⁵ the couple norm,⁷⁶ or marriage.⁷⁷ This reinforces its dominance, requiring non-conjugality to be defined in opposition. We do not mean this as criticism – indeed, this is

⁷³ Barker (n 1).

⁷⁴ K Jenkins, *Ontology and Oppression: Race, Gender, and Social Reality* (Oxford University Press 2023).

⁷⁵ M Pieper and R Bauer, 'Polyamory und Mono-Normativität. Ergebnisse einer empirischen Studie über nicht-monogame Lebensformen' in L Méritt (ed), *Mehr als eine Liebe: polyamoureuse Beziehungen* (Orlanda 2005) 59–70.

⁷⁶ S Roseneil, I Crowhurst, T Hellestun, AC Santos and M Stoilova, *The Tenacity of the Couple-Norm: Intimate Citizenship Regimes in a Changing Europe* (University College London 2020) <https://muse.jhu.edu/book/81857> accessed 27 November 2025.

⁷⁷ N Barker, *Not the Marrying Kind: A Feminist Critique of Same-sex Marriage* (Palgrave Macmillan 2013).

how our chapter begins, since it is something required of us by the nature of the ontology of this construct rather than something that we choose to do. However, a comment on the ontic politics of this necessity is itself necessary if we are to understand the results of our study.

As our study shows, various arguments support the legal recognition of non-conjugal relationships, but they do not apply universally. Since non-conjugality implies the absence of sexual and romantic intimacy, different scholars emphasize distinct relationship models. These varying perspectives are not contradictory but highlight tensions in defining which relationships should receive legal recognition.

The prime example of this tension emerges in relation to ‘friendship’. As one of the authors of this chapter discussed years ago, a politics of relationship based on the idea of friendship poses a powerful challenge to existing hegemonic ways conceptualizing and regulating of relationships.⁷⁸ Some scholars frame friendship through Aristotle’s notion of virtue-based bonds,⁷⁹ while others, like Gusmano, view it through a Foucauldian lens as a form of queer resistance beyond institutional ties, emphasizing that ‘solidarity, complicity, and reciprocity are promoted as central features of queer friendships as a way of life’.⁸⁰ Foucault’s work only applies to friendships ‘outside of institutional relations, family, profession and obligatory camaraderie’⁸¹ and is defined by ‘the sum of everything through which [the friends] can give each other pleasure’.⁸²

In the works under review, as well as elsewhere,⁸³ friendship is often linked to an ethic of care – and this is why care, caring and interdependence were so prominent in several of the arguments we mapped. Care can, however, be employed in two directions. Under a first view, the decline of traditional social structures,⁸⁴ like marriage, increases individual vulnerability, necessitating new strategies for support.⁸⁵ Alternatively, care is framed as resistance to individualism, emphasizing interdependence and community. Despite their differences, both

⁷⁸ D Cardoso, ‘Del amor a la amistad: la política de las relaciones’ in S Cendal (ed), *(h)amor2*, (M Pérez tr, Continta Me Tienes 2015) 53–66.

⁷⁹ EJ Leib, *Friend v. Friend: The Transformation of Friendship—and What the Law Has to Do with It* (1st ed, Oxford University Press 2011) 33.

⁸⁰ Gusmano (n 42).

⁸¹ M Foucault, ‘Friendship as a Way of Life’ in P Rabinow (ed), *The Essential Works of Michel Foucault, 1954–1984: Ethics* (vol 1, Penguin 2000) 136–140.

⁸² Ibid.

⁸³ S Roseneil and S Budgeon, ‘Cultures of Intimacy and Care beyond “the Family”’: Personal Life and Social Change in the Early 21st Century’ (2004) 52 *Current Sociology* 135.

⁸⁴ U Beck and E Beck-Gernsheim, *Individualization: Institutionalized Individualism and Its Social and Political Consequences* (SAGE 2002) ch 1.

⁸⁵ B Adam, U Beck and J van Loon (eds), *The Risk Society and Beyond: Critical Issues for Social Theory* (SAGE Publications 2000).

views position care as essential for survival, particularly for children, the elderly, minorities, and the infirm. While seemingly contradictory, they both share a common assumption: that care work is survival work.

These arguments are inherently biopolitical, focusing on maintaining social well-being rather than on maximizing individual pleasure.⁸⁶ This emphasis on individual survival through interpersonal cooperation – and the push for state recognition – can be seen less as a turn to a feminist ethics of care than as an desperate attempt to counter the progressive dissolution of the welfare state brought about by the maturing of neoliberal capitalism.⁸⁷ Given neoliberalism's reliance on selective validation and exclusion along gender, class, race, sexuality and mononormativity lines, the rhetoric of 'non-conjugal relations' fits within these power dynamics ('dual extensions of partial validation and devaluation').⁸⁸

The emphasis on stability and longevity is part of a necessary line-drawing exercise. Since the state cannot regulate all interpersonal interactions at every moment and junction, it must define which forms of care warrant legal protection. It must, so to say, draw a line. The intertwining of care, friendship and survival creates an expanded utilitarian framework, balancing welfare state erosion with claims to intimate citizenship rooted in self-determination, autonomy and human dignity.⁸⁹

By aligning themselves with the narrative that contemporary statehood uses to legitimize itself, these lines of argument seek to make themselves inevitable and, in a sense, already-here. This already-here presence of not-here legislation is twofold: already-here as part of the moral order of a minimally interventionist state and already-here as part of the everyday lives of many millions of people who have developed and will continue to develop their own networks of care and support.

7.5. Conclusion

Herring summarizes a fundamental tension behind legal recognition: 'If your parent falls seriously ill, to what extent is it a choice to care for them?

⁸⁶ AF Cascais, 'Ontotecnologias do corpo e biopolítica na era da pós-humanidade e da pós-emancipação' (2024) 26 *Natureza Humana – Revista Internacional de Filosofia e Psicanálise* 125; M Foucault, *The Birth of Biopolitics* (M Senellart ed Palgrave Macmillan UK 2008); T Lemke, 'From State Biology to the Government of Life: Historical Dimensions and Contemporary Perspectives of "Biopolitics"' (2010) 10 *Journal of Classical Sociology* 421.

⁸⁷ C Hermann, 'Neoliberalism in the European Union' (2007) 79 *Studies in Political Economy* 61.

⁸⁸ M Jung, 'Theorizing Sexuality Politics of Neoliberalism: A Queer Sociological Approach' (2024) 18 *Sociology Compass* e70000 1, 5.

⁸⁹ Plummer (n 40).

It often does not feel like a choice.⁹⁰ Inasmuch as we are *obliged to choose* because contemporary biographies are forcefully ‘DIY biographies’,⁹¹ what level of constraint is acceptable before a choice becomes disconnected from autonomy? If choice is a function of power, then the recognition and protection of those who rely on non-sanctioned forms of care and support becomes even more important – as these are arguably the ones who need it most. Any change in legal recognition may well have the unintended consequence of deepening the disenfranchisement of those whose membership to the recognized group is ambiguous, questioned, or impossible. This should not be read as a word of caution *against* such legal recognition but rather as an acknowledgment that such recognition is only one step in addressing social problems, not the end goal.

As the chapter shows, what a family *can be* in a given time and space is always contingent on socio-political imaginaries of what a ‘family’ *is*, and what it should be from the perspective of the state. While the romantic, dyadic, sexually exclusive nuclear family gains support in law, the social practices of kinship do not always fall under the radar of the law.

The lack of recognition of non-conjugal unions has thus been a valuable site of inquiry for asking some of the most important questions that family law scholars grapple with. Should family law privilege form or function? Is the family an end in itself or a means to an end? Is ‘family’ ultimately something – i.e. can we approach it from a phenomenological or an ontological perspective?

The analysis illustrates that, to achieve the same intended result – the legal recognition of non-conjugal relationships – multiple rhetorical paths can be used: some authors seeing family as an end in itself; other instrumentalizing it to achieve certain objectives; some scholars privileging forms, others function, and so on. This corroborates the idea that the family should not be essentialized, renouncing the fateful question ‘What is a “family”?’ if directed towards distilling an ‘essence’. The family is ultimately (also) a place of symbolic and material struggle for existence, a place of power and resistance. The idea of the family has a potency that should not be underestimated, because it can serve to do – or prevent – great harm, and the law will always play an important role in shaping this outcome.

⁹⁰ Herring (n 62) 84.

⁹¹ Beck and Beck-Gernsheim (n 84) 15.

PART III

**Empirical Approaches
to Defining Families**

What Is a Family? A Developmental Psychology Perspective

Kate Ellis-Davies and Sarah Foley

8.1. Introduction

Winnicott declared in 1960 that '[t]here is no such thing as an infant [...] wherever one finds an infant one finds maternal care, and without maternal care, there would be no infant'.¹ Whichever discipline of family research or practice you work in, the basic tenant behind this quote is that infants are so utterly reliant on this care that we can almost not think of the existence of the infant or their development without also considering the social environment around them that provides that essential care. If we accept this principle, theoretical questions spring up around the ways in which this family unit can form. What importance does family structure have on the provision of care for children? What constitutes the best environment to ensure that a child thrives? And how does the child act as an active agent of change in his or her own individual development?

Those addressing these theoretical and applied questions of the family may agree that infants and young children need care, but little else may be considered agreed by consensus. Even the definition of what a family is, and what constitutes a family, are contentious areas of scientific theory and debate. In this chapter, we will address how the discipline of developmental psychology has approached the question of what a family is over the last century, and what this definition means for evidence-based law and practice.

¹ D Winnicott, 'The Theory of the Parent-Infant Relationship' (1960) 41 *The International Journal of Psychoanalysis* 585, 586.

Families themselves have changed notably in the last century in how they are structured, the age of transition to parenthood, paths to parenthood, the size of families, and the social norms and values that inform parenting attitudes and practices. Given the change present in families across lifespans and generations, it is apt that developmental psychology itself is primarily tasked with the study of change in humans across their lifespan. Several theories will be discussed in this chapter for how development psychology has tackled the question of what makes a family, and, moreover, what makes a functional family that is supportive of child well-being and development. These theories include attachment theory, family systems theory and the bioecological approach.

As we go through the following theories, we will consider limits of examining families as merely a collection of individuals. Instead, it is in recognizing, understanding and explaining the roles of familial relationships across family, the wider community and the sociocultural context they are developing in, that gives psychology its relevance and application for those working with families. As such, throughout the chapter, it becomes evident that no single theory perfectly captures the true complexity of family formation and development, leaving ample room for developmental psychology to continue developing and progressing.

8.2. Attachment Theory

Family formation, parenting and the parent–child relationship have been topics of academic focus for longer than psychology has been a formalized scientific discipline. However, in the early twentieth century, psychology turned its focus on the importance of the parent–child bond, how it forms in a family, and the impact of this bond on child development and well-being across the lifespan.² Bowlby, a developmental psychologist, psychiatrist and psychoanalyst, was one such person interested in these questions.³ Bowlby's interest in the parent–child relationship as the origins of a family arose from his clinical experience working with children who had suffered the loss of a parent by institutionalization (e.g. children's homes) or through the effects of the World Wars of the twentieth century. Bowlby leaned on ethological theories to build an understanding of the formation and evolution of the parent–child bond. Ethological accounts of development stress the biological drivers of behaviour and the evolutionary pressures that result in adaptive behavioural patterns emerging in parenting and human family formation.

² M Bornstein and C Tamis-LeMonda, 'Mother–Infant Interactions' in G Bremner and A Fogel (eds), *Blackwell Handbook of Infant Development* (Blackwell Publishing 2004) 269–295.

³ J Bowlby, *Attachment and Loss* (vol 1, Basic Books 1969).

8.2.1. *Ethological attachment theory*

Across many species, adults provide care, protection, shelter, and sustenance to their offspring.⁴ Bowlby's ethologically-focused attachment theory recognized the evolutionary pressures that would drive the natural selection of behaviours driving infant attachments to caregivers, ensuring proximity and access to their secure base and shelter needed for survival. Likewise, the drive that caregivers experience to be close to infants and to ensure their safety is explained in ethological attachment theory as arising from adaptiveness to evolutionary stressors. Together these forces aided the formation and development of a family. For parent–infant bonding to occur, ethological attachment theory relies on both halves of the dyad holding this drive for closeness. This closeness to the caregiver is perceived as safer for the infant. In this way, attachment theory is inherently a theory of a family that is centred on the caregiver–child dyad and on how each party interacts with one another and seeks the others out.

In Bowlby's perspective, the early attachment system could also be affected by factors external to the parent–child dyad.⁵ For example, if there was an external threat in the environment, resulting in fear or an internal state of illness or fatigue in the infant, then that would activate the attachment system and directly drive behaviours associated with using the attachment figure as a safe harbour or secure base. While Bowlby observed this drive for closeness to caregivers in a range of species, such as in birds and monkeys, ethological attachment theory sought to apply this principle to further understand human families and child development.

Where humans deviate from this common animal experience is in the biological immaturity in which neonates are born, due to having to be born before the head is too big to be birthed later in gestation.⁶ This immature state at birth ensures that human neonates are wholly reliant on the care provided by parents and remain dependent on their caregivers for an extremely prolonged period in comparison to other mammals. Bowlby recognized that this prolonged period of reliance raised the possibility that the parent–child bond could hold even more influence on child development – not only relating to survival, but also building working models for how the social world worked and how to move within it. This drawn-out period of childhood would also allow the formation of multiple attachments and the growth and change of attachments alongside the developing child.

⁴ D Gubernick, *Parental Care in Mammals* (Springer Science & Business Media 2013).

⁵ Bowlby (n 3).

⁶ B Bogin, 'Evolutionary Hypotheses for Human Childhood' (1997) 104(25) *American Journal of Physical Anthropology* 63.

In a development of attachment theory that still holds applications today, Bowlby used his clinical observations to outline the developmental trajectory of attachment formations in human parent–infant dyads.⁷ From 8–12 weeks of age, Bowlby claimed that infants become socially oriented towards their caregiver and will engage in behaviours that will maintain proximity to their caregiver. By 6–8 months of age, Bowlby stated that infants move on to showing more discrimination in how they respond to different social partners – with strangers eliciting a reduced or social response compared to those the infant is familiar with. Even at this stage of being more socially discerning, Bowlby believed that a fully formed attachment would not be identifiable until the latter part of the first year. Once this stage has arrived, infants would direct their proximity-seeking and secure base to a particular caregiver.

On leaving toddlerhood, Bowlby went on to outline further developments in the attachment bond and system, with children showing more sophisticated goal-driven partnerships with multiple figures by around the fourth year of life. During this stage of cognitive and social-emotional development, children are proposed to develop complex working models for how their relationships work with those around them. These internal working models are a significant step in development, allowing the child to use their experience to develop expectations and predictions for how they will be treated, how others will respond to their actions, and the reliability (or lack thereof) that people in their life are demonstrating in meeting key needs.

8.2.2. *Individual differences in attachment theory*

Caveats to Bowlby's initial theoretical position on the parent–child attachment included that there was insufficient detail on the process by which attachments form, the varying roles parents and child play in attachment formation, and the factors that lead to individual differences in attachment quality. These details – lacking in the original incarnation of Bowlby's attachment theory – were problematic for ensuring its application in areas relating to parenting, child development and family law. Ainsworth and Wittig followed attachment theory's tenant that the parent–child bond was central to the formation and development of the family and made major strides in beginning to build a more complex attachment theory that took account of individual differences.⁸ Specifically, they developed

⁷ J Bowlby, 'The Bowlby–Ainsworth Attachment Theory' (1979) 2(4) *Behavioral and Brain Sciences* 637.

⁸ MDS Ainsworth and BA Wittig, 'Attachment and Exploratory Behaviour of One-Year-Olds in a Strange Situation' in B Foss (ed), *Determinants of Infant Behaviour* (vol 4, Methuen 1969) 113–136.

the Strange Situation methodology for drawing out differences in how the child responded to and used the attachment figure as a secure base to explore from – or to return to in periods of uncertainty or stress.

The Strange Situation procedure was designed to first observe how a 12-month-old child uses the parent as a secure base to be able to explore a novel room and toys, before triggering the attachment system by introducing a stranger into the environment and briefly removing the parent from the room before reintroducing the parent. In Bowlby's attachment theory, at this age, the child should have a fully formed attachment to their parent and selectively use them as a 'secure base' to explore from or to approach for comfort and safe harbour from stressors (aka 'safe haven'). By triggering the attachment system, Ainsworth and Wittig were able to observe whether children were comforted by the presence of the parent, whether they engaged in approach behaviours upon reunifying with the parent, whether they used the parent to aid in recovery from the separation and return to play, or whether the child's response was to avoid or resist interaction with the parent.⁹

Three core typologies of attachment were discerned by Ainsworth and Wittig following the Strange Situation studies. Children securely attached to their mothers would typically initially use the mother as a secure base and explore the novel room and toys; following separation from the mother, the infant would show mild distress, and upon return of the mother, the infant would approach the mother, accepting comfort from the mother before returning to play (referred to as Type B).¹⁰ Children classified as insecure-avoidant (Type A) would typically show no distress at the parent leaving, and upon reunification with the mother would avoid physical contact or eye contact with their mother.¹¹ The last classification category in the original typology was that of insecure-resistant (Type C). These children typically were distraught upon the mother leaving, but upon reunification with the mother would approach her in distress only to actively resist the mother's attempts to soothe or placate them. Main and Solomon later proposed a fourth classification of disorganised attachment (Type D) where children show a lack of cohesive strategy in response to the Strange Situation Procedure, alongside the presence of atypical behaviours such as freezing, which Main and Solomon viewed as behavioural manifestations of a fear or stress response.¹² A collaborative effort by attachment researchers to bring together the first 20,000 Strange Situations revealed that the global

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² M Main and J Solomon, 'Discovery of a New, Insecure-Disorganized/Disoriented Attachment Pattern' in M Yogman and T Brazelton (eds), *Affective Development in Infancy* (Ablex Publishing 1986) 95–124.

distribution of attachment classifications was 51.6 per cent secure, 14.7 per cent avoidant, 10.2 per cent resistant and 23.5 per cent disorganized.¹³

While this advance in methodology allowed for the study of individual differences, it was not until there was an investigation of what factors may be associated with these different attachment types that the application from psychology's study of parent–infant dyad in areas of family law, policy and practice came to fruition.

8.2.3. *Factors affecting individual differences in attachment*

Again, it was Ainsworth who provided key insights that allowed for the development of attachment theory's conceptualization of the family. This conceptualization held parents to be crucial in shaping the nature of parent–child attachments.¹⁴ In a mixed methods and longitudinal analysis of 26 mother–child US-based dyads, Ainsworth and colleagues investigated the antecedents of attachment classifications.¹⁵ From these naturalistic observations, Ainsworth developed the sensitivity hypothesis, whereby a mother's ability to aptly perceive the needs of the child and appropriately respond to them in an effective, predictable and efficient manner was found to be predictive of a secure (Type B) attachment to the mother.¹⁶ Ainsworth theorised that, through an iterative process across the many daily mother–child interactions in a variety of contexts across the first months of a child's life, the child was able to build up a model of how reliable the mother would be in meeting their needs.¹⁷ This position developed into the sensitivity hypothesis, placing maternal sensitivity and responsiveness to the child as central to mother–child attachment formation, and its various related developmental outcomes.

The sensitivity hypothesis has maintained a significant research and applied focus in the field of parenting and in family and child development.¹⁸ De Wolff and Van Ijzendoorn conducted a meta-analysis of 66 studies focused

¹³ S Madigan, RM Fearon, IJ van Pasco, H Marinus, R Duschinsky, C Schuengel et al, 'The First 20,000 Strange Situation Procedures: A Meta-Analytic Review' (2023) 149(1–2) *Psychological Bulletin* 99.

¹⁴ M Ainsworth, 'The Development of Infant–Mother Attachment' in B Caldwell and H Ricciuti (eds), *Review of Child Development Research* (University of Chicago Press 1973) 1–94.

¹⁵ M Ainsworth, MC Blehar, E Waters and S Wall, *Patterns of Attachment: A Psychological Study of the Strange Situation* (Lawrence Erlbaum 1978).

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ RP Fearon and GI Roisman, 'Attachment Theory: Progress and Future Directions' (2017) 15 *Current Opinion in Psychology* 131.

on the role of maternal sensitivity and mother–child attachment.¹⁹ Across the studies of primarily mother–infant dyads, maternal sensitivity was found to play a significant role in predicting later attachment. In addition, in observational research with mother–child dyads, Schuengel et al found that maternal behaviour classed as frightening, frightened, or dissociated, was associated with the child’s attachment with the mother being classified as disorganised (Type D).²⁰ Other factors proposed to be antecedents for disorganised attachment have included maternal maltreatment and parental loss or deprivation.²¹ Thus, while maternal sensitivity was demonstrably a key factor in attachment development, it was not the sole factor at play, and attention to the diverse physical and social environment as well as to the traits of those making up a family would also need to be considered.²²

8.2.4. *Advances in attachment theory*

Bowlby and Ainsworth’s perspectives were both initially maternal-centric, focused on the impacts of maternal deprivation on children and maternal sensitivity, and, as such, effectively suggested a hierarchy of attachment relationships based on the parent’s gender. However, more modern incarnations of attachment theories’ investigations into what makes a family and into parents’ role in attachment, have demonstrated that father–child attachments have comparable developmental trajectories and impacts on children’s survival, well-being and development.²³ Further investigation of parent–child attachments has also shown that parent mental health and well-being (regardless of the parent’s gender) has a significant role to play in parenting quality.²⁴ Going back to the importance Bowlby placed on the infant in a relationship with a caregiver,

¹⁹ MS De Wolff and MH van IJzendoorn, ‘Sensitivity and Attachment: A Meta-analysis on Parental Antecedents of Infant Attachment’ (1997) 68(4) *Child Development* 571.

²⁰ C Schuengel, M van IJzendoorn and M Bakermans-Kranenburg, ‘Frightening Maternal Behaviour Linking Unresolved Loss and Disorganised Infant Attachment’ (1999) 67 *Journal of Consulting and Clinical Psychology* 54.

²¹ M van IJzendoorn, C Schuengel and M Bakermans-Kranenburg, ‘Disorganized Attachment in Early Childhood: Meta-analysis of Precursors, Concomitants, and Sequelae’ (1999) 11 *Developmental Psychopathology* 225.

²² M van IJzendoorn and A Sagi-Schwartz, ‘Cross-cultural Patterns of Attachment: Universal and Contextual Dimensions’ in J Cassidy and PR Shaver (eds), *Handbook of Attachment: Theory, Research, and Clinical Applications* (Guilford Press 2008) 880–905.

²³ M Lamb, *The Role of the Father in Child Development* (5th ed, Wiley 2010).

²⁴ B Arnott and E Meins, ‘Links among Antenatal Attachment Representations, Postnatal Mind-mindedness, and Infant Attachment Security: A Preliminary Study of Mothers and Fathers’ (2007) 71 *Bulletin of the Menninger Clinic* 132; J Condon, C Corkindale, P Boyce and E Gamble, ‘A Longitudinal Study of Father-to-infant Attachment: Antecedents and Correlates’ (2013) 31(1) *Journal of Reproductive and Infant Psychology* 15; S Golombok, ‘Families Created by Reproductive Donation: Issues and Research’ (2013) 7(1) *Child Development Perspectives* 61.

the importance of infant temperament and, crucially, its fit with the parent's personality has also been demonstrated to be important. Overlooking child characteristics, such as temperament, and goodness-of-fit in the parent-child dyad would negate the child's active role as an agent of change in their own development and familial development. It is not then merely sufficient to include the range of individuals located within a family but also to include an examination of all family members' voices and roles in familial development, as well as within and between cultural differences.

Bioecological attachment theory has further advanced the theory by examining the biological foundations and associations with attachment formation behaviours and attachment quality. The study of parental biological adaptation to parenting has again shown that parents show patterns of endocrinological preparation for parenting regardless of the parent's gender.²⁵ Specifically, fathers have been shown to experience increases in oxytocin, drops in testosterone, and increases in cortisol during the transition to becoming a father.²⁶ Furthermore, these biological changes are associated with the levels of direct caregiving that fathers spend with their infants.²⁷ While this investigation of family formation's effects on parents is relatively new in the field of developmental psychology, emerging evidence suggests that these biological adaptations to the transition to parenthood take place regardless of a parent's biological link to the expected child.²⁸ As with mothers, significant endocrinological changes that co-occur with the transition to parenthood in fathers can be associated with changes in mood, well-being, and mental health.²⁹ For both mothers and fathers, it is also the case that attachment theory has recognized that parents' mental health is a significant predictor of parenting quality, child attachment, child development and family well-being.³⁰

²⁵ LT Gettler, 'Applying Socioendocrinology to Evolutionary Models: Fatherhood and Physiology' (2014) 23(4) *Evolutionary Anthropology: Issues, News, and Reviews* 146; LT Gettler, AH Boyette and S Rosenbaum, 'Broadening Perspectives on the Evolution of Human Paternal Care and Fathers' Effects on Children' (2020) 49(1) *Annual Review of Anthropology* 141.

²⁶ R Feldman, K Braun and FA Champagne, 'The Neural Mechanisms and Consequences of Paternal Caregiving' (2019) 20(4) *Nature Reviews Neuroscience* 205.

²⁷ E Abraham, T Hendler, I Shapira-Lichter, Y Kanat-Maymon, O Zagoory-Sharon and R Feldman, 'Father's Brain Is Sensitive to Childcare Experiences' (2014) 111(27) *Proceedings of the National Academy of Sciences* 9792.

²⁸ S Carmona and O Vilarroya, 'The Transition to Parenthood: Linking Hormones, Brain, and Behavior' (2025) 172 *Psychoneuroendocrinology* 107247.

²⁹ EC Aviv, SI Cardenás, G León, YH Waizman, C Gonzales, G Flores et al, 'Prenatal Prolactin Predicts Postnatal Parenting Attitudes and Brain Structure Remodeling in First-time Fathers' (2023) 156 *Psychoneuroendocrinology* 106332.

³⁰ L Atkinson, A Paglia, J Coolbear, A Niccols, KCH Parker and S Guger, 'Attachment security: A meta-analysis of maternal mental health correlates' (2000) 20 *Clinical Psychology Review* 1019; MJ Dykas and AP Smiler, 'Fathering and Attachment' in S Molloy, P Azzam and A Isacco (eds), *Handbook of the Psychology of Fatherhood* (Springer 2022) 87–110.

8.2.5. Attachment theory and its applications for children and the family

The emergence of the sensitivity hypothesis came with widespread investigation of what maternal sensitivity would predict for family well-being and child development in the short and long term. These included applications of attachment theory in family law such as in custody cases,³¹ where mothers were viewed as having primacy in the hierarchy of impactful parenting roles for children. This perceived primacy in caregiving had direct relevance for custody (also known as child arrangement) cases, where family research was applied to consider the right of the child not to be separated from family,³² and how this is impacted by child separations at international borders in migrant and asylum cases.³³ In the educational arena, attachment research and theory were applied in consideration of the impacts of childcare on child attachment and the detrimental effect of corporal punishment in parenting practices on child health, well-being and development.³⁴ Health applications of early attachment theory included the effects of separating children from parents during childhood hospitalizations, as well as research on the role of parenting quality on child attachment – leading to attributing blame for adults' mental health concerns, such as schizophrenia,³⁵ or that the coldness of mothers contributed to autism.³⁶ While this 'refrigerator mother theory' has been debunked, it had significant negative impacts on families.

In a recent position paper by Forslund et al signed by 70 attachment scholars, the authors outlined the current applications of attachment theory and research in family law – with the benefits and pitfalls addressed.³⁷ These benefits include viewing the child as central and having rights to care that ensures a reliable and consistent secure base or safe harbour for them to develop within; that attachment theory may be associated with parent sensitivity, but

³¹ J McIntosh, 'Guest Editor's Introduction to Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understandings for Family Law' (2011) 49(3) *Family Court Review* 418.

³² United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 9.

³³ K Jones-Mason, KY Behrens and NI Gribneau Bahm, 'The Psychobiological Consequences of Child Separation at the Border: Lessons from Research on Attachment and Emotion Regulation' (2021) 23(1) *Attachment & Human Development* 1.

³⁴ ET Gershoff and A Grogan-Kaylor, 'Spanking and Child Outcomes: Old Controversies and New Meta-analyses' (2016) 30(4) *Journal of Family Psychology* 453.

³⁵ S Arieti, *Interpretation of Schizophrenia* (Robert Brunner 1955).

³⁶ B Bettelheim, *Empty Fortress* (Simon & Schuster 1967).

³⁷ T Forslund, P Granqvist, MH van Ijzendoorn, A Sagi-Schwartz, D Glaser, M Steele et al, 'Attachment Goes to Court: Child Protection and Custody Issues' (2022) 24 *Attachment & Human Development* 1.

they are two distinct constructs; and that children form multiple attachments, and these networks of relationships to people in their lives are an asset to the child, with gender not determining the timeline, predictors, or importance of any given attachment relationship.³⁸ Moreover, research suggests that parent behaviour towards the child (in providing a safe harbour) as well as towards the co-parent, is best observed over multiple interactions than singular spot assessment of a Strange Situation Procedure.³⁹ While attachment research can inform the need for contact with parents providing good enough care, it does not offer specific evidence regarding the need (or lack thereof) of distinct types of contact (for example, overnight visitations).⁴⁰

While attachment theory has evolved since its earliest conceptions, central to the theory is still the focus on the iterative interactions between caregiver and child as central to the formation of the earliest relationships that shape a child's well-being and development across a range of domains. Challenges to attachment theory have been variously critiqued: the continued over-reliance on research with mothers (typically white middle-class) over others, including fathers, non-biological parents, ethnic minority and majority world cultures, and LGBTQ+ families; the sometimes-myopic focus on the dyad; and the pathologizing of variation in attachment types.⁴¹ Moreover, for a developmental theory, relatively little theoretical focus has been given to how families change over time – in how they are structured, how they function, and how attachments we hold may adapt and change over an individual's lifespan.

In answering the question of what is a family, attachment theory is inherently a theory of a family that is centred on the needs of the child and those responding to those needs. These caregiver–child relationships are considered to be central to building a sense of self and assumed to be foundational for later peer, romantic and familial relationships.

8.3. Going beyond the Dyad: Family Systems Theory

Over the past century, societal shifts – including the 1970s' sexual revolution, increasing divorce rates, and changes in women's employment – have led to changes in the structures of families, as well as the roles of parents within families. As such, there is a need to reconsider the conceptualization of family processes and forms within developmental psychology. Attachment theory,

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ RA Thompson, JA Simpson and LJ Berlin, 'Taking Perspective on Attachment Theory and Research: Nine Fundamental Questions' (2022) 24(5) *Attachment & Human Development* 543.

with its overwhelming focus on the parent–child dyad (mainly mother–child) as the central component of family, was not adequately describing the evolving family unit, nor its influence on children’s adjustment. This called into question the adequacy of attachment theory in describing what the family is, the roles of those within it, and how this research should be informing law and policy.⁴²

8.3.1. *Family systems theory: key principles*

Family therapists saw that working with individuals led to changes for other members of a family.⁴³ These observations, alongside those of systems thinkers in biology,⁴⁴ encouraged developmental psychologists to see the value of broadening the notion of the family to understand individual adjustment, experiences and trajectories. The family was seen as a system, given that it adhered to several key organizing principles of other living systems, for example the human body, the biosphere, or the animal kingdom’s food chain.⁴⁵ The first of these principles is that a family is greater than the sum of its individual parts. Individuals are necessarily interdependent, in dynamic relationships with other family members and engage with one another in more complex or broader systems beyond the parent–child dyad. Studying a child in isolation or focusing on the mother–child relationship does not allow us to infer the functioning of the wider family unit, nor does it provide a complete picture of individual adjustment or the quality of specific relationships. This leads to the second principle: families, like other ecosystems in the natural world, have hierarchies. Everyone is embedded within a range of subsystems, and these directly and indirectly influence one another. For example, a parent may be in a relationship with their child (i.e. father–child), partner (i.e. marital) and a triadic system that incorporates their child too (i.e. co-parenting). This latter subsystem is known as the executive system, as parents are seen to regulate interactions within the family.

Finally, like other living systems, families are characterized by adaptive self-stabilization and self-organization. That is, family patterns are stable, with specific norms, rules and strategies that govern interactions both

⁴² F Rothbaum, K Rosen, T Ujiie and N Uchida, ‘Family Systems Theory, Attachment Theory, and Culture’ (2002) 41(3) *Family Process* 328.

⁴³ S Minuchin, *Families and Family Therapy* (Harvard University Press 1974).

⁴⁴ LV Bertalanffy, ‘General Systems Theory as Integrating Factor in Contemporary Science’ (1968) 2 *Akten des XIV. Internationalen Kongresses für Philosophie* 335.

⁴⁵ M Cox and B Paley, ‘Families as Systems’ (1997) 48 *Annual Review of Psychology* 243.

within and across different subsystems, becoming well-established and reinforced. However, an adaptive system evolves over time and in response to environmental demand. Challenges to existing roles and patterns of interaction are most likely to occur during times of transition when subsystems are put under pressure (e.g. arrival of a sibling, divorce). During transitions and across the family lifespan, changes can arise at any level of the family system, and fluctuation at one level can stimulate further change in individuals, dyadic and triadic relationships, and the whole family system. As such, family systems change both in their structure and processes across their lifespan.⁴⁶

8.3.2. *Subsystems within the family*

Systems theories therefore assume that family structure and family processes interact to influence children's development.⁴⁷ Take, for example, the couple relationship. At one point or another, all couples will experience conflict; however, it does not necessarily have a negative impact on children.⁴⁸ Furthermore, the pathway from conflict to children's adjustment may be direct or indirect. Destructive conflict, characterized by hostility, criticism, defensiveness, or stonewalling may be distressing for a child to witness, be associated with feelings of guilt or blame, and provide maladaptive models for conflict resolution with peers.⁴⁹ In contrast, constructive conflict – where modest disagreements take place but are resolved, for example, via compromise – may help model positive resolution strategies, as well as foster understanding of competing viewpoints, and help develop emotional security within the family unit.⁵⁰

Alternatively, marital problems may lead to problems for the child due to its effects on parenting, parent–child relationships or family functioning. Specific hypotheses following from family systems include spillover compensation and compartmentalization.⁵¹ Spillover refers to the idea that the dominant emotions and behaviours (either positive or negative) of one

⁴⁶ This is discussed from a trans perspective by Jenkins, [Chapter 4](#), this volume.

⁴⁷ RD Parke, 'Development in the Family' (2004) 55(1) *Annual Review of Psychology* 365.

⁴⁸ E Cummings and P Davies, 'Effects of Marital Conflict on Children: Recent Advances and Emerging Themes in Process-oriented Research' (2002) 43(1) *Journal of Child Psychology and Psychiatry* 31.

⁴⁹ Ibid.

⁵⁰ K McCoy, EM Cummings and PT Davies, 'Constructive and Destructive Marital Conflict, Emotional Security and Children's Prosocial Behavior' (2009) 50(3) *Journal of Child Psychology and Psychiatry* 270.

⁵¹ A Krishnakumar and C Buehler, 'Interparental Conflict and Parenting Behaviors: A Meta-Analytic Review' (2000) 49(1) *Family Relations* 25.

relationship may be carried over into another relationship: for example, negativity and hostility between a couple being reflected in harsh parent–child interactions. In contrast, compensation refers to one relationship making up for shortfalls in another: for example, a parent experiencing low satisfaction and high conflict in the couple relationship may dedicate more time and effort into their relationship with their child. On the other hand, compartmentalization refers to a lack of transfer between subsystems, such that any negativity in the couple relationship does not impact, for better or worse, individual parenting.

Evidence from meta-analytic and genetically sensitive study designs suggests that spillover is more commonly observed than compensation and is particularly likely to increase parental harsh discipline and reduce parental acceptance.⁵² Some researchers have proposed a fathering vulnerability hypothesis that posits that father–child relationships are particularly at risk from problems within the couple relationship.⁵³ This heightened susceptibility is seen as the result of men – on average, and compared with women – having less defined parenting roles and different coping strategies in the face of relational distress (e.g. withdrawal, substance abuse). A family systems perspective underscores how outdated the adage of staying together for the sake of the children is, but also the dynamic interplay of family processes and structure. For example, conflict may lead to divorce, which can change some family processes but also further changes in structure with the introduction of new stepfamily members.

8.3.3. *Executive subsystem: co-parenting*

Co-parenting refers to the collaboration in child-rearing of two parental figures who share responsibilities for at least one child and occurs regardless of whether the parenting team are in a romantic relationship or not.⁵⁴ Co-parenting units differ in their levels of (1) cooperation – that is, the parents' ability to be supportive and respectful in their communications and behaviour

⁵² Ibid; O Erel and B Burman, 'Interrelatedness of Marital Relations and Parent–Child Relations: A Meta-Analytic Review' (1995) 118(1) *Psychological Bulletin* 108; G Harold, KK Elam, G Lewis, F Rice and A Thapar, 'Interparental Conflict, Parent Psychopathology, Hostile Parenting, and Child Antisocial Behavior: Examining the Role of Maternal versus Paternal Influences Using a Novel Genetically Sensitive Research Design' (2012) 24(4) *Development and Psychopathology* 1283.

⁵³ E Cummings, C Merrilees and M George, 'Fathers, Marriages, and Families: Revisiting and Updating the Framework for Fathering in Family Context' in M Lamb (ed), *The Role of the Father in Child Development* (5th ed, John Wiley & Sons 2010) 154–176.

⁵⁴ M Feinberg, 'The Internal Structure and Ecological Context of Coparenting: A Framework for Research and Intervention' (2003) 3 *Parenting: Science and Practice* 95.

towards each other in relation to the child; (2) child-rearing agreement – that is, the extent to which parents hold similar views on child-related topics; (3) conflict and undermining behaviours; and (4) triangulation – whereby a parent forms an alliance with a child.⁵⁵

Meta-analytic work bringing together the results of 59 independent studies – composed of 10,824 families with children up to 16 years old (87 per cent cohabiting) – has demonstrated modest, but nevertheless significant, impacts of each of these co-parenting dimensions on children's mental health, behaviour problems, social functioning and on parent–child attachment.⁵⁶ A related but distinct concept is parental gatekeeping, referring to behaviours that are seen as gate 'closing' (for example, rolling one's eyes in response to a parenting behaviour) or 'opening' (for example, encouragement).⁵⁷ Studies with dual-earner cohabiting couples have found that maternal gate-opening and closing behaviours are respectively associated with higher and lower levels of fathers' engagement in childcare⁵⁸ and the quality of father–child interactions.⁵⁹ These findings highlight the importance of roles and boundaries within and between subsystems and how disturbances, in the form of role reversal, distortion, or control, can be problematic.

8.3.4. *Family systems theory: the family unit*

Researchers and clinicians have also examined levels of cohesion, flexibility and communication within the family system.⁶⁰ Cohesion refers to the emotional bonding family members have towards one another and is measured by assessing how family members balance their separateness versus togetherness – for example, in relation to decision-making, boundaries, coalitions, time and interests. Flexibility is understood as changes in leadership, role relationships and relationship rules and is measured by examining the stability of dimensions such as negotiation styles and control.

⁵⁵ Ibid.

⁵⁶ D Teubert and M Pinquart, 'The Association between Coparenting and Child Adjustment: A Meta-analysis' (2010) 10 *Parenting: Science and Practice* 286.

⁵⁷ L Altenburger, 'Similarities and Differences between Coparenting and Parental Gatekeeping: Implications for Father Involvement Research' (2023) 29(3) *Journal of Family Studies* 1403.

⁵⁸ SJ Schoppe-Sullivan, GL Brown, EA Cannon, SC Mangelsdorf and MS Sokolowski, 'Maternal Gatekeeping, Coparenting Quality, and Fathering Behavior in Families with Infants' (2008) 22(3) *Journal of Family Psychology* 389.

⁵⁹ L Altenburger, SJ Schoppe-Sullivan and CK Dush, 'Associations between Maternal Gatekeeping and Fathers' Parenting Quality' (2018) 27(8) *Journal of Child and Family Studies* 2678.

⁶⁰ D Olson, 'Circumplex Model of Marital and Family Systems' (2000) 22(2) *Journal of Family Therapy* 144; D Olson, L Waldvogel and M Schlieff, 'Circumplex Model of Marital and Family Systems: An Update' (2019) 11(2) *Journal of Family Theory & Review* 199.

Finally, during group interaction, communication differs in terms of listening, disclosure, coherence, clarity and respect. Families exhibiting modest levels of flexibility and cohesion are characterized as balanced, while levels of flexibility and cohesion at both extremes (i.e. chaotic to rigid; disengaged or enmeshed) are seen as unbalanced and as more likely to demonstrate poor communication and experience dysfunction in the long-term.⁶¹

8.3.5. *Family systems theory: divorce and step-families*

Returning to divorce, this change in family structure is often associated with reduced child well-being,⁶² but it is largely explained by interparental conflict, increased negative parenting (hostility, intrusion, conflict), lower levels of parental support and role diffusion, as well as financial changes and parents' mental health.⁶³ Observational research has demonstrated the beneficial effects of co-operative versus conflictual or undermining co-parenting on children's emotional and behavioural adjustment.⁶⁴ Interventions supporting the co-parenting relationship appear successful in fostering optimal outcomes at multiple levels, including child and parent well-being, the parent–child relationship and co-parenting quality.⁶⁵ Research which captures dimensions at the level of the individual, dyad and family demonstrates the value of a family systems approach to understanding individual adjustment.⁶⁶

Conceiving of a family as a system that evolves – contracting or growing over time and in response to events – enables researchers to be responsive to capture and interpret individual adjustment and experiences within a very common family form – step- or blended families. Most research examining relationships within blended families has focused on the step-parent–step-child relationship – for example, step-parent relationship quality is associated with the child's psychological, behavioural, social, academic and physical

⁶¹ Olson, Waldvogel and Schlieff (ibid).

⁶² E Lansford, 'Parental Divorce and Children's Adjustment' (2009) 4(2) *Perspectives on Psychological Science* 140.

⁶³ R van Dijk, IE van der Valk, M Deković and S Branje, 'A Meta-Analysis on Interparental Conflict, Parenting, and Child Adjustment in Divorced Families: Examining Mediation Using Meta-analytic Structural Equation Models' (2020) 79 *Clinical Psychology Review* 101861.

⁶⁴ D Lamela, B Figueiredo, A Bastos and M Feinberg, 'Typologies of Post-divorce Coparenting and Parental Well-Being, Parenting Quality and Children's Psychological Adjustment' (2016) 47 *Child Psychiatry and Human Development* 716.

⁶⁵ C Nunes, Y de Roten, N El Ghaziri, N Favez and J Darwiche, 'Co-parenting Programs: A Systematic Review and Meta-analysis' (2021) 70(3) *Family Relations* 759.

⁶⁶ See e.g. JL Coe, PT Davies, RF Hentges and ML Sturge-Apple, 'Understanding the Nature of Associations between Family Instability, Unsupportive Parenting, and Children's Externalizing Symptoms' (2020) 32(1) *Development and Psychopathology* 257.

well-being and problems.⁶⁷ Interestingly, the associations between step-parent and -child relationship and child outcomes are comparable to those between biological mothers' and fathers' parenting and child outcomes within cohabitating households.

Consistent with family systems theory, practices that are seen to promote effective step-parenting and positive child outcomes focus on supporting interactions within and between new and existing family subsystems.⁶⁸ Positive practices within step-families include (1) maintaining close parent-child bonds via regular contact, involvement and protected one-on-one time; (2) establishing appropriate parent-child communication boundaries, such as child-focused dialogue, avoiding discussing the reasons behind the relationship breakdown, and not speaking negatively about the child's other parent; (3) exercising parental control with age-appropriate monitoring, and consistency with family rules and discipline; (4) supporting the development of the step-parent-step-child relationship, such as by reducing gate-closing and engaging in gate-opening behaviours; and (5) facilitating step-family cohesion, for example by engaging in shared activities and family rituals from the mundane (e.g. evening meals, bedtime routines) to the celebratory (e.g. birthdays, festivities) and rites of passage (e.g. graduation, weddings).⁶⁹ Thus, even though step-family members may in some cases lack legal recognition, authority and responsibilities, it is apparent that these 'invisible' family members exert an influence on individual and familial well-being.

Addressing the question of what makes a family, family systems theorists found the focus on the parent-child dyad lacking, prompting consideration of a broader range of actors and relationships. Instead, acknowledging the complexity within the family unit allows for greater fluctuation and disruption of family patterns, leading to varied consequences for individual experiences and outcomes.

8.4. Situating the Family in Wider Systems: The Bioecological Model

While family systems theory has been a valuable development in understanding family dynamics and relationships, it nevertheless took the nuclear family as its starting point and therefore many of the assumptions that accompany this: for example those around family structure, formation, and roles. The

⁶⁷ TM Jensen, 'Stepparent-Child Relationships and Child Outcomes: A Systematic Review and Meta-Analysis' (2022) 28(4) *Journal of Family Nursing* 321.

⁶⁸ C Sanner, L Ganong, M Coleman and S Berkley, 'Effective Parenting in Stepfamilies: Empirical Evidence of What Works' (2022) 71(3) *Family Relations* 884.

⁶⁹ Ibid.

advent of assisted reproductive technologies and continued societal changes highlighted the futility of considering the family in a social vacuum. Unlike family systems theory, the bioecological model – a prominent ecological theory used across the social and developmental sciences – embeds families in wider social systems and advocates studying individuals in the environments where they actually live.⁷⁰ The family is understood to be an ever-changing system of individuals with their own biopsychosocial characteristics, that are both influenced by and influence wider society. Adopting this framework has enabled developmental psychologists interested in the family to address questions of biological relatedness, paths to parenting and how this relates to parenting rights and access. Answering these questions has clear real-world applications and is consistent with Bronfenbrenner's contention that developmental science should inform policy and practice.⁷¹

8.4.1. *Bioecological model: key principles*

Mirroring the changing ways in which people conceptualize and 'do' family, the bioecological model is an evolving theoretical system.⁷² At its core is the idea that development reflects both continuity and change in the biopsychological characteristics of individuals and groups, and that this occurs not only across the lifespan of the individual but also in historical time. The conceptual framework foregrounds four properties: process, person, context and time. Process refers to a range of interactions between individuals and their environments, noting that some are proximal (primary mechanisms that impact the individual over time, such as parent–child interactions) and others are distal (factors that may indirectly influence the individual by acting on or changing closer systems). Importantly, the extent to which processes impact development is influenced by the other three properties: for example, the impact of hostile parenting on children's mental health will vary depending on the characteristics of the child (person), the immediate and wider social and environmental contexts (context) and the time period (time). Proximal processes, with individuals in one's immediate environment, are hypothesised to be significant drivers of development.⁷³ Thus, from a bioecological model perspective, the assertion about what

⁷⁰ U Bronfenbrenner, *Making Human Beings Human: Bioecological Perspectives on Human Development* (Sage Publications Ltd. 2005).

⁷¹ Ibid.

⁷² Ibid; U Bronfenbrenner and P Morris (eds), *The Bioecological Model of Human Development* (6th ed, vol I, Wiley 2007); U Bronfenbrenner, 'Ecology of the Family as a Context for Human Development: Research Perspectives' (1986) 22 *Developmental Psychology* 723.

⁷³ Bronfenbrenner and Morris (ibid).

makes a family is clear: family processes matter more than family structure for optimal developmental outcomes and experiences.

The ‘bio’ component of the bioecological model highlights that human beings are evolved biological systems, and biologically based characteristics (for example, genes, hormones, brain structure and functioning) impact development – though this is not a given, as biological dispositions may only give rise to behaviours in certain environments. Person characteristics (such as dispositions and resources) are present for both the individual at the centre of the model but also for those who interact with the individual from different systems in the environmental context.

This context is conceptualised to reflect a set of five nested systems: micro-, meso-, exo-, macro- and chronosystems.⁷⁴ A *microsystem* is a setting where the target individual plays a direct role and has direct experiences and social interactions.⁷⁵ This is the subsystem where we find the family. A child has a distinct role in the family (for example, first daughter), they have family experiences (for example, holidays) and social interactions with others (for example, playing with their younger sibling). The *mesosystem* is understood to comprise the relationships between two or more of the target individual’s settings (that is, two or more microsystems): for example, a parent discussing their child’s progress at school during a parent–teacher meeting.⁷⁶ The *exosystems* are settings that the child may not directly experience (such as a parent’s work setting) but still may impact them through the effects working conditions have on their parent’s well-being or stress, for example.⁷⁷

Macrosystems refer to wider cultural influences or ideologies that trickle down to impact the target individual, or legal and economic structures that impact the other subsystems:⁷⁸ for example, revisions to the Human Fertilisation and Embryology Act in 2008 to consider children’s need for ‘supportive parenting’ rather than the ‘need for a father’ influenced family formation and parental responsibility via access to fertility treatment and legal recognition of parent(s). The final system is the *chronosystem*, which reflects changes in the person or the environment over time. These changes over time may affect the other systems within the ecological system.⁷⁹ For

⁷⁴ U Bronfenbrenner, *The Ecology of Human Development* (Harvard University Press 1979); U Bronfenbrenner, ‘Ecology of the Family as a Context for Human Development. Research Perspectives’ (1986) 22 *Developmental Psychology* 723.

⁷⁵ Bronfenbrenner, *The Ecology of Human Development* (ibid.).

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid; U Bronfenbrenner, ‘Recent Advances in Research on the Ecology of Human Development’ in RK Silbereisen, K Eyferth, and G Rudinger (eds), *Development as Action in Context: Problem Behavior and Normal Youth Develop* (Springer-Verlag 1986) 287–309.

example, the transition to parenthood is impacted by changes in statutory and workplace policies pertaining to parental leave, which have changed dramatically over the last 50 years.⁸⁰ However, at an individual level, the specific policies outlined in a contract may be subject to change by the employer. Put simply, this model states that a family cannot be understood in isolation but instead should be understood as a collection of individuals, each bringing their own characteristics and histories into interactions with others, and that these interactions and familial relationships shape and are shaped by the direct and wider environments people find themselves in at particular moments in time.

8.5. New Family Forms

Timing matters for family. New family forms refer to families that were not visible or could not exist in the past due to prevailing societal attitudes or lack of assisted reproductive technologies. These differ from ‘non-traditional’ family structures such as blended families or single parenthood following from couple relationship breakdown. Examples of new families include LGBTQIA+ parent families, intentional single-parent families, and parents who used donor conception (sperm, egg, or embryo donation) and surrogacy. Including these diverse family types in family research and theories has challenged and deepened the conceptualization of what makes a family.⁸¹

Historical epoch shapes our experiences and expectations, but so does one individual’s stage in the lifespan. A gay man born in 1950 may never have anticipated that parenthood was an option for his family life, whereas in the UK in 2025 there are multiple routes to fatherhood, including in a partnership, elective co-parenting, or as a solo parent via adoption, fostering, surrogacy and/or gamete donation, which involve different levels of legal recognition. Changes over time also impact family formation and structure for other members of their microsystem: for example, assumptions that ‘coming out’ would inevitably close the path to grandparenthood. Through its recognition of the chronosystem, the bioecological model intentionally builds in a future definition of family that is yet unknown.

New family forms provide a test of gendered assumptions and decouple the caregiver role from gender. In addition, they provide a means to test the relative importance of genetic and gestational links. Research questions in psychology around new family forms often reflect key societal concerns, highlighting again how developmental psychology is often reactive to families’

⁸⁰ For further on this from a Swedish perspective, see Moradi, [Chapter 12](#), this volume.

⁸¹ S Imrie and S Golombok, ‘Impact of New Family Forms on Parenting and Child Development’ (2020) 2 *Annual Review of Developmental Psychology* 295.

lived experience. For example, research with families with same-sex parents or intentional single parents has addressed the impact of the lack of a mother or a father within the nuclear family unit, as well as the impact of having primary caregiving fathers.⁸² Multi-method, longitudinal research following gay father, lesbian mother, and heterosexual parent adoptive families,⁸³ as well as that following donor-conceived children with a single-mother versus partnered heterosexual couples,⁸⁴ has demonstrated no differences by family type in parent and child adjustment or parent-child relationship quality. Crucially, across all families, parenting quality (that is, proximal process) and parental mental health predicted child adjustment. Where differences emerge, they are often due to context, for example legal barriers, stigma and discrimination have a deleterious effect on children's adjustment.⁸⁵ As a testament again to the drivers of development, good parent-child relationship quality has been demonstrated to buffer against the negative impact of the stigma.⁸⁶

8.5.1. Genetic and gestational relatedness and disclosure decisions

The use of assisted reproductive technologies to have children addresses the importance of the 'bio' in the bioecological model. In two-parent families where parents use a sperm or egg donor, one parent will lack a genetic relationship with the child, but the birthing mother will nevertheless have a gestational relationship. Many parents who pursue surrogacy will use their own gametes and have a genetic but not a gestational relationship with their child. Taking a bioecological perspective allows for testing whether a person's characteristics (that is, genetic relatedness) impact the proximal processes (that is, parenting) in ways that compromise children's developmental outcomes. This test directly addresses the prevailing assumption regarding the negative impact of third party-assisted reproductive technologies on family life and adjustment.

⁸² C Jones, S Foley and S Golombok, 'Parenting and Child Adjustment in Families with Primary Caregiver Fathers' (2022) 36 *Journal of Family Psychology* 406.

⁸³ AL McConnachie, N Ayed, S Foley, MC Lamb, V Jadv, F Tasker et al, 'Adoptive Gay Father Families: A Longitudinal Study of Children's Adjustment at Early Adolescence' (2021) 92(1) *Child Development* 425.

⁸⁴ S Golombok, S Zadeh, T Freeman, J Lysons and S Foley, 'Single Mothers by Choice: Parenting and Child Adjustment in Middle Childhood' (2020) 35 *Journal of Family Psychology* 192.

⁸⁵ RH Farr and CP Vázquez, 'Stigma Experiences, Mental Health, Perceived Parenting Competence, and Parent-Child Relationships among Lesbian, Gay, and Heterosexual Adoptive Parents in the United States' (2020) 11 *Frontiers in Psychology* 445.

⁸⁶ H Bos and N Gartrell, 'Adolescents of the US National Longitudinal Lesbian Family Study: Can Family Characteristics Counteract the Negative Effects of Stigmatization?' (2010) 49(4) *Family Process* 559.

To this end, a comprehensive seven wave study has followed 117 British families who used assisted reproduction (surrogacy, egg donation, donor insemination) and an unassisted conception comparison group, from infancy until young adulthood.⁸⁷ The researchers found no family type differences in self- or parent-reported psychological difficulties or flourishing at age 20, or any differences in researcher-rated parenting quality.⁸⁸ Regardless of family type, higher levels of negative parenting at age 14 predicted adjustment difficulties at age 20.⁸⁹

The use of a donor also raises questions about the impact of disclosing (or not) this information to one's child. In the sample just described, parents were more likely to disclose if they used surrogacy (100 per cent) and egg donation (88 per cent) but were less likely if they used donor insemination (42 per cent).⁹⁰ The nature of when and what can be disclosed will vary too, with the latter also influenced by differences in legislation around third party-assisted reproductive technologies and donor anonymity. Returning to the previous 20-year longitudinal study, where the parents used anonymous donors, findings showed that among those who disclosed, parents who did so before their child turned 7 had higher levels of well-being and engaged in less negative parenting when their child was 20 years old, compared to those who disclosed after age 7.⁹¹ On the other hand, young people who were told about their conception after age 7 reported perceiving higher levels of parental rejection at 20 years old than those who were informed earlier.⁹² Taken together, it appears that proximal processes (parenting) rather than genetic or gestational connections matter more for children when it comes to their family life.

The preceding study reflects a tendency within developmental psychology (which is also pervasive in wider society and the law) to use the 'traditional' family as the basis for all comparison: that is, the 1950s' family model, consisting of a cohabiting heterosexual couple with genetically related children conceived unassisted by technology, is often used as a 'norm' from which others are seen to deviate. Having said that, research designs have evolved. For example, a recent British study recruited families who conceived using identity-release egg donation, and compared child, parent and family functioning with families who conceived using their own gametes

⁸⁷ S Golombok, C Jones, P Hall, S Foley, S Imrie and V Jadva, 'A Longitudinal Study of Families Formed through Third-Party Assisted Reproduction: Mother-Child Relationships and Child Adjustment from Infancy to Adulthood' (2023) 59(6) *Developmental Psychology* 1059.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

but used in vitro fertilization, thus seeking to control for the experience of fertility treatment.⁹³ Subtle differences emerged during infancy, such that mothers reported lower levels of social support and fathers reported poorer psychological well-being in the egg donation scenario compared with IVF families,⁹⁴ and some mothers struggled with nongenetic motherhood.⁹⁵ At the transition to school, children in egg donation families showed higher levels of acting out behaviour compared with IVF-created children (as rated by mothers, fathers and teachers). However, low levels of social support, increasing levels of parenting stress, parental criticism and poor couple relationship quality predicted child adjustment difficulties across all families.⁹⁶ As pathways to parenthood continue to diversify, researchers will need to keep pace and evolve their study designs to understand relationships within all new family forms.

8.5.2. *Diversity within family research*

Families are not static and tied to one place. International surrogacy highlights the importance of considering changes in time and context for families. Crossing borders to pursue surrogacy means individuals must consider and cope with different legal frameworks (i.e. different macrosystems), which are influenced by other events in the chronosystem, for example as seen recently during the COVID-19 pandemic and war in Ukraine.⁹⁷ The increasing mobility of families, along with the fact that they are no longer tied to one place geographically, is changing the way families are formed and perceived. However, despite the bioecological model acknowledging diversity both within and between cultures, most developmental research, including studies on new family forms, typically involves work with ‘WEIRD’ samples, that is Western, Educated, Industrialised, Rich and Democratic nations.⁹⁸ The imbalance of research with families in majority world countries⁹⁹ and the

⁹³ S Imrie, V Jadva, S Fishel and S Golombok, ‘Families Created by Egg Donation: Parent–Child Relationship Quality in Infancy’ (2019) 90(4) *Child Development* 133.

⁹⁴ Ibid.

⁹⁵ S Imrie, V Jadva and S Golombok, ‘“Making the Child Mine”: Mothers’ Thoughts and Feelings about the Mother–Infant Relationship in Egg Donation Families’ (2020) 34 *Journal of Family Psychology* 469.

⁹⁶ S Imrie, J Lysons, S Foley, V Jadva, K Shaw, J Grimm et al, ‘A Longitudinal Study of Families Created Using Egg Donation: Family Functioning at Age 5’ (2023) 37(8) *Journal of Family Psychology* 1253.

⁹⁷ S Foley and K Ellis-Davies, ‘Parental Well-being’ in AE Goldberg (ed), *The Sage Encyclopedia of LGBTQ+ Studies* (2nd ed, Sage 2024).

⁹⁸ J Henrich, S Heine and A Norenzayan, ‘Most People Are Not WEIRD’ (2010) 466 *Nature* 29.

⁹⁹ S Alam, ‘Majority World: Challenging the West’s Rhetoric of Democracy’ (2008) 34(1) *Amerasia Journal* 88.

narrow evidence base within family psychology¹⁰⁰ serve to undermine the presumed universality of theories and definitions of the family.

Research with LGBTQIA+ parent-headed families has overwhelmingly focused on the experiences of individuals within the LG group, leaving trans and non-binary (TNB) and bisexual parents under-examined. The parenthood of TNB individuals challenges gendered norms of parenting,¹⁰¹ including who can be a mother or father, whether either is essential for a child's well-being and development, and whether other parenting identities can exist.¹⁰² The reality of family life for TNB parents is one of negotiating and reimagining these norms within their legal context and differing levels of transphobic discourse. Echoing problematic ideas that led to research exploring lesbian mother and gay father families, there is an assumption that growing up with trans parents will have a negative impact on children's adjustment, for example due to experiences within (parent conflict, timing of 'coming out') and outside the family home (stigma). Despite some children reporting additional challenges, such as encountering stigma at school or in the streets,¹⁰³ work with small samples suggests that the psychological adjustment of children with TNB parents is in line with population norms and that children enjoy good relationships with their parents.¹⁰⁴

Additional research highlights strengths and agency within families that are often neglected in other studies. For example, bisexual parents report feeling able to create inclusive environments for their children to explore their own identities.¹⁰⁵ Similarly, non-biological parents in LGBT families in the United States reported taking legal actions (e.g. second parent adoption, wills), symbolic actions (e.g. parallel naming, shared last name) and engaging in equal parenting to counter their experiences of invalidation within their microsystems, for example being ignored during health care appointments or

¹⁰⁰ JJ Arnett, 'The Neglected 95%: Why American Psychology Needs to Become Less American' (2008) 63(7) *American Psychologist* 602.

¹⁰¹ S Bower-Brown, 'Beyond Mum and Dad: Gendered Assumptions about Parenting and the Experiences of Trans and/or Non-binary Parents in the UK' (2022) 18 *LGBTQ+ Family: An Interdisciplinary Journal* 223.

¹⁰² See Brown, Chapter 3, this volume.

¹⁰³ S Zadeh, S Imrie and S Golombok, 'Stories of Sameness and Difference: The Views and Experiences of Children and Adolescents with a Trans* Parent' (2021) 17 *Journal of GLBT Family Studies* 1.

¹⁰⁴ S Imrie, S Zadeh, K Wylie and S Golombok et al, 'Children with Trans Parents: Parent-child Relationship Quality and Psychological Well-being' (2021) 21(3) *Parenting: Science and Practice* 185; M Foucault, *The Birth of Biopolitics* (M Senellart, F Ewald and A Fontana eds Palgrave Macmillan UK 2008).

¹⁰⁵ LE Ross and C Dobinson, 'Where Is the "B" in LGBT Parenting? A Call for Research on Bisexual Parenting' in AE Goldberg and KR Allen (eds), *LGBT-parent Families: Innovations in Research and Implications for Practice* (Springer 2012) 87–103.

at nursery pickups.¹⁰⁶ Thus the process of *doing* family involves transactions between individuals, people and places within their immediate environment (e.g. avoiding specific places) and wider society.

The bioecological model therefore tackles the question of what makes a family by considering the interactions between individuals and their environments, and uniquely integrates both the lifespan of individuals and their historical epoch. Time is therefore crucial in defining a family, as it shapes the norms and values that influence the infrastructures and institutions impacting family formation and functioning.

8.6. Conclusion

While all three theoretical perspectives examined in this chapter – attachment theory, family systems theory, and the bioecological model – have strengths and disadvantages, they remain important as they continue to shed light on what the family is, its various structures, and the way families influence children’s developmental outcomes and experiences. For these psychological perspectives to continue to be relevant to real-world applications, they will need to address some of the perennial challenges facing any theory that aims to accurately describe, explain and predict the diverse construct that is the family, and its effects on children. Some of these challenges mentioned in this chapter include ensuring that children are viewed as an active agent of change in their own development within the family; the importance of looking beyond minority world settings; and capturing the intersectional experiences of families.

There is also recognition that the questions underpinning scientific and social scientific research are not immune to political bias.¹⁰⁷ For example, a deficit model that presumes a negative impact of new family forms has informed research questions and the reporting of evidence, potentially perpetuating difference or othering. Difference and change in family formation are often feared, yet the evidence suggests that children, parents and overall family functioning is as good as – if not better than – for those in a ‘traditional’ family. A key challenge for psychologists, therefore, is to also consider and capture the diverse ways in which children and families flourish and thrive.

¹⁰⁶ AE Goldberg and KR Allen, ‘“I’m Not Just the Nonbiological Parent”: Encountering, Strategizing, and Resisting Asymmetry and Invalidation in Genetic/Gestational Parent Status among LGBTQ Parents’ (2022) 28(4) *Journal of Family Nursing* 381. See also KR Allen, [Chapter 2](#), this volume.

¹⁰⁷ N Honeycutt and L Jussim, ‘A Model of Political Bias in Social Science Research’ (2020) 31(1) *Psychological Inquiry* 73.

Furthermore, researchers must be responsive and address questions that arise through collaboration with the public and those working with families across a range of sectors, including law, education, health care and public policy. Family forms will continue to evolve with technological advances (for example, at-home genetic testing and shared biological motherhood) and as people become increasingly creative with what family looks like for them – for example, some heterosexual single parents rejecting ‘traditional’ paths to parenthood and choosing to conceive and raise children outside of romantic relationships in elective co-parenting arrangements.¹⁰⁸

Advances in evidence-based law and policy are not set in stone and are subject to retrograde change, leaving families in general – and minority groups in particular – vulnerable. Developmental psychology theory and research have laid the foundations for an inclusive and malleable definition of the ‘family’. Moreover, the evidence suggesting that day-to-day interactions drive stability and change and appear more important than family structure provides promise that evidence-based prevention, intervention, and policy can serve as a force for supporting optimal individual outcomes and experiences across an individual’s lifespan. The challenge for psychology will be to keep pace with the speed and forms of familial change, as well as the factors that impact this change in the coming century.

¹⁰⁸ S Foley, V Jadva and S Golombok, ‘Elective Co-parenting with Someone Already Known versus Someone Met Online: Implications for Parent and Child Psychological Functioning’ (2024) *Reproductive BioMedicine Online* 104747 <https://doi.org/10.1016/j.rbmo.2024.104747> accessed 27 November 2025.

A Feminist Economist's Perspective on Marriage Laws

Shoshana Grossbard

9.1. Introduction

One of the arguments often used to justify family laws is that societies want to maximize the chances that the very young are well taken care of. Does that imply encouraging the traditional family based on a marriage, with children born to married parents? Increasing proportions of children are not born into such traditional families even though research indicates that children born to married or cohabiting parents tend to be better off than their counterparts raised in single-parent families (for example, because children born to couples tend to experience lower poverty rates and higher academic achievements).¹

This chapter examines factors that help explain the likelihood that a child is born to a mother who is married or lives out-of-couple. More specifically, it focuses on the fertility implications of family laws regulating asset ownership in marriage regarding (1) women's ability to own any assets after they get married (are coverture laws in place?) and (2) the ownership of assets in married couples (is it Community Property or an alternative arrangement?). Empirical research has shown that these laws have affected the likelihood that a child was born either out-of-wedlock or out-of-couple. The findings are interpreted assuming that the choice between in-couple and

¹ S McLanahan and C Percheski, 'Family Structure and the Reproduction of Inequalities' (2008) 34(1) *Annual Review of Sociology* 257; M Kearny, *The Two-Parent Privilege: How Americans Stopped Getting Married and Started Falling Behind* (University of Chicago Press 2023).

out-of-couple fertility is the result of a rational decision. What guides the analysis and discussion are the assumptions that individuals make decisions that best serve their interest (for example, they make rational choices) and that individual men and women are independent decision-makers. The assumption of rational choice characterizes social scientists trained in a number of disciplines and is particularly popular among economists.

Becker², Mincer³, and Easterlin⁴ are among the first economists who engaged in the analysis of fertility assuming rational choice. While emphasizing economic factors such as income and wages, their analyses also considered the possible influence of education, norms, mortality, and religion. They also assumed that individuals first form families and then make decisions about having children. Most economists who have analyzed fertility since then follow Becker's theoretical framework of household decision-making that assumes that fertility is a household (typically composed of a couple) decision. Relatively recent examples of economists using such household-level conceptual framework include Doepke⁵ and Spolaore and Wacziarg.^{6,7} In contrast to these economic models of in-couple fertility, I assume that individuals are always independent decision-makers. This holds before couple formation, while in couple, and in case of dissolution of the couple.⁸ This perspective represents a 'feminist' approach, distinguishing itself from the traditional approach of the male founders of family economics, who assumed that a woman's will is subsumed under a man's will and that men control women. In a similar way, the conceptual frameworks of the articles reporting the findings discussed here are rooted in the assumption that women make rational choices regarding what is in their best interest: first get married (or

² GS Becker, 'An Economic Analysis of Fertility' in National Bureau Committee for Economic Research (ed), *Demographic and Economic Change in Developed Countries*, a Conference of the Universities (Princeton University Press 1960) 209–240; GS Becker, 'A Theory of the Allocation of Time' (1965) 75 *The Economic Journal* 493.

³ J Mincer, 'Market Prices, Opportunity Costs, and Income Effects' in C Christ (ed), *Measurement in Economics* (Stanford University Press 1963) 67–82.

⁴ RA Esterlin, 'Towards a Socio-economic Theory of Fertility: A Survey of Recent Research of Economic Factors in American Fertility' in SJ Behrman, L Corsi Jr and R Freedman (eds), *Fertility and Family Planning: A World View* (University of Michigan Press 1969) 127–156.

⁵ M Doepke, 'Accounting for Fertility Decline during the Transition to Growth' (2004) 9 *Journal of Economic Growth* 347.

⁶ E Spolaore and R Wacziarg, 'Fertility and Modernity' (2021) 132 *The Economic Journal* 796.

⁷ Some have adapted Becker's theory of fertility to women's choice between being a married or a single mother, as, for instance, R Rosenzweig, 'Welfare, Marital Prospects, and Nonmarital Childbearing' (1999) 107(6) *Journal of Political Economy* 533; S Bauernschuster and R Borck, 'Formal Child Care and Family Structure: Theory and Evidence' (2016) 62(4) *CESifo Economic Studies* 699.

⁸ See S Grossbard, 'Independent Individual Decision-makers in Household Models and the New Home Economics' in JA Molina (ed), *Household Economic Behaviors* (Springer 2011) 41–56.

cohabit) and then have a child, or have a child out of marriage or out of couple.⁹ In earlier work focusing on women's choice between marital and non-marital fertility I have assumed that men 'pay' women for having their children and that fertility outcomes are a function of how much men are willing to pay women for having their children. Furthermore, I assumed that such a price varies with whether there are excess women or excess men in the marriage market.¹⁰ In past work I have also analysed men's decision to have children in the context of a polygamous society. There I viewed them as individuals who can have children either with one wife or with a number of wives.¹¹

This chapter is organized as follows. Section 9.2 presents two studies involving the effects of a change in a law related to ownership of marital assets on changes in fertility. This is followed by a discussion of the results in light of a rational choice model of fertility that assumes that individual men and women are rational and separate decision-makers. The conclusions then emphasize the implications of relevance to contemporary scholars of family law.

9.2. Two Case Studies

Table 9.1 summarizes the two empirical studies on which this section is based. The first case examines the effects of the annulment of coverture laws in the United States in the second half of the nineteenth century and the first part of the twentieth century. The law change is the abolition of coverture in a particular state in the United States (where each state has its own laws relating to marital property). The outcome of interest is the proportion of mothers of young children who were unmarried.

⁹ O Ekert-Jaffe and S Grossbard, 'Does Community Property Discourage Unpartnered Births?' (2008) 24(1) *European Journal of Political Economy* 25; HR Alshaikhmubarak, R Richards Geddes and S Grossbard, 'Single Motherhood and the Abolition of Coverture in the United States (2019) 161(1) *Journal of Empirical Legal Studies* 94. The economic literature also includes analyses of non-marital fertility such as Akerlof, Yellen and Katz (GA Akerlof, JL Yellen and M L Katz, 'An Analysis of Out-of-wedlock Childbearing in the United States' (1996) 111(2) *The Quarterly Journal of Economics* 277).

¹⁰ DM Heer and A Grossbard-Shechtman, 'The Impact of the Female Marriage Squeeze and the Contraceptive Revolution on Sex Roles and the Women's Liberation Movement in the United States, 1960 to 1975' (1981) 43(1) *Journal of Marriage and the Family* 49; A Grossbard-Shechtman, 'Marriage Squeezes, Cohabitation, and the Feminist Revolution' in K Davis and A Grossbard-Shechtman (eds), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* (Russell Sage Publications 1985) 375–397.

¹¹ A Grossbard-Shechtman, 'Economic Behavior, Marriage and Fertility: Two Lessons from Polygyny' (1986) 7 *Journal of Economic Behavior and Organization* 415.

Table 9.1: Two family laws regarding ownership in marriage and their possible association with non-marital, out-of-couple, marital, or in-couple births

Case	Laws	Outcome of interest
1. Coverture laws 1850–1920, United States	Married women can keep money	Out-of-marriage mothers
2. Do divorce laws assume Community Property?	Financial arrangement if marital dissolution	Out-of-couple mothers

The second case examines the association between out-of-couple births and whether or not women live under a legal regime involving Community Property. Here the legal change is the passage of community property rules in New Zealand and the Canadian province of Ontario; the study compares fertility outcomes before and after a change in law pertaining to marital and post-marital finances. The outcome of interest is the proportion of mothers who had children not only out of marriage but outside of a couple.

9.2.1. Case 1: Comparing the prevalence of single motherhood before and after the abolition of coverture in the US

In the majority of US states prior to 1850, the English common law system of *coverture* was applied, which required a married woman to relinquish property and wages to her husband.¹² However, between 1850 and 1920 many US states passed legislation that expanded married women's rights so that they could own their market earnings or separate property.

Research on this case was initiated by Hazem Alshaikhmubarak, Richard Geddes, and I to test whether the abolition of coverture in the United States is linked to changes in marital and non-marital births for the reasons previously mentioned. Given that (1) coverture reduced women's material benefits from being married; (2) conversely, the passage of Married Women's Earnings Acts or Married Women's Property Acts led women to derive higher material benefits from being married; and (3) the passage of these acts did not affect the material benefits from being a lone mother, it was predicted that these acts would be associated with a lower likelihood that single women would have a child.

Tests involved first merging three sets of data: (1) data on law passage specifying the year when a state passed the Married Women's Property Acts and Earnings Acts (between 1850 and 1920, all but five states passed these laws, but the states passed these laws at different times); (2) state-level

¹² This section is based on Alshaikhmubarak, Geddes, and Grossbard (n 9).

data from the US decennial census summary reports about some state characteristics that may influence non-marital fertility, such as female labour force participation rates; and (3) individual-level data from IPUMS, the Integrated Public Use Microdata Series (IPUMS-USA), informing us about household composition, including whether the household included an unmarried mother and her young child (under age 6). Regression analyses¹³ were performed to estimate the likelihood that an unmarried woman has a child under age 5 and to compare that with the likelihood that a married woman has a child that age. We found that, for all states, granting married women the right to own property in their name is associated with a lower likelihood that single women have a young child. This finding is consistent with the previous prediction and the assumption of rational choice by women. However, it is also to be expected that the abolition of coverture would make men less likely to want to marry and have children. From this point of view, one expects more non-marital motherhood after the abolition of coverture. The finding implies that women's added incentive to first marry and then have a child dominates men's diminished gain from getting married. For the whole sample, we did not find that the passage of the Earnings Acts was associated with the likelihood that women would be unmarried mothers. However, when we took the state's female labour force participation rates into consideration, we found that in states with higher than average labour force participation of women, the passage of the Earnings Acts is also associated with a lower likelihood that single women have a child. Again, this makes sense: in states with high female labour force participation, women are more likely to want to keep their own earnings after marriage, and the Earnings Acts would be more related to their decision to have a child outside marriage than in states where married women have a low probability of participating in the labour force.

Furthermore, Alshaikhmubarak, Geddes, and I found that abolition of coverture is only negatively associated with non-marital childbearing among US-born women, not among foreign-born women. This also makes sense since women who migrated here from other countries would have been less informed about the possible financial costs that marriage entails for women in the United States. The abolition of coverture in their state of residence would therefore be less related to the likelihood that foreign-born women have a child outside marriage than to that likelihood among US-born women.

¹³ Regression analysis is a commonly used statistical technique that examines the individual effects of each variable included in a multivariate explanation of a particular outcome.

9.2.2. Case 2: Comparing prevalence of single motherhood before and after passage of Community Property rules in case of divorce

Here, change occurred not in laws ruling women's right to property while married but in laws governing individual rights in case of marital dissolution due to divorce or death.¹⁴ Marriage offers more benefits to women if they can expect more access to marital assets in case the marriage dissolves. In particular, Community Property laws tend to benefit a couple's lower earner, and this tends to be the woman in the case of heterosexual couples. In case of dissolution of the relationship, under Community Property each individual is entitled to half the assets, which for the lower earner is typically more than what they spent to purchase marital assets. It follows from the rational choice reasoning just presented that women would be more likely to have marital births – and less likely to give birth extra-maritally – if a country switches from a regime that does not clearly prescribe how property should be divided at marriage dissolution to a regime of Community Property.

New Zealand made that switch. Prior to 1995, New Zealand followed the English system of equitable discretion – with marital property owned individually, and no determinate division upon dissolution. Instead, property was divided by a court as it saw fit, which offered lower protection to low earners in case of dissolution: there was no clear division rule. In 1995, the country adopted a Community Property System. In Ekert-Jaffe and Grossbard, we showed that a significant drop in the likelihood that a woman gave birth out-of-couple resulted from that switch. This evidence can be interpreted in terms of rational choice behaviour: when the country passed the Community Property law, it became more advantageous for lower earners to first marry or form a couple and then have a child. We estimated the association between division rules in case of marital dissolution and the likelihood that women give birth out-of-couple, not only outside marriage, since the law in New Zealand at the relevant time treated couples who have been in a relationship of over three years' duration as akin to married couples in this respect. Likewise, that same year, in 1995, the Canadian province of Ontario switched from an equitable distribution system to one of Community Property. There too, the likelihood that a woman gave birth out-of-couple dropped after the switch, although not to an extent that it was statistically significant.

One can also observe some correlation between the regime regulating division of assets at marriage dissolution and proportion of out-of-couple births for all countries that participated in the same fertility survey and therefore had comparable data for out-of-couple births. [Table 9.2](#), adapted from Ekert-Jaffe and Grossbard, ranks a number of Western countries in

¹⁴ This section is based on Ekert-Jaffe and Grossbard (n 9).

Table 9.2: Unpartnered first births and rules for division of marital property in case of divorce

Country and year of survey	Rule for division of marital property	Degree of community	Percentage of unpartnered first births ^a
US 1995	Common Law	Low	15
Canada 1995 ^b	Common Law	Low	19
Austria 1995	Some Acquired Assets	Low	20
Quebec + Ontario ^c 1995	Acquired Assets ^d	Medium	11
Germany 1992	Acquired Assets	Medium	11
Belgium (Flanders) 1992	Acquired Assets ^d	Medium	3
France 1994	Acquired Assets ^d	Medium	7
Finland 1990	Acquired Assets / Unrestricted Community ^e	MEDIUM	10
Norway 1989	Unrestricted Community ^e	HIGH	13
Sweden 1993	Unrestricted Community ^e	HIGH	8

Note: a) Percent of women with unpartnered status observed three months before birth; mothers born in 1946–1970 giving birth in 1962–1992; b) Excludes Quebec for the entire period and Ontario after 1978; c) Ontario: for births after 1985; d) Community Property only for assets acquired during the marriage; e) Community Property is unrestricted: includes assets acquired before and after marriage.

Source: Ekert-Jaffe and Grossbard (n 9)

terms of how generous laws regarding division of property are likely to be to the member of a couple with lower earnings.

The table first lists countries offering low protection to low earners in case of divorce: either they had laws that allowed judges significant discretion in dividing assets (in the case of most of Canada and the United States),¹⁵ or they only considered some acquired assets as Community Property (in the case of Austria). Four countries (Belgium, France, Finland, and Germany) had a mild form of Community Property, where only those assets acquired during the marriage are subject to a 50/50 division

¹⁵ A minority of US states have Community Property. Since most follow Common Law, we classified the United States as a country offering low protection to lower earners. This only includes the parts of Canada without Community Property.

rule. More generous to low earners were countries with unrestricted Community Property laws, meaning that all assets – either acquired within the marriage or outside it – were subject to a 50/50 division rule in case of dissolution. Two countries with such rules are Norway and Sweden. It can be seen from [Table 9.2](#) that, overall, the percentage of out-of-couple births to unpartnered mothers was particularly high in countries or provinces with low degrees of Community Property, whereas Norway and Sweden, countries with a high degree of Community Property, had low proportions of out-of-couple births.

9.2.3. Discussion

In the two cases we examined the chances that a woman becomes an unmarried or out-of-couple mother as a function of family laws: laws regulating married women's rights to own property or keep their earnings (Case 1) and laws governing division of property when a marriage dissolves or a couple separates (Case 2). The empirical analysis in both cases indicates that the more women stand to gain from first getting married (or become part of a couple) and then having a child, the more they were likely to experience marital or in-couple fertility rather than extra-marital or out-of-couple fertility.¹⁶ These outcomes are consistent with women responding rationally to legal changes. However, the same changes are also expected to have discouraged rational men from marrying or becoming part of a couple. It appears from the empirical studies reviewed here that how the legal changes affected women's interests was more influential than how these changes affected men's best interests.

In sum, assuming that women followed an economic or rational approach helps explain the association between laws governing asset ownership in marriage and the likelihood of out-of-marriage (or out-of-couple) fertility versus marital (in-couple) fertility. This approach assumed that individuals are independent decision-makers before couple formation, while in couples, and in the case of dissolution of the couple.¹⁷ Prior to considering having a child, it is assumed that each individual makes decisions based on his or her circumstances and objectives. The investigator then determines whether the end result best serves his or her personal interests. A similar analytical framework is also helpful when the

¹⁶ Reverse causality is unlikely to have occurred: the laws I examined are unlikely to have been changed out of concern for excessively high rates of out-of-couple or non-marital fertility.

¹⁷ See Grossbard (n 8).

goal is to better understand other individual decisions, such as labour supply or consumption.¹⁸

9.3. Conclusion

This chapter has reported on the link between changes in fertility and variability and family laws related to asset ownership in marriage. More specifically, non-marital or out-of-couple fertility was linked to (1) the abolition of coverture laws in the second half of the nineteenth century and the first part of the twentieth century in the United States and (2) changes in legal regime governing division of marital property in case of marital dissolution or separation in a number of Western countries and provinces. Findings were interpreted in light of rational-choice theory that views individuals, not households or couples, as decision-makers. One implication of this work is that legal scholars and policymakers need to pay more attention to marriage laws such as those regarding individual ownership in marriage. This is relevant to policymakers, given that children born to unmarried parents are more likely to be poor and to be low-achievement students than their counterparts born to married parents.¹⁹

Furthermore, it is hoped that this line of research will encourage more scholars of the family to move away from analytical frameworks that study fertility decisions assuming that multi-person households make decisions as if they had one voice, rather than recognizing the separate voices of individual members of these households. The former was the approach of Gary Becker, winner of the Nobel prize in 1992 and author of a *Treatise on the Family*,²⁰ one of the most cited books ever published by an economist: as of mid-April 2024, the book was cited more than 26,500 times. Becker did not just overlook conflicts within couples. He also lacked sympathy for causes popular among feminists, such as pay equality for men and women. One of the most prominent advocates for equal pay for men and women, Barbara Bergmann, one of the founders of feminist economics, was particularly critical of Becker's ideas on the economics of the family.²¹

¹⁸ S Grossbard-Shechtman, *On the Economics of Marriage* (Westview Press 1993, reprinted by Routledge 2019); S Grossbard, *The Marriage Motive* (Springer 2015).

¹⁹ McLanahan and Percheski (n 1); Kearney (n 1).

²⁰ GS Becker *Treatise on the Family* (Harvard University Press 1981).

²¹ BR Bergmann, 'Becker's Theory of the Family: Preposterous Conclusion' (1996) 39 *Challenge Magazine* 9.

Family Ideals across Cultures

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10.1. Introduction

Across cultures, the family is a foundational social institution, shaped by social norms and values that influence broader societal organization. However, our understanding of what individuals consider an ‘ideal family’ remains limited, particularly when factoring in cultural differences. Additionally, the institution of the family has experienced significant transformations in modern societies. While much research has focused on family components such as children, marriage, intergenerational relationships, and intangible elements such as communication and gender roles, there is less exploration into how people envision their ‘ideal family’.

Given the potential influence of individuals’ changing attitudes on family change in industrialized societies, this study examines perceptions of the ‘ideal family’ in various culturally distinct, low-fertility societies.¹ We adopt a unique measure of family ideals based on vignette studies across eight low-fertility countries: Italy, Spain, and Norway in Europe; China, Japan, South Korea, and Singapore in Asia; and the United States. After being exposed to each vignette, respondents were asked whether the described family aligns with their own vision of the ‘ideal family’, providing valuable insights into their preferences.

¹ Low-fertility societies are those with below-replacement fertility, i.e. below 2.1 children per woman, while very low-fertility societies are those with a level below 1.3 children on average per woman.

Randomizing across the different options within each factor in each hypothetical family (vignette) and having respondents assess six different scenarios, we ensure the independence of the variables, allowing us to compare and contrast the relative importance of various family components. The analysis reveals both expected and surprising findings, which are presented first by gender and then by country. Despite some variation across countries, the results generally point in the same direction, suggesting that family ideals may incorporate some universal elements regarding modalities of unions, offspring number, couple relationship, investment in children and so on.

10.2. Theories of Family Change and Our Approach

The institution of the family is undergoing significant changes, particularly in post-industrial societies. In Europe and North America, these shifts are captured in the concept of the Second Demographic Transition. Pioneering scholars including Inglehart,² along with Van de Kaa and Lesthaeghe,³ argued that changes in values and an increased emphasis on self-realization have diminished the traditional role of the family in industrialized societies. This is empirically evident in trends such as rising cohabitation, divorce, and re-partnering rates, delayed childbearing and stark declines in fertility. Yet these trends are not uniform; the rise in cohabitation and marital dissolution varies, and fertility rates differ significantly even between below-replacement⁴ fertility countries. While cohabitation, births outside of marriage, and single-parenthood are prominent in Western societies (not only in Central or Northern Europe but also in Southern European Catholic countries), they are less common in Asia.⁵ The rate of fertility decline also differs

² R Inglehart, *The Silent Revolution: Changing Values and Political Styles among Western Publics* (Princeton University Press 1977); R Inglehart, *Culture Shift in Advanced Industrial Society* (Princeton University Press 1990).

³ R Lesthaeghe and DJ Van de Kaa, 'Twee demografische transitie. Bevolking: groei en krimp' (1986) 61 *Mens en Maatschappij* 9.

⁴ Replacement fertility implies a total fertility rate (TFR) of 2.1 children per woman on average – enough to replace, on average, the two parents, even taking mortality into account. This also means that assuming stable life expectancy and no migration, a TFR of 2.1 would imply that, in the long run, the size of populations would remain stable.

⁵ See, inter alia, AJ Cherlin, 'Goode's World Revolution and Family Patterns: A reconsideration at Fifty years' (2012) 38 *Population Development Review* 577; R Lesthaeghe, 'The Unfolding Story of the Second Demographic Transition' (2012) 36 *Population Development Review* 211; J Surkyn and R Lesthaeghe, 'Value Orientations and the Second Demographic Transition (SDT) in Northern, Western and Southern Europe: An Update' (2004) 3 *Demographic Research, Special Collection* 45; DJ van de Kaa, 'Europe's Second Demographic Transition' (1987) 42(1) *Population Bulletin* 1; WJJ Yeung and AKL Cheung, 'Living Alone: One-person Households in Asia' (2015) S15 *Demographic Research* 1099;

considerably, even among countries with very low fertility, dropping below one child in some East Asian countries.⁶

These variations in family change raise important questions. What characteristics define an ‘ideal family’? How do perceptions of family ideals differ across societies with varying cultural traditions, political institutions, and labour markets? And how do these ideals align with actual demographic behaviour at both the individual (micro) and societal (macro) levels? Addressing these questions requires a complex understanding of the concept of the ‘ideal family’, the development of a unified measure for such a multidimensional concept, and an appreciation of the ways family ideals vary across different cultural and policy contexts.

The primary challenge in conceptualizing an ‘ideal family’ lies in its inherently multidimensional nature. Integrating various family characteristics into a cohesive conceptual framework is complex, as it requires an understanding of the relative importance of different attributes such as partnering, childbearing, child-rearing, material constraints, the division of domestic work, and the balance between family and career obligations.

This challenge also applies to the study of related topics, including, for example, comparative surveys of fertility ideals where individuals are asked about their ideal number of children, either for themselves or for families in general. While traditional survey research has revealed a consensus around the ideal of having two children,⁷ this approach has significant limitations. Survey questions often require respondents to choose a single ideal number of children, which can obscure the nuances of their preferences.⁸ Importantly, because fertility ideals are typically not considered alongside other dimensions of family life, it is difficult to determine the importance of fertility relative to other factors, such as the division of household labour, career aspirations, financial resources and the availability of extended family support. As a result, most studies are unable to directly measure the extent to which fertility ideals are shaped by

WJJ Yeung, S Desai, and G Jones, ‘Families in Southeast and South Asia’ (2018) *Annual Review of Sociology* 44.

⁶ A Adsera, ‘Vanishing Children: From High Unemployment to Low Fertility in Developed Countries’ (2005) 95 *American Economic Review* 189; A Adsera, ‘Where Are the Babies? Labor Market Conditions and Fertility in Europe’ (2011) 27 *European Journal of Population* 1; F Billari and HP Kohler, ‘Patterns of Low and Lowest-low Fertility in Europe’ (2004) 58 *Population Studies* 161; S Morgan, ‘Is Low Fertility a Twenty-first-century Demographic Crisis?’ (2003) 40 *Demography* 589; R Rindfuss and M Choe, *Low and Lower Fertility: Variations across Developed Countries* (Springer 2015).

⁷ T Sobotka and É Beaujouan, ‘Two Is Best? The Persistence of a Two-child Family Ideal in Europe’ (2014) 40 *Population and Development Review* 391.

⁸ Ibid.

respondents' implicit trade-offs with other aspects of family life, including material and social constraints.⁹

Another example is parental investment in children's success: whether by supporting educational opportunities or providing direct wealth transfers, parental resources are vital for children's economic and social advancement, which in turn contributes to the persistence of intergenerational inequality.¹⁰ Significant material investment in children, however, affects other parental decisions, such as career choices, reallocating resources away from personal pursuits, and selecting neighbourhoods or living near extended family, particularly when school quality is a concern.¹¹ While income and wealth are important factors, the specific allocation of these resources reveals how families prioritize multiple, often competing goals and needs.¹²

Research on family preferences has largely focused on specific elements, such as partnership arrangements (marriage, cohabitation, or divorce), gender roles and the division of labour, and childbearing.¹³ Studies based on single-item questionnaires often fail to accurately capture the relative importance and trade-offs between different family attributes, as they

⁹ G Becker, *A Treatise on the Family* (National Bureau of Economic Research, Inc. 1981); A Adsera, 'An Economic Analysis of the Gap between Desired and Actual Fertility: The Case of Spain' (2006) 4 *Review of Economics of the Household* 75; E Beaujouan and C Berghammer, 'The Gap between Lifetime Fertility Intentions and Completed Fertility in Europe and the United States: A Cohort Approach' (2019) 38 *Population Research and Policy Review* 507; KJ Hagewen and SP Morgan, 'Intended and Ideal Family Size in the United States, 1970–2002' (2005) 31 *Population and Development Review* 507; S Morgan and H Rackin, 'The Correspondence between Fertility Intentions and Behavior in the United States' (2010) 36 *Population and Development Review* 91; WB Miller, 'Differences between Fertility Desires and Intentions: Implications for Theory, Research and Policy' (2011) 9 *Vienna Yearbook of Population Research* 75; M Testa, 'On the Positive Correlation between Education and Fertility Intentions in Europe: Individual- and Country-level Evidence' (2014) 21 *Advances in Life Course Research* 28.

¹⁰ E.g. F Bernardi and G Ballarino, *Education, Occupation and Social Origin. A Comparative Analysis of the Transmission of Socio-Economic Inequalities* (Edward Elgar 2016).

¹¹ HG Van de Werfhorst, 'Changing Societies and Four Tasks of Schooling: Challenges for Strongly Differentiated Educational Systems' (2014) 60(1) *International Review of Education* 123.

¹² S Lundberg, RA Pollak and J Stearns, 'Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing' (2016) 30 *Journal of Economic Perspectives* 79; S McLanahan, 'Diverging Destinies: How Children Are Faring under the Second Demographic Transition' (2004) 41 *Demography* 607; S McLanahan and W Jacobsen, *Diverging Destinies Revisited* (Springer International Publishing 2015).

¹³ F Goldscheider, E Bernhardt and T Lappegård, 'The Gender Revolution: A Framework for Understanding Changing Family and Demographic Behavior' (2015) 41 *Population and Development Review* 207; L Mencarini, 'Does Gender Equality Affect Fertility Decisions in Europe? (2018) *Population Europe Discussion Papers Series n. 10*, <https://population-europe.eu/research/discussion-papers/discussion-paper-no-10-gender-inequality-over-life-course> accessed 29 November 2025.

tend to treat multifaceted cultural values as independent responses. This method can obscure the nuanced ways in which various family ideals are prioritized or balanced against each other across different cultural contexts. For instance, there is considerable interest in understanding why individuals and families today are having fewer children compared to previous generations. Similarly, trends in union formation and dissolution have changed considerably. However, the relative importance or value placed on fertility desires in comparison to partnership arrangements and the range of other interrelated decisions that families routinely face are typically not considered.

Understanding the various dimensions of family values is crucial for appreciating the trade-offs families make and how individual family decisions contribute to overall trends in family behaviour.¹⁴ The trade-offs are influenced by socioeconomic and institutional contexts, which may differ among societies. For example, families living in societies with hyper-competitive education systems might choose to allocate additional resources to a smaller number of children in order to make the most of their limited assets. Consequently, decreasing fertility rates in these societies may be partially attributed to the emphasis on child development and the desire for intergenerational mobility. Likewise, in cultures where gender inequality is prominent, the idea that mothers are primarily responsible for children's social and emotional growth may support traditional family roles, resulting in reduced female participation in the workforce.¹⁵

In this study we explore the multidimensional characteristics of an 'ideal family' across several countries selected to ensure institutional and cultural variation as well as to incorporate differences in low fertility: Singapore and South Korea are just at or below 1 child per woman; Italy, Spain, Japan, and China are just below the 1.3 threshold of lowest-low fertility; and the United States and Norway are above it. Importantly, these countries differ along several relevant structural dimensions, including welfare policies

¹⁴ KO Mason, 'Explaining Fertility Transition' (1997) 34 *Demography* 443.

¹⁵ See, among others: J Haskey, 'Trends in Marriage and Cohabitation: The Decline in Marriage and the Changing Pattern of Living in Partnerships' (1995) 80 *Population Trends* 5; G Jones, 'The "Flight from Marriage" in South-east and East Asia' (2005) 36(1) *Journal of Comparative Family Studies* 93; WJJ Yeung and GW Jones, 'Emerging Dimensions of Marriage in Asia' (2024) 45(5) *Journal of Family Issues* 30; JM Raymo, H Park, Y Xie and WJJ Yeung, 'Marriage and Family in East Asia: Continuity and Change' (2015) 41 *Annual Review of Sociology* 471; J Raymo, H Park and J Yu, 'Diverging Destinies in East Asia' (2023) 49 *Annual Review of Sociology* 443; WJJ Yeung and S Hu, *Family and Population Changes in Singapore: A Unique Case in the Global Family Change* (Routledge 2018); MC Brinton and E Oh, 'Babies, Work, or Both? Highly Educated Women's Employment and Fertility in East Asia' (2019) 125 *American Journal of Sociology* 105; H Ono, 'Women's Economic Standing, Marriage Timing, and Cross-national Contexts of Gender' (2003) 65 *Journal of Marriage and Family* 275.

(more generous in Norway than in the United States or Asian countries), income inequality (relatively low in Norway and much higher in China), and kinship ties, reputational concerns, and gender norms (more pronounced in East Asia compared to Europe). Here we introduce an approach that integrates the multidimensionality of the family into one unified framework, thereby establishing how the dimensions of the family vary across these institutional settings.

10.3. Vignette Study in Eight Low Fertility Countries

We defined family ideals over ten factors, motivated by classical theories of family behaviour, to conduct a survey that included a factorial experiment consisting of family vignettes with respondents from urban China, Japan, South Korea, Singapore, the United States, Italy, Spain, and Norway. This survey exposed all respondents to six vignettes, each describing a different heterosexual couple and family characterized by random variations in the ten factors: union status; fertility; household income level; community respect; family communication style; contact with grandparents; gender roles between the couple; work–family conflict; expected educational outcome of children; financial support provided to child(ren). Respondents were then asked whether the vignette described a family they desired for themselves based on a ten-point scale. The survey also included a host of other close-ended questions about participants' demographic and socioeconomic background (e.g. sex, birth year, birthplace, education, employment status, employment contract type, occupation, working hours, city of residence, household size and income, marital status, cohabitation history, number of brothers and sisters, number of children, fertility plans, son preference, and life satisfaction).

The online survey was conducted from December 2021 to February 2022 by Kantar, except in Singapore where Toluna was used. Both Kantar and Toluna are leading international survey companies with extensive experience in each of our sampled countries. They maintain large national online panels by employing various recruitment methods such as e-newsletter campaigns, opt-in email, co-registration, social media, as well as both internal and external affiliate networks to ensure representative population coverage. In this study, a stratified quota sampling based on age and gender was used for each country: one-fourth of the sample consists of women aged 25 to 39, one-fourth is men of the same age, one-fourth is women aged 40 to 50, and the last fourth is men of the same age. We also oversampled by race and ethnicity in the United States and in Singapore.

Initially, over 22,000 participants were recruited across the eight countries, but participants with missing questions (e.g. age or sex) and respondents

with identical responses to the six vignettes were dropped. We ended up with a final sample consisting of 20,141 respondents and 120,846 respondent vignette observations. There were around 2,500 individuals per country, with a larger US and Singapore sample ($N = 3,500$) and a smaller Norway sample ($N = 750$).¹⁶

There are clear advantages of using factorial survey experiments to study family ideals. First, in a vignette experiment where all respondent features are controlled for in the experimental design, the effect of family dimensions on individual ratings can be interpreted as causal effects. The complete control over vignettes' characteristics also ensures a higher level of internal validity than with traditional survey methods. Second, respondents in factorial survey experiments can be asked to evaluate vignettes that vary along multiple dimensions. This has the advantage of allowing us to test for various combinations, including some which occur only rarely in reality. Third, the multi-dimensionality of the factorial survey experiment may help prevent respondents from giving socially desirable answers because the simultaneously changing vignette dimensions make it difficult for them to know the study's purpose.¹⁷

We ran two separate experiments because we were interested in how parents invested in their children but were unable to combine scenarios that involved families with and families without children. The first experiment (Universe A) included vignettes describing couples who were either married or cohabiting and who did or did not have children. Importantly, Universe A does not include the two factors relating to investment in children because of the possibility of childless families. The vignettes in the second experiment (Universe B) were limited to families that had at least one child but included the possibility of divorce and the additional dimensions of parents' aspirations for their children's education and the financial support they provided.

¹⁶ Detailed information about the survey design, sample constructions, experimental design and analytical strategy can be found in: A Aassve, A Adserà, PY Chang, L Mencarini, H Park, C Peng et al, 'Family ideals in an era of low fertility' (2024) *PNAS* 121(6) e2311847121, <https://doi.org/10.1073/pnas.2311847121>. The data are deposited for public access in C Peng, 'Family Ideals in an Era of Low Fertility' (Harvard Dataverse, deposited 9 January 2024) <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/LR2B6Y> accessed on 29 November 2025.

¹⁷ K Auspurg, T Hinz and C Sauer, 'Why Should Women Get Less? Evidence on the Gender Pay Gap from Multifactorial Survey Experiments' (2017) 82 *American Sociological Review* 179; T Karabchuk, H Dülmer and K Gatskova, 'Fertility Attitudes of Highly Educated Youth: A Factorial Survey' (2022) 84 *Journal of Marriage and Family* 32; K Auspurg and T Hinz, *Factorial Survey Experiments* (vol 175, Sage Publications 2014); P McDonald, 'How Factorial Survey Analysis Improves Our Understanding of Employer Preferences' (2019) 45 *Swiss Journal of Sociology* 237.

10.4. Results of Statistical Models: Commonalities and Differences across Countries

10.4.1. Pooled estimates of eight countries

We first discuss the main factors that respondents perceive as characteristics of an ‘ideal family’ separately by gender. The results are shown in [Figures 10.1](#) and [10.2](#). Interestingly, there are no significant differences, apart from in relation to the importance of family communication, which is considered more positively by women. For all respondents, being married, having one or two children, earning a higher-than-average income, being respected in the community, maintaining frequent contact with grandparents, having good communication among family members, gender egalitarian couple roles, no work–family conflict, children expected to complete higher education, and parents saving to support their children are all seen as ‘features of an ideal family’, for both men and women.

Conversely, divorce (compared to being married) is the least preferred factor followed by having a below-average income, no children (compared to having one child), and cohabitation. Having two children is slightly preferable to having one while having three children is only marginally preferred over having just one. Overall, relational factors seem to outweigh material dimensions. As long as a couple did not divorce and has at least one child and maintains good relationships within the nuclear family, with extended family and the broader community, this is considered more important than having more children, earning higher income, children achieving higher levels of education, or following specific gender roles. Importantly, in both Universes A and B, women value more family communication than men.

10.4.2. Country-specific estimates

With the sample sizes achieved, we can also provide country-specific estimates. [Figures 10.3](#) to [10.10](#) present results by each country. In Universe A, which includes vignettes with childless couples, there are no statistically significant differences between marriage and cohabitation among Spanish and Italian respondents, despite a negative coefficient for cohabitation in both countries. This suggests that, in these contexts, cohabitation is not perceived as less desirable than marriage. However, in Universe B, which includes only couples with children, marriage is more strongly associated with an ‘ideal family’ in Italy, while in Spain – even when all hypothetical families include children – there is no significant difference between the two union types. Thus, while cohabitation is becoming more prevalent in both countries, within the context of families with children, Italian respondents still perceive cohabitation as less favourable. Additionally, divorce is seen

to compromise the ideal family arrangement in both countries, but this perception is stronger in Italy.

In Universe A, the role of parenthood and the number of children is similarly viewed in both countries: childless families are considered less ideal than those with at least one child, and families with two children are slightly preferred over those with only one. However, families with three children are not valued more than those with only one child, suggesting a traditional preference for two-child families in both Italy and Spain. Differences emerge in Universe B: in Italy, families with two children are valued more than those with just one, while in Spain, there is no significant distinction between families with one, two, or three children. This suggests that in Spain, factors such as educational aspirations and the financial burden of supporting children (introduced in Universe B) diminish the importance of having more than one child.

Lower-than-average income is viewed negatively, while above-average income is viewed positively in both universes and in both countries. Effective communication among family members is also seen as a key attribute of an ‘ideal family’, although it is more highly valued in Spain than in Italy in Universe B. Respondents in both countries recognize the importance of an egalitarian division of paid and unpaid work, though Spanish respondents place more emphasis on this in both sets of vignettes. Similarly, the absence of work–family conflict is crucial for family ideals desirability in both countries, as is the respect families have in their communities. Frequent contact with grandparents and extended family members is also highly valued. When it comes to attributes related to children, lower parental educational aspirations are viewed more negatively in Spain, while saving for children’s futures is more important in Italy, reflecting a stronger emphasis on familial support. Overall, these findings suggest that postmodern family patterns are more widely accepted in Spain than in Italy, particularly when considering families with children in Universe B. Attributes aligned with postmodern family ideals, such as effective communication and gender equality, are also more highly valued in Spain. This confirms that ideals and behavioural changes have been stronger in Spain than in Italy, even if we cannot decree the End of the Traditional Southern European Family Model.¹⁸

As we examine the other countries, it is striking how the estimated coefficients move in similar directions. In other words, the overall results in Figure 10.1 are quite similar across all the other countries, despite their geographical and cultural differences. However, there are differences in terms

¹⁸ A Aassve, A Adserà, E Bastianelli and L Mencarini, ‘Family Ideals in Italy and Spain: Towards the End of the Traditional Southern European Family Model?’ (2026) *European Sociological Review*, jcaf055, <https://doi.org/10.1093/esr/jcaf055>.

of significance. For instance, cohabitation is considered less ideal in Japan, Korea, and Singapore (as it is in Italy), but there are no statistically significant differences for other countries. On the contrary, childlessness is consistently viewed as less ideal in all countries, and there is no strong discernible effect related to the number of children. An interesting exception is China, where having three children is highly significantly associated with a less ‘ideal family’ – a likely consequence of the long-standing one-child policy.

The estimates for income also reflect differences between countries: lower income is generally associated with a less ‘ideal family’ compared to higher income. However, there is an exception here too: in Norway, the effect of high income is not statistically significant. This might be due to Norway’s greater income equality and generous public support compared to the other countries. As seen in [Figures 10.1](#) and [10.2](#), being respected in the community, good communication, and contact with grandparents are all associated with a more ‘ideal family’. While the effects of community respect are fairly consistent across countries, substantial differences arise in the importance of communication between family members, with Norway showing the strongest emphasis on it. Perhaps surprisingly for a ‘non-familistic’ society, where the family ties are often described as weak,¹⁹ Norway is also the country where family respect holds the most weight. Norway stands out for having the greatest income equality in its society, and in fact, in our experiment, high income is not considered important in the context of a generous welfare system. Instead, good communication with grandparents and family respect are highly valued there, in contrast to countries like Spain and Italy, where contact with extended family is more common. Departing from expectations of common Southern European models, Spain also differs from Italy in placing more emphasis on egalitarian family roles and valuing cohabitation more positively.

In China, divorce and cohabitation are viewed negatively, while family income is highly valued. Across all countries, children’s education and parents saving for their children’s future are important features of a desirable family. Despite cultural and institutional differences, the results suggest that family ideals are universal, with divorce, childlessness, and family communication being central themes.

In general, across countries, egalitarian attitudes are an important attribute of the ‘ideal family’, and, accordingly, protecting the careers of both parents is highly valued. These patterns are also present in Universe B, where the

¹⁹ D Reher, ‘Family Ties in Western Europe: Persistent Contrasts’ (1998) 24(2) *Population and Development Review* 203; B Mönkediek and H Bras, ‘Strong and Weak Family Ties Revisited: Reconsidering European Family Structures from a Network Perspective’ (2014) 19(2) *The History of the Family* 235.

presence of children is always included in the vignettes. Across all countries, divorce is associated with a less ‘ideal family’. The number of children follows the same pattern observed in Universe A: there is no significant difference between having one child and having two or three. In other words, parenthood is a strong family ideal, but the actual number of children is not a major factor.

Since Universe B always includes vignettes with children, we can also consider how respondents value those children. Although there are some differences between countries, the estimates suggest that families who save, on the whole, for their children’s future are evaluated more positively than those that do not. The importance placed on children’s education is also consistent across countries. There is no distinction between pursuing a college education versus graduate studies, but there is a clear difference when compared to having only a high school education, which is seen more negatively in the Asian countries.

10.5. Conclusion

Because much of the scholarship in support of Second Demographic Transition theory assumes that traditional expectations for family life no longer strongly influence family behaviour, this study examined the characteristics linked to ideal families across high-income countries with very low fertility rates. Family decisions are always made contingent on consideration of various conflicting demands, goals, and limitations.²⁰ Rather than focusing on just one aspect, which can obscure important trade-offs, our factorial experimental design allows us to evaluate how different family characteristics compare.

We found that parenthood remains highly valued. The most ideal scenario involves being married (though cohabitation is also acceptable) and having at least one child, with the total number of children being less significant than being a parent or not. Higher-than-average income is beneficial, though exceptions exist. Regular contact with grandparents and good communication among family members are also important. Investing in children’s development, education, and future savings is key.

The main takeaway is that relationship quality outweighs ‘quantitative’ outcomes. As long as a family remains intact and has at least one child, maintaining strong relationships within the nuclear and extended family and with the broader community is more important than having more children or a higher income. Our research shows no strong link between the number of children and what defines an ‘ideal family’. Couples prioritize other aspects

²⁰ For a feminist economic perspective on this, see Grossbard, [Chapter 9](#), this volume.

of family life over having more children, which may help explain the decline in fertility rates below the traditional two-child ideal.

The study also sheds light on why there is a persistent gap between desired and actual fertility rates; i.e. decisions about family size are influenced by several factors such as the distribution of household tasks, gender equality, relationship quality, and social reputation. If they are to succeed, policies to close this gap may need to focus on promoting marriage by improving work–life balance, housing, and employment security – especially in East Asia, where non-marital parenthood is rare and overall fertility rates are among the lowest in the world.

The cross-country comparison brings new insights into how different cultures perceive family ideals and well-being. Divorce is universally viewed negatively, even in countries where it is common, such as Norway and the United States. In Italy, Japan, Korea, and Singapore, cohabitation is also seen less favourably, reflecting cultural preferences for traditional family structures. Again, while childlessness is seen negatively everywhere, the actual number of children does not significantly impact perceptions of family ideals. Positive communication within the family and strong ties with extended family members are universally valued (particularly by women), with income status being important everywhere except Norway.

In conclusion, having children contributes positively to the ‘ideal family’, but the number of children does not matter much. This contrasts with earlier studies,²¹ which suggest a strong preference for a two-child family. Our findings align more closely with actual fertility rates and suggest that previous studies may have overestimated the importance of having more children due to how survey questions were framed. Communication within the family, rather than gender roles or work–family balance, emerges as the most important factor for an ‘ideal family’, supporting the argument that a shift is occurring toward self-fulfilment and quality of life in modern family dynamics.

While this study highlights shared values, it also reveals differences in how families balance various aspects of life, influenced by local, economic, social, and institutional settings. Countries with stronger welfare systems, such as those in Europe, may place less emphasis on income as a marker of family ideals, whereas income plays a more significant role in Asia and the United States. These findings underscore the importance of considering broader social and economic contexts when addressing family behaviour and fertility trends.

²¹ E.g. Sobotka and Beaujouan (n 7).

Figure 10.1: Universe A by gender (pooling the eight countries)

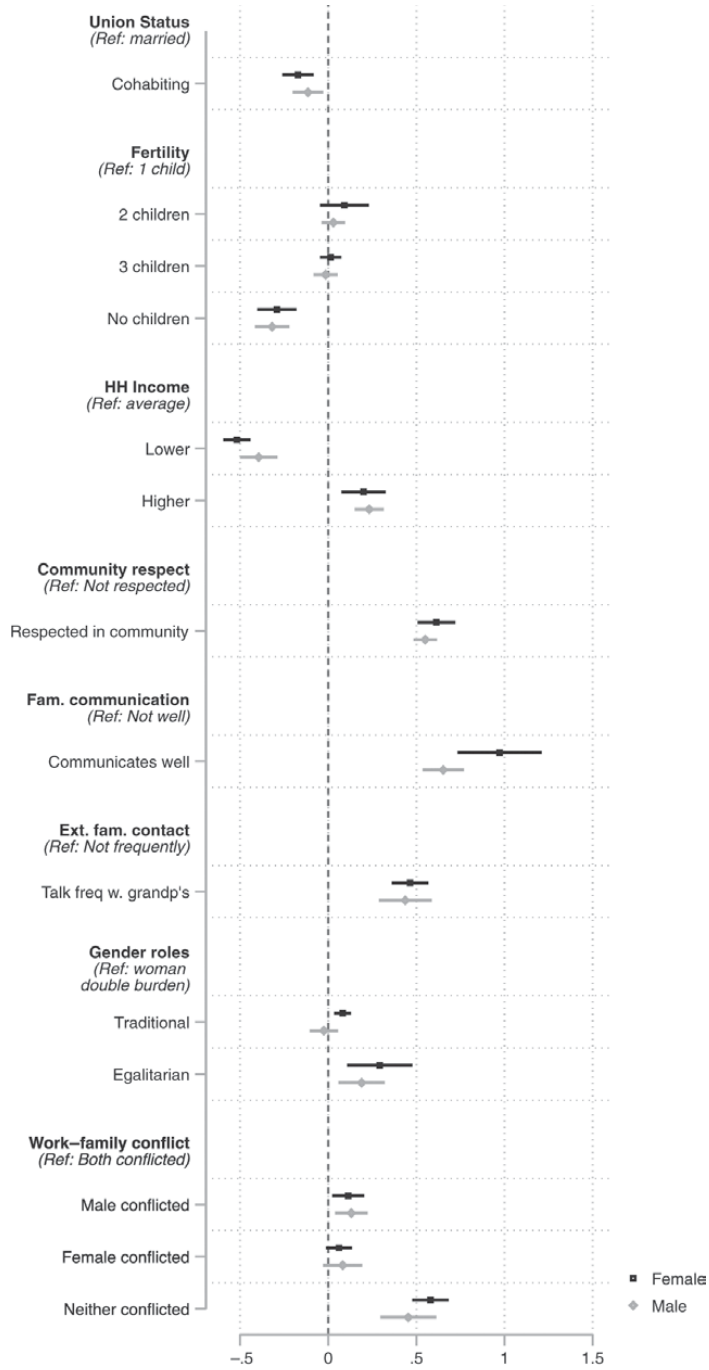


Figure 10.2: Universe B by gender (pooling the eight countries)

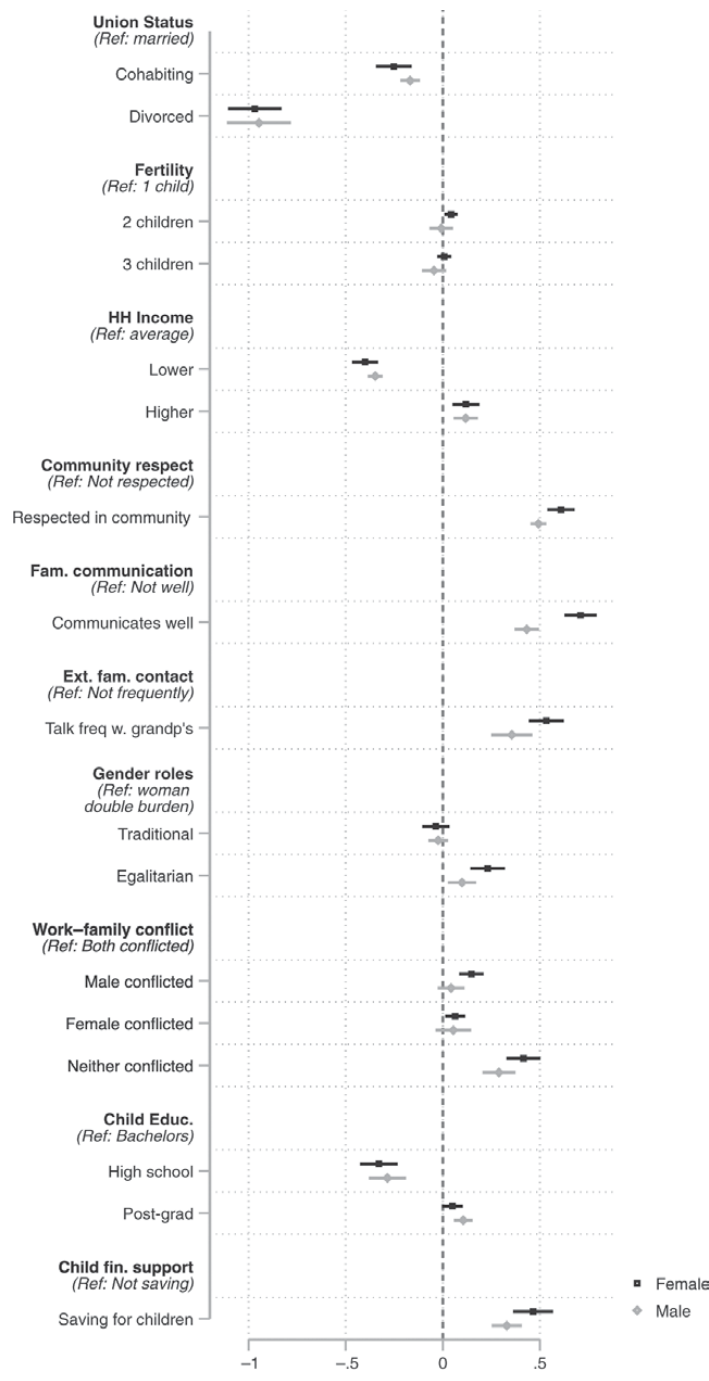


Figure 10.3: Results of Universe A versus B in Italy

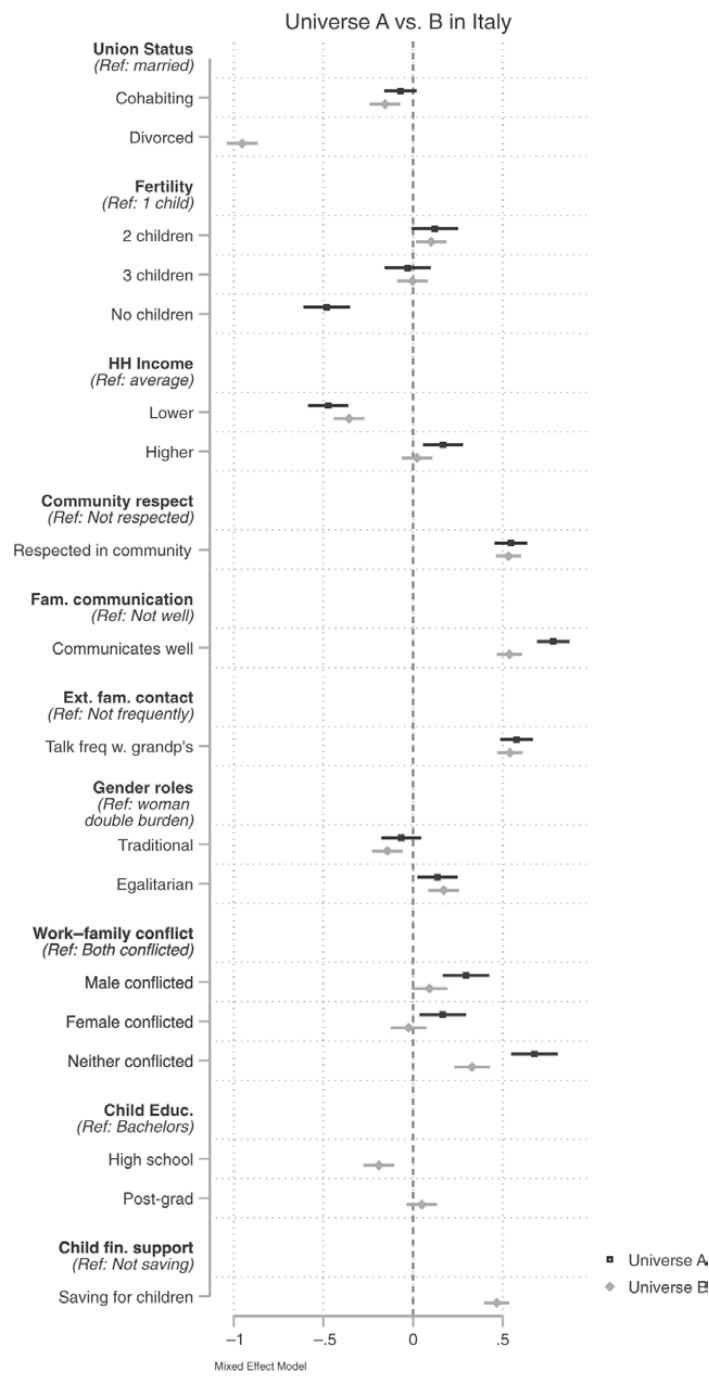


Figure 10.4: Results of Universe A versus B in Spain

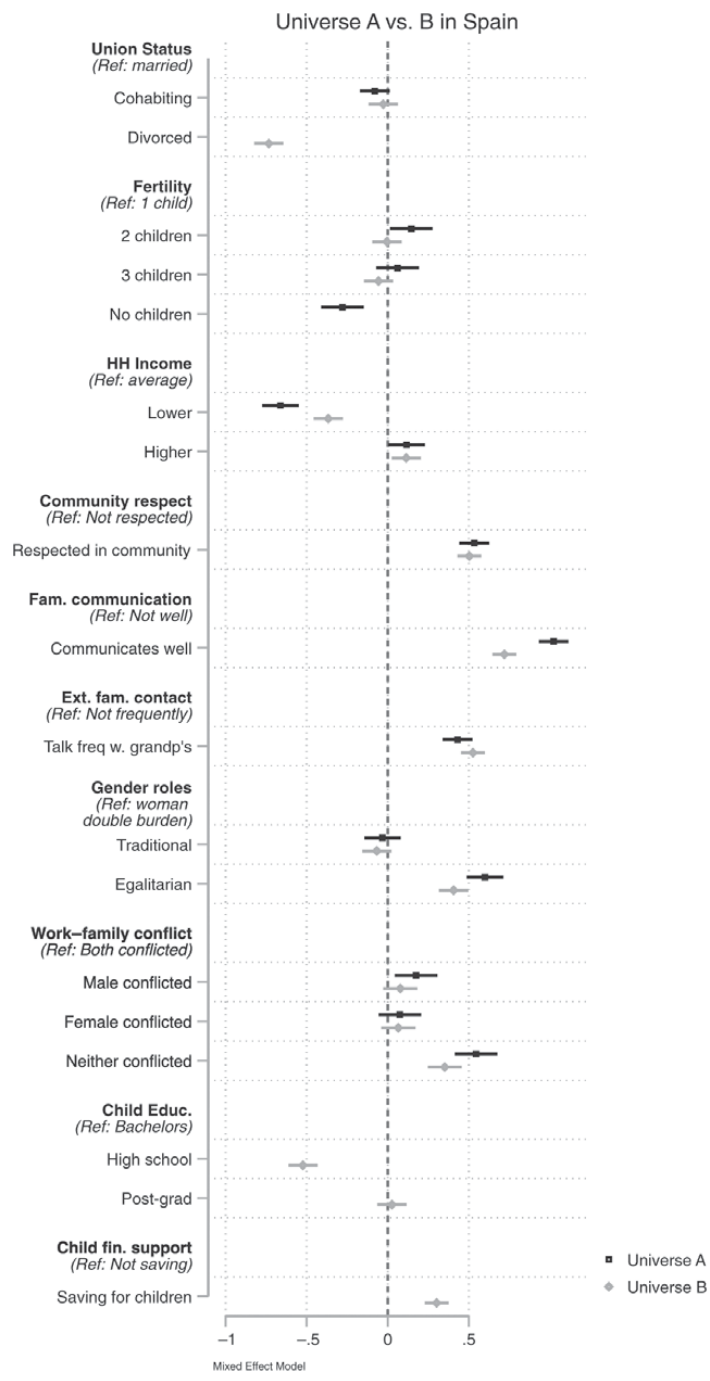


Figure 10.5: Results of Universe A versus B in Norway

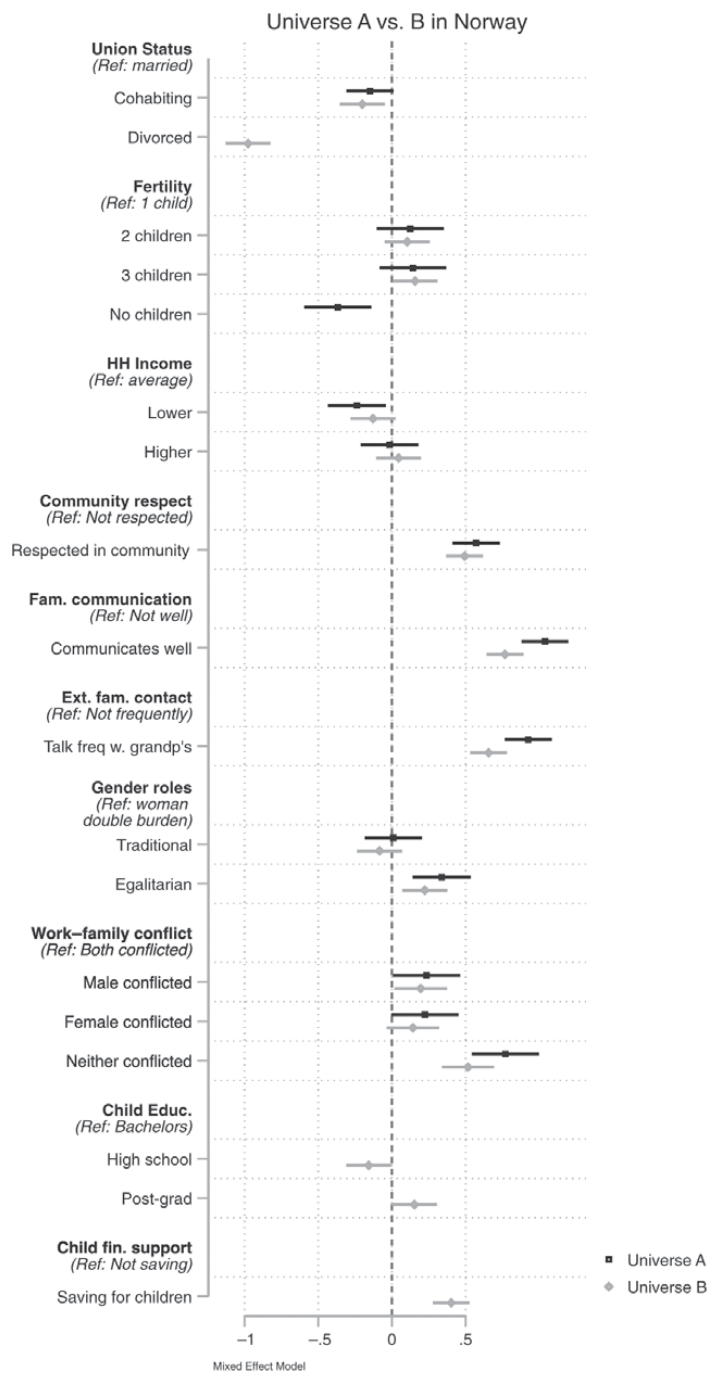


Figure 10.6: Results of Universe A versus B in United States

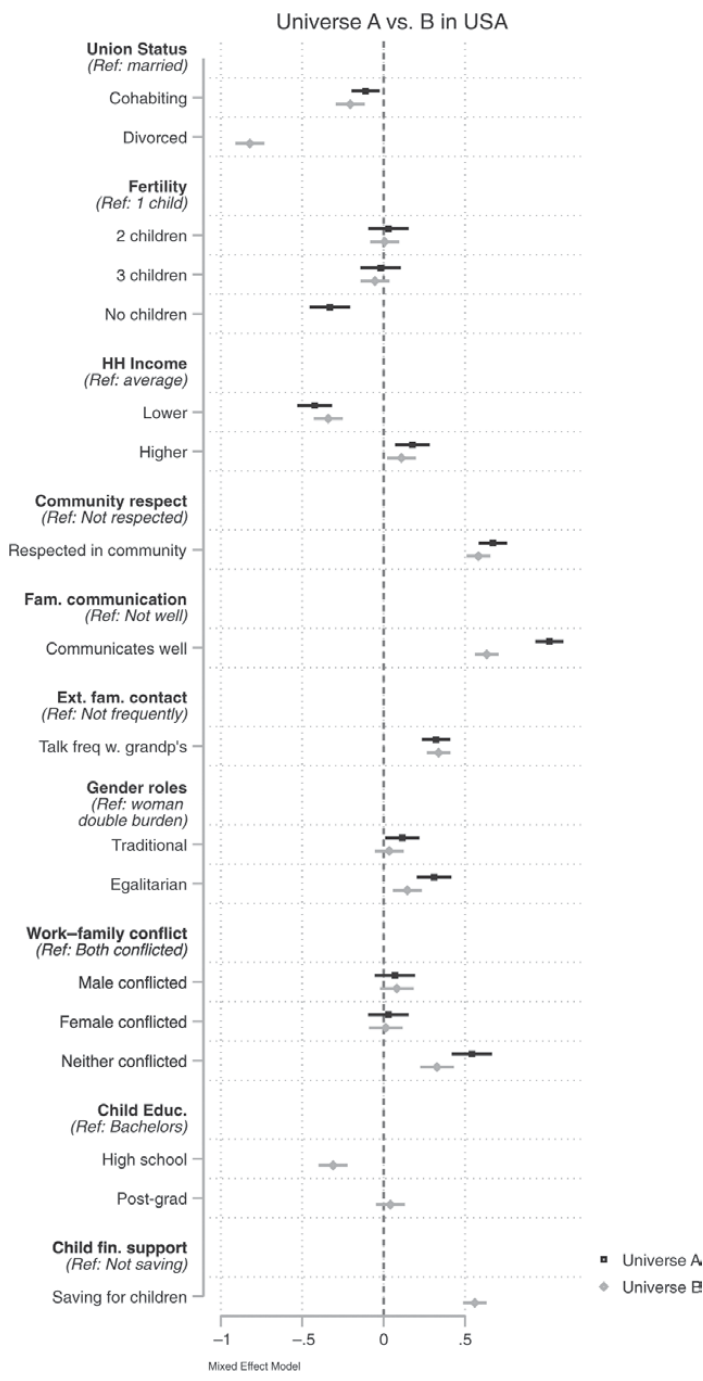


Figure 10.7: Results of Universe A versus B in Japan

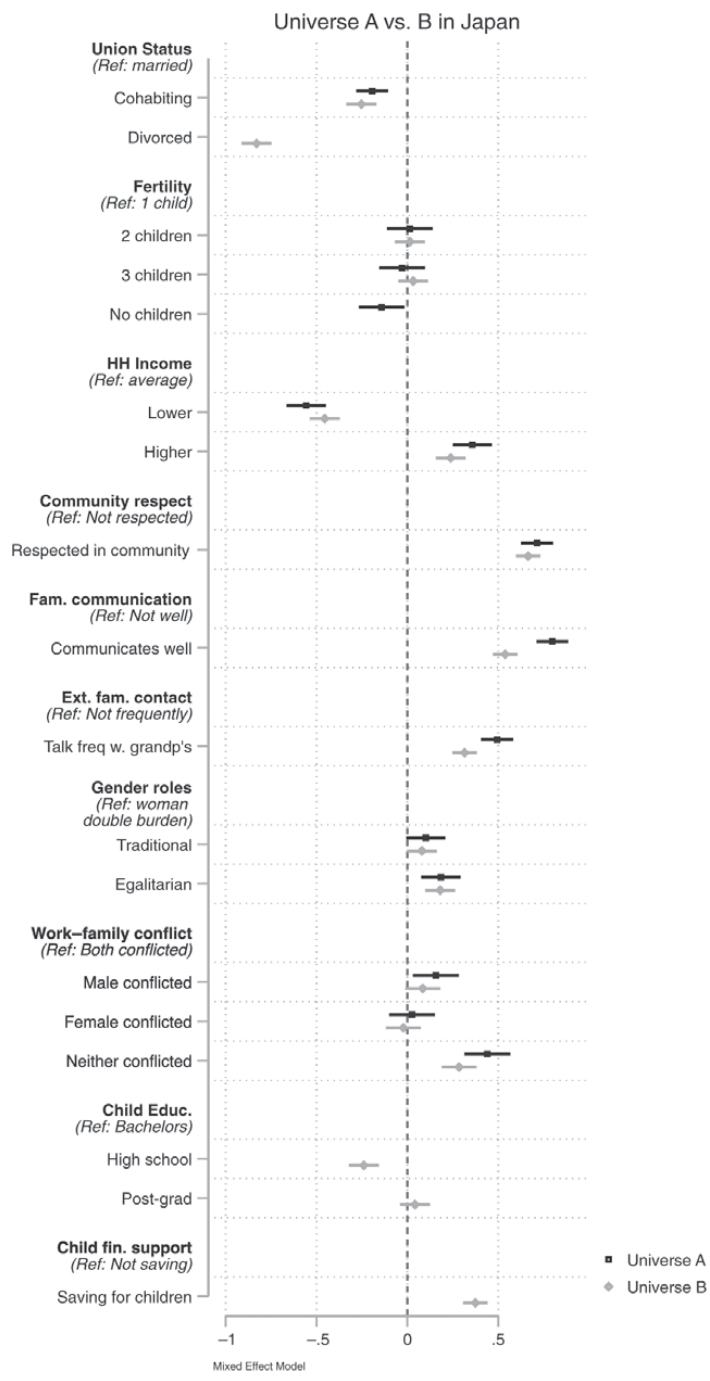


Figure 10.8: Results of Universe A versus B in South Korea

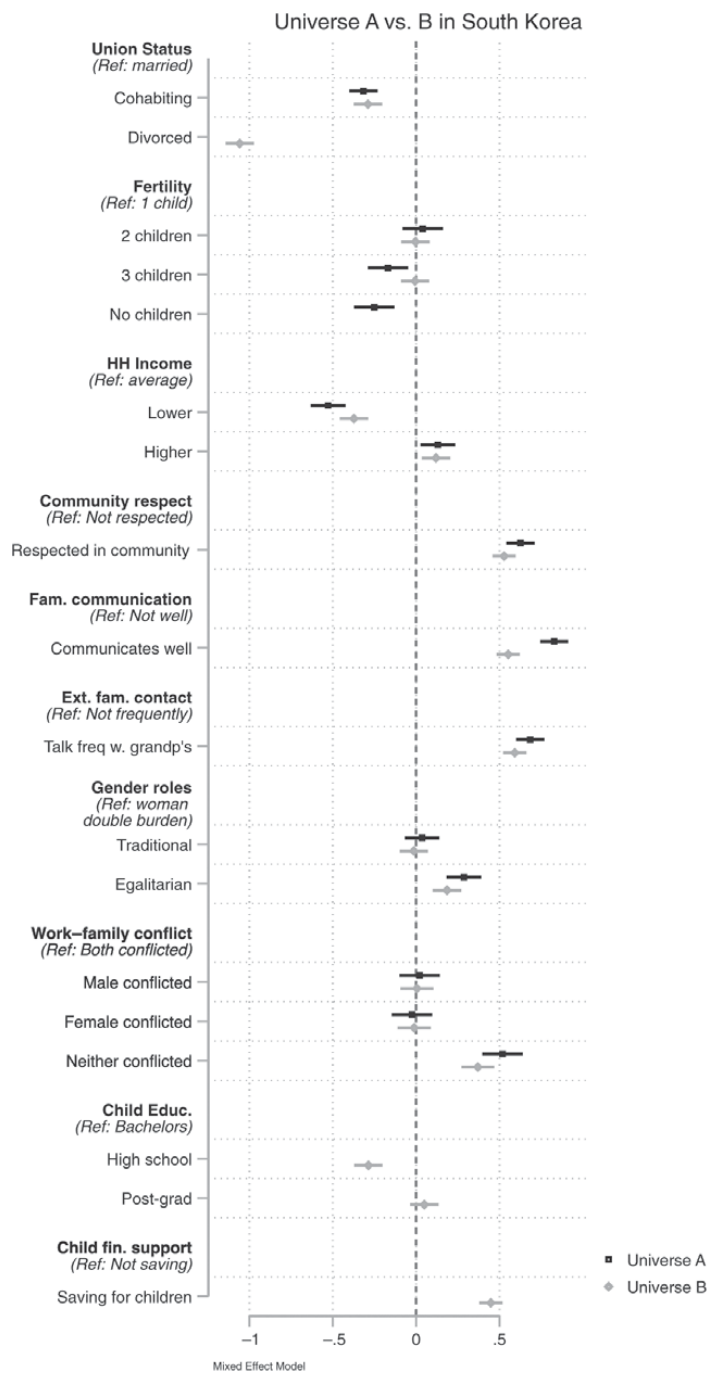


Figure 10.9: Results of Universe A versus B in Singapore

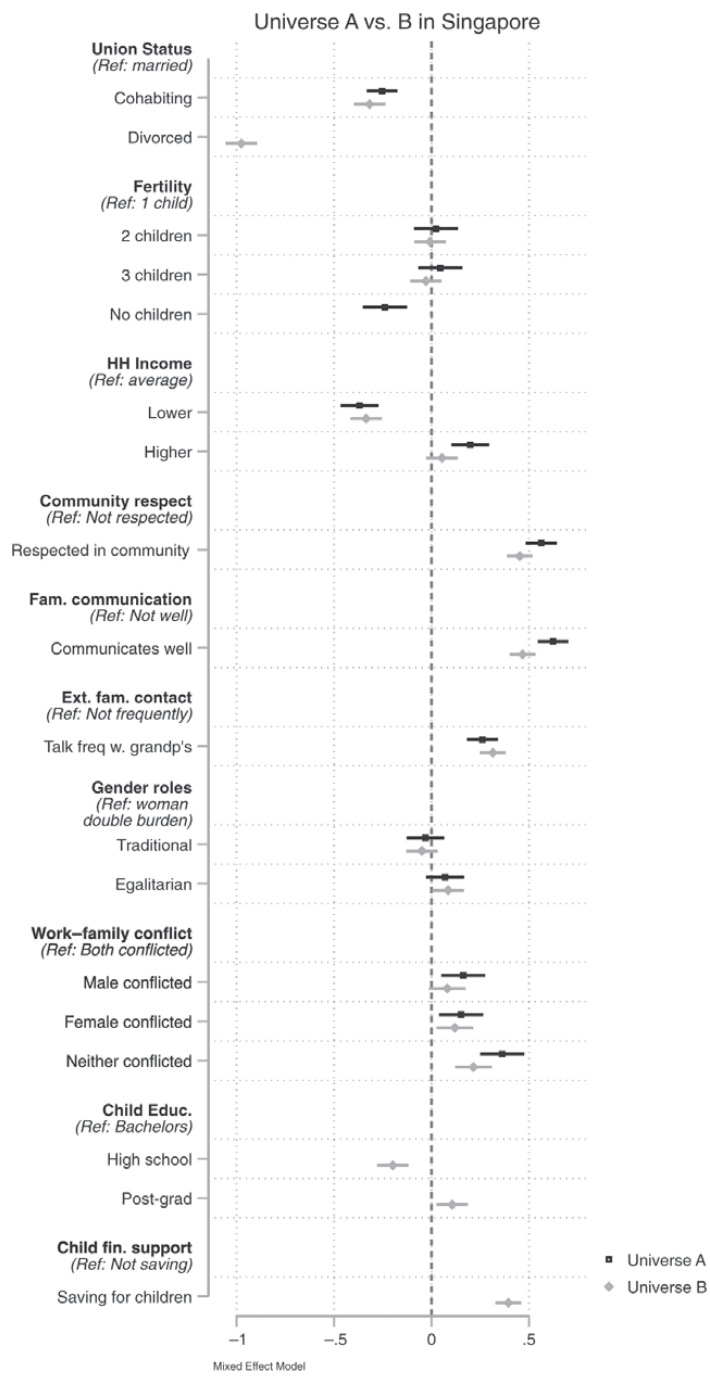
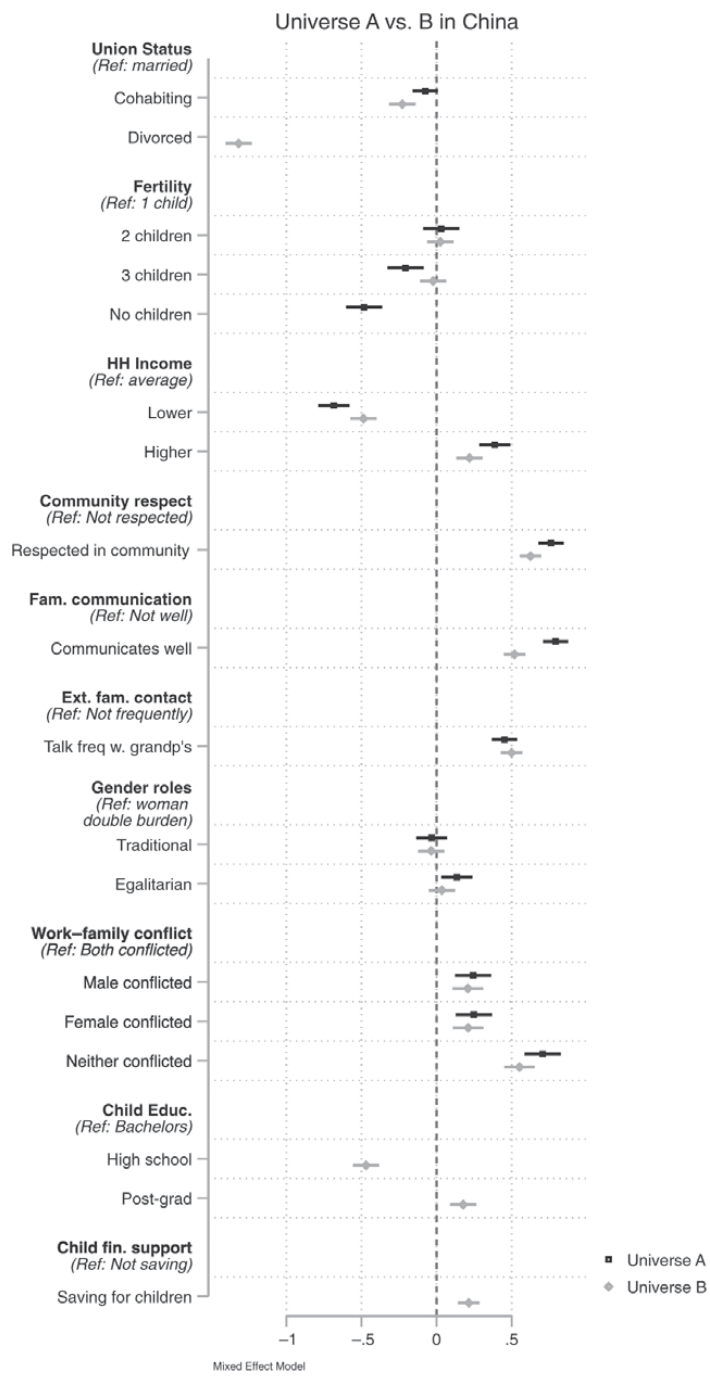


Figure 10.10: Results of Universe A versus B in China



PART IV

Rethinking the Family of Law

The Legal Family as a Child Development Incubator

Noam Peleg

11.1. Introduction

This chapter offers a children's rights perspective on family law, focusing on the objectives, forms, and functions of the 'legal family'. Family law controls parent–child relationships alongside other bodies of law, such as welfare law, labour law, migration and citizenship law, and criminal law, to name just a few. But family law has an exclusive jurisdiction in establishing and recognizing adult–child relationships, namely the status of parentage.

Recognizing the diversity of families and family living, this chapter argues that, from a children's rights perspective, the main objective of the legal family should be to support the realization of children's rights, including their developmental rights – for families with children. Consequently, family law should recognize existing and potential care and kinship arrangements that support and enable children to enjoy the full scope of their rights, including their right to development. The chapter does not argue that the law should recognize a family unit only if it involves care relationships between children and adult(s), nor that having children is an essential element of being 'a family'.

The chapter proceeds in five parts. Following this introduction, Section 11.2 asks how the 1989 UN Convention on the Rights of the Child¹ (the Convention) conceptualizes 'the family' and its role regarding children and their rights, how it constructs what good child-rearing practices look like,

¹ *United Nations Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

and how these factors are connected, if at all, to family structures. [Section 11.3](#) moves to review the form and functionalist approaches to family law. Using common law traditions, that part asks what, if any, objectives these approaches establish for the legal family. [Section 11.4](#) discusses in greater detail the objectives of the legal family before the chapter moves, in [Section 11.5](#), to address parental duties and responsibilities to children. [Section 11.6](#) argues that a children's rights approach to family law should result in changing how functional parenting tests work, so as to accommodate children's rights considerations and positive care arrangements when determining who a child's legal parents are and who might have parental responsibility over a child.

11.2. The Convention, Families, and Child Development

11.2.1. Family structure

The Convention is the most widely ratified human rights treaty in the world, with 196 countries having become state parties. Indeed, the United States is the only member of the United Nations that has failed to ratify it. The Convention establishes and recognizes a set of some three dozen rights, reflecting norms and values concerning children and their rights, as well as children's relationships with their families, communities, and states and with the international community.

The Convention recognizes the child as an agent in their own right and guarantees a range of developmental rights for children, including the right to development in Article 6(2). It describes 'the family' as the backbone of social structure and emphasizes the importance of the family for children and for society. The Convention further centres the family as the main entity in children's lives, extends respect for the prerogative and autonomy of parents in raising their children, and mandates states to support parents in fulfilling their roles (Articles 4, 5, and 18). The Preamble states: 'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'.

The Convention mentions 'parents' 36 times and, except on one occasion, always uses the plural term. It also refers several times to households composed of plural parents.² This embrace of an essentialist understanding of the family in accordance with the nuclear family model is further manifested in the fact that circumstances where a child lives with, or knows, only one of his or her parents are seen as exceptional. The norm is reflected,

² See also Articles 2, 3(2), 5, 7, 9, 10, 14, 18, 21, 22, 23, 24, 27, 29 and 40.

for example, in Article 7, which recognizes the child's right to 'know and be cared for by his or her parents', and Article 9, which provides strong protection for the nuclear family model by establishing a duty of states to 'ensure that a child shall not be separated from his or her parents against their will' – except in situations of abuse, where separation is seen to be in the child's best interests.

These provisions should be read in conjunction with Articles 10, 16, 18, 20, 21, and 22, which deal with the rights of children in various contexts, including privacy, parental responsibility, and adoption. In this way, the Convention reinforces the significance of family relationships for children,³ but it does so in the context of a specific family structure. Article 10 is particularly worth noting in this regard, as it refers to the right of a child to maintain relationships with both parents in cases where the parents live in different states. In fact, this is the only provision that contemplates a singular parent, and it is where the Convention marks a one-parent household as an exception to the biparental heteronormative model that underpins its logic and narrative. Article 10 therefore establishes a set of entitlements and obligations to govern this exceptional situation. The relevance of this terminology and the essentialist conceptualization of family and parenting should be called into question, given the living realities of many children who grow up in families where parents do not live together, for various reasons, but at the same time maintain an intimate, romantic, or other form of care or kinship relationship, and have an agreement, implicit or explicit, in writing or not, concerning their parenting.

This emphasis on the nuclear family model and a particular care arrangement coexists, as Sheila Varadan has shown, with other terminology concerning parental figures and care. In addition to its frequent use of the term 'parents', the Convention mentions 'legal guardian(s)' 11 times, while 'members' of the family and those who are 'responsible' for the child are mentioned four times each. Three additional categories are mentioned, including 'relatives', 'other persons legally responsible for the child', and 'members of the extended family or community'. Parents, nonetheless, represent most carers identified in the text,⁴ while other care arrangements and kinship structures are left in the margins. As Varadan notes, while the drafters of the Convention were aware of 'a need to capture a broad range of carers within the family structure, they struggled to find clarity over who

³ B Bennett Woodhouse, 'The Child's Right to Family' in J Todres and SM Kind (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020) 237–257, 239.

⁴ S Varadan, 'There's No Place Like Home: The Role of the Informal Carers under the UN Convention on the Rights of the Child' (2021) 35 *International Journal of Law, Policy and the Family* 1, 22.

those carers should be'.⁵ And, eventually, the text of the Convention centred and mainstreamed a 'Western' model of the nuclear family, one that is based on a two-parent household composed of a father and a mother.

The Convention thus reflects and perpetuates a particular form of family structure, namely the heteronormative nuclear family model, where two parents, a father and a mother, have a conjugal relationship and together raise their child(ren).⁶ While this archetype governs the lives of children and families in each state party to the Convention, it overlooks the diversity of families and kinship arrangements in many societies.⁷ It also reinforces the idea that those who 'bear' a child have a certain claim or right over the child's rearing. Yet, from a child's perspective, guidance and support will come from multiple actors, including but not limited to biological parents, and in many cases these relationships will play a significant role in the child's social identity, religious beliefs, community ties, and so on. To rely on a definition of family that prioritizes a specific model of 'biological' or 'nuclear' families denies children the support, guidance, and direction they need from a multitude of adults to form an identity, test out ideas, and so on.

Having said all of that, it is worth noting that the text of the Convention does not include an explicit statement that limits the number of parents that a child can have; nor does it explicitly refer to the sex and/or gender identity of the parents. This silence can be explained by the fact that the Convention was debated during the 1980s, when same-sex marriage was illegal in all countries and same-sex relationships were criminalized in many (predominantly by outlawing anal intercourse between men); reproductive technologies were rare, expensive, and inaccessible to many; adoption was limited to married couples; and, by and large, little social acceptance was extended to so-called non-traditional family structures. Further, even the concepts of 'gender' and 'sexual orientation', as Michael Freeman and Philip Veerman have noted,⁸ are absent from the text of the Convention. This omission provides space for developing an inclusive interpretation, whereby family models and kinship structures that exceed the heteronormative nuclear family model can be read into the Convention. Nothing in the text suggests that only one definitive model of family structure will ensure that the rights of children will be protected by 'the family'. Moreover, as Nigel Cantwell and Anna Holzscheiter argue in their commentary on Article 20, the family

⁵ Ibid, 6.

⁶ Cf. M Warner, *The Trouble with Normal* (Free Press 1999).

⁷ S Harris-Short, 'Listening to "the Other"? The Convention on the Rights of the Child' (2001) 2(2) *Melbourne Journal of International Law* 304.

⁸ M Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law, Policy and the Family* 52; P Veerman, 'The Ageing of the UN Convention on the Rights of the Child' (2010) 18(4) *International Journal of Children's Rights* 585.

environment in which the child lives and where their needs are met should be recognized by law, even if it is not the child's 'natural' birth family.⁹

This diversity of family forms is not limited to non-Western societies where kinship is shared among family members and the wider community beyond the two parents, or where care practices are intergenerational. The heteronormative family model is challenged in Western societies too, where other intimate relationships and care arrangements are practised and are gaining (limited) legal recognition. This includes single-parent households, same-sex relationships, and social parenting, to name just a few.¹⁰

11.2.2. *Family objectives*

Several articles in the Convention address, either implicitly or explicitly, the objectives of the family and set out a range of expectations for family functions. These objectives and functional dimensions are predominantly located in provisions establishing the duty of parents and members of the extended family to support child development (Article 18) and to provide guidance to children as to how to exercise their rights (Article 5). Defining the objective of child-rearing practices in this way should be further understood in the context of the broad and comprehensive protection for child development provided by the Convention (Article 6[2]), including in the contexts of the right to an adequate standard of living (Article 27) and the objectives of education (Article 29).¹¹

Accounting, from a child's perspective, for the duties and responsibilities that the Convention establishes for parents, it seems that children can expect that their developmental needs will be cared for and supported by their family and will be front and centre of the functionality of the family. In other words, it can be argued that the main objective of child rearing is to promote child development. This reading might be in tension with how the Convention constructs family form and parenting composition.

However, by centring parents as the predominant sources of care, the Convention does not adequately distinguish between the (potential) quality of other care arrangements, either formal or informal. It seems that a formal duty of care can only be discharged by the child's legal parents, while informal care, as the name suggests, can be performed by others. More importantly, the Convention ignores the reality that many children benefit or can benefit from

⁹ N Cantwell and A Holzscheiter, *A Commentary on the United Nations Convention on the Rights of the Child, Article 20: Children Deprived of Their Family Environment* (Martinus Nijhoff 2008) 26–7.

¹⁰ See, for example, the chapters in [Part I](#) of this volume.

¹¹ N Peleg, *The Child's Right to Development* (Cambridge University Press 2019).

positive and supportive informal care for their development. It is, therefore, important to centre ‘care’ and to distinguish between the providers of care and how they are regulated: namely, the identity of the carers, the legal relationship of the carers with the child, the potential of the carers or other adults to have a positive relationship with the child, and the ability of the carers to support the child’s rights and development. Formal and informal care are categories that describe the status of the care provider vis-à-vis the child, but both are silent on the quality of care and its benefits to the child. From a child’s rights perspective, I argue that such recognition should be offered based on the care provided, or expected to be provided, for the child, and not exclusively on the status, actions, intentions, and genetics of the adults.

This then raises the question of who can and should raise a child and obtain the legal powers that enable them to do so, usually in the form of legal status as a parent or some form of parental responsibility. This child-centred question can potentially come into tension with the Convention, which, as previously argued, seems to prioritize the child’s relationship with their biological parents over relationships with others who provide care to the child. Or, at the least, it sees the latter as secondary and inherently inferior to the former.

11.3. Function and Form at the Intersection of Family Law and Child Development

Family law, as a composite legal system, emerged in common law at the mid-nineteenth century, with the transformation of ‘the law of husband and wife into the law of marriage, and of marriage from contract to status’.¹² This is when a thin regulatory environment that focused on the laws of marriage, divorce, and succession evolved into a broader familial intimacy law. Family law focused on family formation and was increasingly extended to deal with the end of the familial relationship and post-separation life.¹³ But scant attention was given to the nature of the relationship between adults, let alone questions of family violence, the relationship between parents and their children, or how parents raise their children. Subsequently, the content of a parent–child relationship had no bearing in post-separation arrangements, as far as children were concerned, and the law followed strict rules of custody and access.¹⁴ For example, the tender year doctrine,

¹² J Halley, ‘What Is Family Law?: A Genealogy, Part I’ (2011) 23(1) *Yale Journal of Law & Humanity* 1, 3.

¹³ H Reece, *Divorcing Responsibly* (Hart 2003).

¹⁴ JE Hasday, *Family Law Reimagined* (Harvard University Press 2014) 95–157.

where mothers were given custody of their younger children post-separation.¹⁵

This new family law established the status of parentage using a rather simple formula: *Mater semper certa est*, meaning that ‘the mother is always certain’. The birth mother was considered as the child’s legal mother, while her husband was presumed to be the child’s legal father.¹⁶ A special status was reserved for unmarried women who gave birth, or for married women who became pregnant when it was known to the community that the husband was not the genetic and biological father of the child (for example, when a woman’s pregnancy began while her husband was away). The children of these women were given various derogatory legal statuses, such as ‘bastards’, and they and their mothers were subjected to a range of legal and social sanctions.¹⁷ Other presumptions of parentage were not available.

The introduction of child abuse and neglect laws in the late nineteenth century saw the first legislative limitation on parental autonomy. Under those laws, some parental practices that could cause or have the potential to cause harm to the child became illegal. Similarly, a failure to provide some minimal living standards for children or to follow social norms was labelled as neglect and could lead to external intervention in the family unit. This could take the form of child removal as a permanent or temporary measure, the incarceration of a parent, or measures that were less harsh, such as fines.¹⁸ In the United States, dedicated family courts, then known as ‘juvenile courts’, were established to assist children and their families. However, this attempt to solve familial problems through judicial intervention was, as Jane Spinak argues, never realized. The court’s failure, according to Spinak, is rooted in racism, assimilation norms and class politics.¹⁹

Abuse and neglect laws can be seen as limitations on parental autonomy. But they can also be framed differently: these laws establish a duty of care for parents and made harm prevention an essential aspect of parental roles and an inherent element of how parents should exercise their autonomy. Defined in negative terms, parents now have the duty to not neglect or abuse their children. This is a significant shift from seeing parentage only via the prism of the right to bear, instead introducing questions concerning the meaning of

¹⁵ JE Artis, ‘Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine’ 38 (2004) *Law and Society Review* 769.

¹⁶ Cf., for example, section 2(1) of the English Children Act 1989.

¹⁷ See, for example, *Attorney-General (Vic.) v Commonwealth* (1962) 107 C.L.R. 529, 587–588, where the High Court of Australia discussed, inter alia, the question of legitimacy, ‘bastard’ and the newly adopted Marriage Act.

¹⁸ C Lyon and P De Cruz, *Child Abuse* (Jordan & Sons 1990) 7–12.

¹⁹ JM Spinak, *The End of Family Court* (NYU Press 2023).

the right to rear.²⁰ It is a departure as well from the historical conception of children as the property of their fathers.²¹ The duty of care can also be seen as the beginning of regulating family function: the function not to harm the child. Alternatively, this can be conceptualized as an objective of the family unit and of the parental role: to enable the child to grow up free from harm.

Other than that, child-rearing practices continued to be considered private, with the law – including family law – taking no interest in them. Even in the event of divorce, when public scrutiny over the family occurred, family law focused on the behaviours, needs, and preferences of adults.²² Custody and visitation rights were allocated to either the mother or the father, with no consideration of the specific circumstances of the case or the needs – let alone the best interests or rights – of children. These decisions, until the 1970s and 1980s, were made in the shadows of gender politics and gender norms. The tender years doctrine is one example for this. Based on this doctrine, custody disputes resulted in the automatic allocation of custody rights to mothers, irrespectively of circumstances or any individual assessments, and as such, it is a clear manifestation of this legal climate. No weight was given to family function, family objectives, or children's preferences. Sometimes – and this very much varied among jurisdictions – the decisions were masked as if they were made in the best interests of children, but no child-focused best interests investigation or analysis was conducted by the courts.²³

Over the years, shifts in social and legal attitudes to mothers, fathers, motherhood, fatherhood, parenting, and gender norms resulted in changes to this law. Family law began to embrace accounts of the welfare principle or contextualized best interests analysis, which, in turn, saw some individual assessment of every child and every family before decisions were made. These developments were not free from problems, including racial biases. But actual parenting remained unregulated, while the regulation of the right to rear did not develop beyond issues of abuse and neglect. In that sense, the overall goals of family law, as Carl Schneider argued, remained to facilitate family formation (the right to bear) and to enable families to care for the dependency needs of individuals.²⁴ This, in turn, contributed to the maintenance of a broad, near absolute parental autonomy.

²⁰ D Archard, *Children: Rights and Childhood* (3rd ed, Routledge 2015) ch 10.

²¹ J Montgomery, 'Children as Property?' (1988) 51(3) *Modern Law Review* 323.

²² M Mclean and J Eekelar, *The Parental Obligation* (Hart Publishing 1997).

²³ J Wolf, 'The Concept of the "Best Interest" in Terms of the UN Convention on the Rights of the Child' in M Freeman and P Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff 1992) 125–133, 130–132.

²⁴ CE Schneider, 'The Channelling Function in Family Law' (1992) 20 *Hofstra Law Review* 495, 497–498.

Further social changes and increased acceptance and visibility of different forms of family living – including non-marriage relationships, non-heteronormative lifestyles and relationships, and the use of reproductive technologies – saw family law expanding the range of relationships that qualified as a legal family. A parallel change saw the expansion of the criteria for eligibility as a child's legal parent, moving beyond the confines of the presumption of marriage, whereby the birth mother and her husband were deemed a child's legal parents. Gradually, legal mechanisms began to delink parenthood from parentage and to establish and recognize the legal parenthood of various men and of parties to various relationships.²⁵ For example, a mother's new partner (often called 'stepfathers'), genetic fathers (men who are otherwise not in an intimate relationship with the women who gave birth), and intended parents from various family and relationship compositions were introduced as potential legal parents. In a similar vein, new categories of families, in addition to marriage, such as cohabitation or single parenthood were introduced too. Women without partners gained access to sperm banks and IVF treatments, allowing for the birth of a child with an unidentified father and excluding the legal parenthood of the sperm provider. The fatherhood of a man in a cohabitating relationship with a child's mother was recognized, changing the previous law where mothers in these situations, aka unmarried birth mothers, were seen as sole parents and the children would have been considered as if they were born with an 'unknown father'.²⁶

These parameters of legal parenthood focus on relationships between adults. They rarely, and only to a limited extent, consider the intentions of adults to become parents or to act as parents that might follow the legal recognition of a parental status. The laws also have very little, if anything, to do with the relationship that adults might have with children in practice. In Australia, for example, the Family Law Act 1975 includes a range of parenting presumptions, whereby the gestational person is always (with the sole exception of surrogacy) considered to be the child's legal mother, and the status of the child's 'second parent' is based on the nature of their relationship with the mother for the duration of the pregnancy. For example, if a woman cohabitated with a man nine months before the birth of her child, then this man is presumed to be the child's legal father, irrespectively of the man's (or the mother's) intentions about his parenthood or the genetic contribution of the man.²⁷

²⁵ A Margaria, *The Construction of Fatherhood* (Cambridge University Press 2019) 4–18.

²⁶ Cf. sections 69P–69U, Family Law Act 1975 (Cth) in Australia.

²⁷ Family Law Act 1975 (Cth), s 69Q.

On the other hand, in the case of assisted reproduction, section 60H of the Family Law Act establishes that if a woman has a child conceived using assisted conception and her partner at the time of conception – whether in a marriage or a de facto relationship – agrees to the procedure, then the partner will be recognized as the child’s second parent, irrespectively of any genetic connection to the child (while excluding the sperm and/or ovum providers from being recognized as legal parents, despite their genetic connection to the child). It is, therefore, only when it comes to assisted conception that the intentions of the adults involved matter.²⁸

Importantly, children’s best interests and rights, the parental capacities of adults, the ability or willingness of an adult to fulfil any parenting objective and any actual adult–child relationship are not considered in these regulations of family forms. Family law, in that sense, establishes the status of parentage based on relationships between adults (parents) and, to an extent, their intentions, but disregards any consideration of children’s needs or rights. The only exception is adoption; in such cases, the needs and rights of children are scrutinized, as well as the parental capacities of the prospective parents.²⁹ However, adoption is not a problem-free process and, while it is a jurisdiction-specific issue, it tends to focus on the child’s best interests in a narrow way and rarely involves considerations of children’s rights as a holistic concept.

The next part looks at functional tests, which focus on the practice of adults and adult–child relationships and takes these as benchmarks in establishing legal status.

11.4. Functions of the Legal Family

A functional approach to family law focuses on relationships between adults rather than on the question of whether such relationships were legally formed. It attempts, to an extent and with limited success, to depart from the patriarchal norms that traditionally underpin family law. Instead, the approach extends legal recognition to the relationship between two adults who function as a ‘couple’, whatever that might mean at a particular time and place, and who did not take formal steps to gain legal recognition of their relationship. In the twenty-first century, as will be discussed, the functional approach has been extended to include existing care relationships between children and adults who are otherwise not recognized as their legal parents.

The functional approach was developed to enable adults who did not marry each other – by choice or because they were ineligible, whether due

²⁸ Cf. *Masson v Parsons* [2019] HCA 21 – 266 CLR 554.

²⁹ AR Appell and BA Boyer, ‘Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption’ (1995) 2 *Duke Journal of Gender Law & Policy* 63.

to marital status or to sex or gender – to acquire legal recognition of their intimate or romantic relationship. Functionality, in that sense, is an exercise in reverse engineering: if you behave or conduct your intimate relationship in accordance with how society and subsequently the law imagine that a family or a couple should function, then the law, in turn, will extend legal recognition to your relationship. Such recognition will be extended once the care – the intimate or kinship relationship – has been practised and will last if the functionality continues. In many instances, the legal recognition will have dated back to the day when certain or sufficient functions were established – for example, when cohabitation began or when a more amorphous test, such as ‘living together on a genuine domestic basis’, as the Family Law Act in Australia requires,³⁰ has been met.

Arguably, the functional approach works in contradiction to marriage law. A valid marriage ceremony establishes legal status through a one-off event, and the status of marriage will not be affected, changed, or nullified by a married person’s subsequent behaviour. A married person might never again see his or her spouse, or provide care and support, or have any intimate relationship, but this, in and of itself, will not revoke the person’s status. In most instances, it is only a divorce order that can change that status, and a court will make this order if one party to the marriage or both can demonstrate that a ground for divorce has been met (in addition to any other conditions that the law in each country might add).³¹ The same logic applies to the status of parentage: once this status has been established, only a court order can disconnect a parent from a child, in the form of either an adoption order or, where available, an emancipation order.

A functionalist recognition relies on an essentialist understanding of what families ‘do’, imaginaries of what the social unit titled ‘a family’ is, and romantic ideas about how the family should function. Recognition as a functioning family involves looking at factors such as the duration of the relationship between the adults, scrutinizing living arrangements, including the most intimate elements and so on. Such recognition is usually available for two adults who behave as a couple, irrespectively of whether children have been born into the relationship or are being raised by the adults together.³² Nonetheless, raising children together might be a factor that will

³⁰ Family Law Act 1975 (Cth), s 4AA.

³¹ Cf. LA Rosenbury, ‘Two Ways to End Marriage: Divorce or Death’ (2005) *Utah Law Review* 1227.

³² See, for example, Family Law Act 1975 (Cth), s 4AA, which stipulates a list of circumstances that can be taken into account when considering if a couple functions as a ‘couple living together on a genuine domestic basis’: (a) the duration of the relationship; (b) the nature and extent of their common residence; (c) whether a sexual relationship exists; (d) the degree of financial dependence or interdependence, and any arrangements for

carry much weight, leading to the conclusion that the couple functions like a family. But, even in those cases, the care extended to children will result in recognition of the adult–adult relationship and not necessarily the adult–child relationship(s). As Susan Hazeldean shows, raising children together as a couple does not necessarily result in legal recognition of the family unit in many US states, for both different-sex and same-sex couples alike.³³ In other words, the functional test is designed for, focuses on, and is mainly used to recognize relationships between adults and adult–child care relationships that are instrumentalized for the purposes of granting recognition of the adult–adult relationship.

The functionalist approach to family law is often praised for its inclusivity, as it allowed a range of relationships beyond different-sex marriages to gain legal recognition and, by extension, legal rights that are like the entitlements and obligations of married heterosexual couples.³⁴ This was especially true for same-sex couples, who could benefit from the functional approach at times when same-sex marriage was illegal. This is not the place to recite the debates about same-sex marriage and legal recognition of same-sex relationships, and whether marriage equality should be a cause worth fighting for within the queer community. But the point worth mentioning here is the backlash that many same-sex couples experienced when marriage became legal for them over the past two decades, and when the form took over the function. In the United States, for example, following the legalization of same-sex marriage with the Supreme Court decision in *Obergefell v Hodges* in 2015,³⁵ many states have restricted and scaled back functionalism. This, in turn, has denied recognition of family units to same-sex couples – including those with children – who did not, could not, or chose not to marry. Hazeldean’s review and analysis of the laws in all 50 states shows the extent to which unmarried same-sex couples are not recognized as the legal parents of their children in many circumstances where such recognition is afforded to unmarried different-sex couples.³⁶ In other words, it can be argued that advocating in favour of formal recognition can result in the limitation of the

financial support, between them; (e) the ownership, use and acquisition of their property; (f) the degree of mutual commitment to a shared life; (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship; (h) the care and support of children; (i) the reputation and public aspects of the relationship.

³³ S Hazeldean, ‘Illegitimate Parents’ (2022) 55 *UC Davis Law Review* 1583, 1592–1610. See also KR Allen, [Chapter 2](#), this volume.

³⁴ J Dewar, ‘The Normal Chaos of Family Law’ (1998) 31 *Modern Law Review* 467. See, for example, the discussion on non-conjugal relationships by Palazzo and Cardoso, [Chapter 7](#), this volume.

³⁵ 576 US 644 (2015).

³⁶ Hazeldean (n 33).

functionalist approach and the subsequent narrowing of the range of familial relationships that will be recognized in law. At the same time, the status and legal stability that the 'form' approach offers should not be easily dismissed.

In its original iteration, the functionalist approach instrumentalized child-rearing and saw it as an indication of the seriousness of the adult–adult relationship. Over time, the approach was extended to include adult–child relationships. A functional parenting test usually involves scrutinizing the adult–child relationship and assessing whether it is stable, positive, and ongoing, as 'natural' (aka biological) parenting is imagined to be, before extending legal recognition to this existing relationship – or not. Like the functional test applied to adults, the assessment is made against an essentialist, abstract, standardized, and idealized model of the parent–child relationship. This test can lead to legal recognition of the parent–child relationship, moving beyond parenting presumptions and adoption. However, it will not, in and of itself, lead to recognition of the adult–adult relationship or the legal family.

What do I mean by that? A common scenario here is when two adults are in an intimate and/or care relationship and raising a child (or children) together. The adults may or may not be married to each other, but only one of them is the child's legal parent and the other is a step-parent, which makes them a legal stranger. Then, with only one adult having a legal relationship with the child while their partner nonetheless functions as a parent, the functional parenting doctrine can lead to legal recognition of that parental relationship. The functional parenting tests often include an additional eligibility criterion: the adult in question needs to be in a relationship – whether intimate, legal, or in some other recognized form – with the child's legal parent. But often this will not also result in legal recognition of the adult–adult relationship. Thus functional tests can lead to two separate recognition processes, one for the adult–adult relationship and another for the adult–child relationship, without ever recognizing the family. In other words, it means that functional approaches have the potential to recognize a set of parallel relationships. This, in turn, can lead to instability for the child and might also create instability and discrepancies for future children of this family, including with respect to their relationship as (legal) siblings. Without formal recognition of the family or familial relationships, family members run the risk of being seen as legal strangers until dual functionality is established, often in two separate processes.

In that sense, even this seemingly child-centred test relies on the nature of the legal relationship between the adults. It is, therefore, not enough to 'function' as a parent of a child to be recognized as such under some versions of the functional parenting test. For children, then, the functional test is conditioned on and secondary to the adult–adult relationship.

Adoption, including single-parent adoption, was once considered as the main vehicle for gaining the legal status as a parent for non-biological

and/or non-genetic parents. This legal pathway was often utilized by such parents, in both same-sex and different-sex relationships, to obtain the status of parent to a child they raise together with their partner, after acting as a psychological parent to the child, in cases where they have no other legal relationship with the child. Adoption, however, is a long and difficult process that involves social services, considerable legal expenses, and eventually a court order. It is the quality of the parental care and, to a degree, the capabilities of the parent that will be scrutinized by the court. The processes are onerous, with many families reporting that they are left feeling humiliated and discriminated against.³⁷ Arguably, adoption is a child-centred legal process, as it revolves around the concept of the best interests of the child. But adoption law, which in practice relies on similar benchmarks to a functioning relationship test, when used as a means of formally establishing parentage status for adults, views the child as a beneficiary of this process. Further, given the intense level of involvement by state authorities – which are not free from biases – the adoption process might result in a denial of the legal recognition of the already existing psychological care relationship. This, in turn, can have devastating effects on child development.

The functional parenting doctrine does not make obvious what the purposes or objectives of parenting or of the family unit might be. Nor does it explicitly explain or specify what ‘good’ adult–child relationships or care or kinship arrangements might look like. Rather, the doctrine assesses an existing adult–child relationship against an essentialist, imaginary, and inevitably biased understanding of care in a biparental family context. The potential inclusionary test is operationalized in the shadow of biases, racial stereotypes, and so-called neutral, or even scientific benchmarks of what might qualify as good, supportive or acceptable parenting. This, in turn, depends on the standard that the relevant law establishes, along with societal views on this relationship.³⁸ But, from the perspective of a child, none of these considerations takes the child’s rights into account or gives them due weight. And, probably more importantly, none of them centres the child’s rights, needs, and development at the heart of the decision-making process about a key question that is of fundamental importance to the child: who is eligible, and who has the duty, to care for them?

³⁷ L Ross, R Epstein, C Goldfinger, L Steele, S Anderson and C Strike, ‘Lesbian and Queer Mothers Navigating the Adoption System: The Impacts on Mental Health’ (2008) 17 *Health Sociology Review* 254; KL Acosta, *Queer Stepfamilies: The Path to Social and Legal Recognition* (NYU Press 2021) 147–174.

³⁸ Cf. G Strauss, ‘What Role Remains for De Facto Parenthood?’ (2019) 46(4) *Florida State University Law Review* 909.

11.5. Parental Responsibility, Family Objectives, and Children's Rights

The regulation of adult–child relationships is often a two-tier system, composed of the status of parentage, on the one hand, and the day-to-day care for the child, governed by the concept of ‘parental responsibility’, on the other. Parental responsibility refers to the nature and expectation of having legal responsibility for a child. Although parental responsibility often results from holding the status of a parent, it can also be ascribed by a court to adults who are otherwise not the legal parents of a child.³⁹ As is often the case, the question of parentage, as previously discussed, is not subject to or determined by children’s rights or best interests considerations. This is, for example, the law in the United States⁴⁰ and in Australia⁴¹ – although it has been argued that a change in the approach might be developing in some US states,⁴² whereby child welfare becomes a consideration in parenthood decisions. Parental responsibility, however, especially the decision whether an adult who is not a legal parent of the child will be given parental responsibility, is subject to best interests considerations.

In Australia, ‘parental responsibility’ means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’.⁴³ The two potential parents of a child will automatically obtain parental responsibility once a child is born, but the Family Law Act enables ‘any other person concerned with the care, welfare, or development of the child’ to be given parental responsibility by an order of the Family Court.⁴⁴ This will mean that a child can have three or more adults who have parental responsibility for them. One important difference between the legal status of a parent and parental responsibility that ought to be considered is that the latter expires when the child turns 18, while the former is a lifetime status – including both the life of the child and that of the parent – and, potentially subject to inheritance and other laws, continuing even after death.

From a child’s perspective, this means that an adult can be granted parental responsibility (a sort of form) if they already support the child’s development (function). As previously mentioned, while the status of parentage is not being decided based on children’s rights considerations or functional parenting, this is not the case with parental responsibility

³⁹ This is the case in Australia: Family Law Act 1975 (Cth), s 65C.

⁴⁰ D NeJaime, ‘The Nature of Parenthood’ (2016) 126 *Yale Law Journal* 2260, 2269.

⁴¹ Family Law Act 1975 (Cth).

⁴² A Agarwal, ‘“New Parents” and the Best Interests Principle’ (2024) 35(2) *Yale Journal of Law and Feminism* 288.

⁴³ Family Law Act 1975 (Cth), s 61B.

⁴⁴ *Ibid*, s 65C.

and parenting matters before the court. The Family Law Act in Australia includes a statutory checklist of considerations that the court must consider when deciding parenting matters. Until 2023, the Act included a long set of expectations for parents and families, articulating how they should support children's best interests. These included parents being active in their child's lives, providing 'proper parenting' with the objective of enabling the child to achieve their 'full potential' and acting in a way that supports the child's welfare and development. Further, the law established a right for children to have contact with adults who are 'significant to their care, welfare and development', and those adults did not necessarily have to be members of the child's family.⁴⁵ Providing such an elaborate web of duties and directives resulted in an articulation of the objectives of the legal family and, from a child's point of view, established a clear set of expectations – including that the child's development will be the object of care.

However, the Act was reformed in 2023, with the amendment coming into force in May 2024, introducing a new and shorter definition of the best interests principle. The new definition includes the following factors that ought to be considered by the court when determining what is in the child's best interests in the context of parental disputes and when deciding matters concerning parental responsibility: the child's safety; the views of the child; 'the developmental, psychological, emotional and cultural needs of the child'; the parental capacity of each parent and others who have parental responsibility; the benefit for the child from having a relationship with their parents and any other people who are significant to the child, where it is safe to do so; and any other relevant circumstances.⁴⁶ The reform further specifies how adults with parental responsibility should function. It also clearly and explicitly articulates what the objective of parenting is: to support the developmental needs of children. But the law does not extend the test to the question of the status of 'parent' or to how that status could be obtained. Instead, the law continues to include a set of parenting presumptions that are based on the traditional triangle – gestation, marital status, and genetics – apart from accounting for intention when it comes to artificial conception and surrogacy.

The duality of the concept of 'function' should be further unpacked. While its common use is to analyse whether an adult–child relationship meets the criteria for functioning parenting as a precondition for the legal recognition of the relationship, in the case of Australia we see a legislated framework that conveys an expectation about what a good and positive relationship between children and parents should look like and what objectives it should

⁴⁵ Family Law Act 1975 (Cth), s 60B.

⁴⁶ Family Law Act 1975 (Cth), s 60CC.

serve. Functionalism, in that sense, is not only a test but also an objective. When parents disagree on how to fulfil their duties to their child, usually but not always in the context of separation, and when a parenting order is being requested, the court will consider the best interests checklist and will decide on the three components of parental responsibility: guardianship, or the scope of legal responsibility that each parent will have; custody, or who will be the main caregiver for the child; and access (visitation), or how often, and according to which arrangement, the child will see the non-residential parent.

11.6. Rethinking Family Function and Form

Writing in 1984, more than 40 years ago, Fran Olsen claimed that family law scholarship is torn between the apologetic and the utopian. The apologetic aspect perpetuates gender and other biases, despite rapid changes in society and in law, while the utopian aspect, according to Olsen, often offers some minor changes in law that nonetheless ‘help perpetuate oppressive family institutions’,⁴⁷ essentially meaning that the two ends result in a similar status quo. For children, therefore, family law is, by and large, one of many manifestations of the legal oppression that they confront every day.

Family forms focus on establishing adult–adult relationships and recognizing adult–child parental relationships, where gestation, marital status, and genetics are the primary considerations. Children’s rights, or an actual practice of care and support for children, are not factors in the regulation of family forms, except in adoption laws, where these considerations are put aside in favour of prioritizing others, including child welfare. Functional family law refers to family ‘function’ both as a description and as an analytical framework for examining existing relationships between adults and/or between adults and children (adult–child, adults–child, and adults–children relationships), who otherwise do not have any recognized legal family relationship. According to this doctrine, once you can establish that you already function as a family, then you can apply for formal recognition of an existing nuclear family relationship.

A child’s rights approach supports defining the objectives, functions, and forms of the legal family considering the Convention and the duties that it establishes for parents and caregivers. This provides a different basis for understanding and operationalizing the questions of form and function, or parentage and parenting. In broader terms, it can set the duty of care towards children as a point of departure for rethinking the meaning of kinship,

⁴⁷ F Olsen, ‘The Politics of Family Law’ (1984) 2(1) *Law & Inequality: A Journal of Theory and Practice* 1, 4.

relationships between adults and children, and relational experimentalism. ‘Kinship’, Tyler Bradway and Elizabeth Freeman argue, is a term that goes beyond belonging and intimacy – two concepts that often underpin functional tests. Using kinship also provides an opportunity to go beyond the confines of heteronormative nuclear family models.⁴⁸

Once adults promote and support children’s developmental rights, as the Convention expects them to do, the question becomes how family law should account for this and, more specifically, whether it should do so via the functional approach or, separately or concordantly, via the formal route. A child’s rights conceptualization of the functional parenting test would suggest that, once an adult fulfils his or her duties, obligations, and responsibilities towards a child, then the test has been met, and legal recognition of the relationship should follow. This conceptualization offers a more concrete and child-friendly benchmark, compared to the amorphic functional parenting tests currently in use. If it is chosen, a child’s rights approach to formal family law should result in creating a new presumption of parenting, where the status of parents can be established based on supporting a child’s rights and development.

The challenge is to shift the functional test 180 degrees and look at it from a child’s point of view. Instead of asking whether adults are acting like a family as a precondition to warrant legal recognition of their intimate relationship or of the adult–child parental relationship, we should instead ask who is the adult that cares for the child’s developmental rights or that can do so in the future, and then allocate a parental relationship accordingly. To an extent, it can be argued that the functional parenting doctrine works in this way. However, in many countries, an eligibility criterion for being considered as a parent under this test is being in a recognized legal relationship with the legal parent of the child (if there is one). Indeed, although the functional parenting test often provides recognition for a married step-parent, most jurisdictions offer almost no pathway for the legal recognition of functional parenting for the unmarried partner of a legal parent.⁴⁹ Doing so would ensure that children and parents enjoy the stability of a status that comes with formal recognition, rather than settling for a functional and temporary recognition of parental responsibility – which can be revoked and which ends when the child turns 18.

The function, in other words, looks at adult–child relationships instead of adult–adult and adult–child relationships, and is not subjugating the

⁴⁸ T Bradway and E Freeman, ‘Introduction’ in T Bradway and E Freeman (eds), *Queer Kinship: Race, Sex, Belonging, Form* (Duke University Press 2022) 1–25, 2.

⁴⁹ C Huntington, CG Joslin and C von Bary, ‘Introduction’ in C Huntington, C von Bary and CG Joslin (eds), *Social Parenthood in Comparative Perspective* (NYU Press 2023) 1–11, 4.

functional to the form. In cases where form outdoes function – for example, where there is one adult who is a legal parent and another who is a parent in action, and the family law system prefers the former over the latter irrespective of the ways in which each adult functions or of the views of the child – such biases towards the form do not serve the main function of the family, which should be to support child development.

If formal recognition comes with the status of parentage, instead of parental responsibility, we should immediately address the issue of the biparental model and contemplate instead the possibility that a child will have more than two legal parents. From a child's rights perspective, this is, at least theoretically, an acceptable option, and there is no strong justification for capping the number of parents that a child can have at two. Moreover, this arbitrary limitation, which does not take into account an individual best interests analysis, can be considered, in and of itself, to be contradictory to children's rights. The practical aspects of poly-parenting, however, require further consideration: how, for example, will a group of adults fulfil their duties towards the same child, and what will happen when they disagree or otherwise cannot cooperate? However, such challenges are insufficient reason to override children's rights: there is nothing new about parental disagreement and complicated relationships between adults who otherwise ought to cooperate when it comes to parenting. Family law systems have long developed mechanisms to address, mitigate, and resolve parental disputes, and they can evolve to accommodate non-traditional family structures.

From *Folkhemmet* to Post-welfare Sweden: Rethinking Care and Dependency in a Neoliberal Context

Helena Moradi

12.1. Introduction

Sweden's welfare state, historically lauded for its collectivist ethos and egalitarian principles, was founded on the ideological bedrock of *Folkhemmet*, or the 'people's home'. Introduced in the early twentieth century by Prime Minister Per Albin Hansson, *Folkhemmet* envisioned a society unified by shared universal responsibility for dependency, anchored in strong institutional mechanisms – thus fundamentally reimagining the role of the family in society.¹ By positioning caregiving as a public commitment and collective obligation rather than an individual burden,² this

¹ PA Hansson, 'Folkhemstalet' (1928) SvenskaTal.se (in Swedish) <https://www.svenskatal.se/tal/per-albin-hansson-folkhemstalet> accessed 1 December 2025; N Edling, 'Varifrån kommer välfärdsstaten?' (2018) 25(2) *Socialvetenskaplig tidskrift* 115; N Edling, *The People's Home: The History of a Swedish Keyword 1900–2020* (Stockholm University Press forthcoming); E Åsard and WL Bennett, *Democracy and the Marketplace of Ideas: Communication and Government in Sweden and the United States* (Cambridge University Press 1997); T Meyer, 'The Rise and Fall of the Folkhem in Swedish Politics' in E Åsard and WL Bennett (eds), *Democracy and the Marketplace of Ideas: Communication and Government in Sweden and the United States* (Cambridge University Press 2021) 86–114.

² The Swedish welfare state's ambition to ensure equitable living standards is enshrined in its constitution, specifically Chapter 1, Section 2 of the Instrument of Government, reflecting the commitment to universal rights and social solidarity. For a deeper understanding of Sweden's welfare model, see Å-Z Duvander, 'Family Policy in Sweden: An Overview' (2008) *Stockholm University Demography Unit Working Paper 5/2008*; M Bäck-Wiklund, 'The Family and the Welfare State: A Route to De-familialization' in R Liljeström (ed), *Autonomy and Dependence in the Family* (1st ed, Routledge 2003) 157–176.

vision³ resonates deeply with the theoretical approach of Martha Albertson Fineman's Vulnerability Theory, which critiques liberal autonomy⁴ frameworks for their failure to account for the universal and inherent dependency of human beings, advocating instead for institutional mechanisms that foster resilience and equity.⁵ For clarity and variety, references to this conceptual framework will henceforth be termed *the vulnerability-centred lens*, emphasizing universal embodiment and embedded dependency.

Sweden's commitment to gender equality has long been a cornerstone of its public policy, yet caregiving inequities persist. As in many other high-income nations, gender-neutral parental leave policies fail to disrupt entrenched caregiving norms. Although Sweden boasts one of the highest paternal leave uptake rates globally,⁶ women still take approximately 70 per cent of parental leave, reinforcing traditional gender divisions of labour.⁷ Moreover, the privatization of certain welfare services, including

³ In the literature on welfare states, a broad distinction is often made between 'marginal' and 'institutional' models. The marginal model is characterized by market dominance and limited state intervention, primarily serving 'the human residual incapable of self-help'. In contrast, the institutional model offers extensive public responsibilities, ensuring that welfare distribution is not left to families or the market. This model promotes broad social solidarity and universality, with social programs that are redistributive and designed to guarantee all citizens an acceptable standard of living and full social citizenship rights unconditionally. See C Bergqvist, 'Myten om den universella svenska välfärdsstaten' (1990) 93(3) *Statsvetenskaplig tidskrift* 223; G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990); W Korpi, *The Democratic Class Struggle* (Routledge & Kegan Paul 1983).

⁴ M Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004).

⁵ See generally M Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

⁶ Sweden ranks 1st in the EU on the Gender Equality Index with 82.2 points. See European Institute for Gender Equality, 'Gender Equality Index 2023'. Despite high rankings, unpaid domestic labour remains disproportionately gendered, with women globally spending nearly three times as much time on unpaid care work. See UN Women, *Progress of the World's Women 2019–2020: Families in a Changing World* (UN Women 2019) 2. While the Gender Empowerment Measure (GEM) shows increased female workforce participation, caregiving responsibilities continue to limit economic resilience. See T Hanna, C Meisel, J Moyer, G Azcona, A Bhatt and S Duerto Valero, *Forecasting Time Spent in Unpaid Care and Domestic Work* (UN Women and Frederick S Pardee Center for International Futures 2023) 2.

⁷ M Grandahl, J Stern and EL Funkquist, 'Longer Shared Parental Leave Is Associated with Longer Duration of Breastfeeding: A Cross-Sectional Study among Swedish Mothers and Their Partners' (2020) 20 *BMC Pediatrics* 159; H Mandel and M Semyonov, 'Family Policies, Wage Structures, and Gender Gaps: Sources of Earnings Inequality in 20 Industrialized Countries' (2005) 20(3) *American Sociological Review* 949; ND Gupta, N Smith and M Verner, 'The Impact of Nordic Family Policies on Female Employment and Wages' (2008) 22(3) *Feminist Economics* 1.

childcare and eldercare, has exacerbated economic inequalities by limiting access for lower-income families, illustrating the gap between formal equality and structural dependency. The persistence of these disparities reveals the necessity of policies that move beyond market-based solutions and recognize caregiving as a fundamental societal responsibility rather than an individualised burden.

The ideological foundation of *Folkhemmet* was operationalized through policies like universal childcare, maternity grants (*moderskapspenning*), and the *husmorskontrakt* ('housekeeper/housewife contract'), which incentivized an emphasis on domestic caregiving. These measures, while progressive in providing institutional support for dealing with dependency, also perpetuated structural inequalities by reinforcing the family's role as the primary caregiving unit, rather than recognizing it as an institution shaped by and reliant upon state-supported mechanisms. This reification of the family as a self-contained entity obscured its structural interdependence with the welfare state and labour market, positioning caregiving as a private duty rather than a collective social responsibility.

Far from being an issue that affects only certain categories of people, the dependency connected to caregiving is universal, rooted in our embodied condition.⁸ This perspective insists that all individuals, across varying life stages,⁹ will inevitably rely on social institutions to manage caregiving burdens. *Folkhemmet's* emphasis on collective responsibility partly aligned with this recognition. Yet the practical policies ended up reinforcing traditional roles¹⁰ suggesting that, while the state did facilitate support through universal policies,¹¹ it also embedded caregiving labour in particular family structures – as it was still based on the ideology of the autonomous individual. Nevertheless, the neoliberal transformation of the late twentieth century fundamentally reshaped Sweden's welfare state. The collectivist ideals of

⁸ See generally M Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (2000) 8 *The American University Journal of Gender, Social Policy & the Law* 13.

⁹ See generally M Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010–11) 60(2) *Emory Law Journal* 251; M Albertson Fineman, 'Dependencies' (2012) *Emory Legal Studies Research Paper* 12.

¹⁰ J Schiratzki, 'Gender in Court – In the Best Interests of the Child? A Report from a Research Project on Adjudication of Parental Responsibility in Swedish Courts' (2007) 50 *Scandinavian Studies in Law* 477, 479.

¹¹ AA An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' (1994) 8 *International Journal of Law and the Family* 62–81; Schiratzki (n 10); S Littmarck, *Barn, föräldrar, välfärdsstat: Den politiska debatten om föräldrautbildning och föräldrastöd 1964–2009* (Linköping University 2017) 303.

Folkhemmet were gradually eroded as dependency was reframed as a private responsibility,¹² leading to systemic vulnerabilities that disproportionately affected those with less resilience, i.e. those with fewer resources and deeper care obligations.

Swedish family law, particularly through its reliance on formal equality, exemplifies these broader patterns of neoliberal governance, reflecting a trend observed in other legal systems that similarly prioritize procedural neutrality over substantive equity in caregiving arrangements. Formal equality assumes that treating individuals equally under the law ensures fairness, yet it often disregards the material realities shaping caregiving dynamics. This formalistic approach, while ostensibly equal, often fails to sufficiently address the systemic and social dimensions of managing dependency.

By contrast, a vulnerability-centred lens, grounded in universal embodiment and the recognition that all individuals pass through phases of dependency,¹³ demonstrates that purely formalistic legal measures overlook the ways institutions (like the family, workplaces, markets, and cultural norms) affect real caregiving capacities. The promise of 'equal rights' in custody, for instance, can become an empty gesture if daily caregiving has already been unevenly allocated due to market pressures or insufficient social support.

This chapter employs the vulnerability-centred lens as a framework to critique the transformation of Swedish welfare and caregiving framework in order to give an alternative vision of what a family is or, rather, could be. Unlike traditional liberal frameworks that prioritize individual autonomy and formal equality, this approach foregrounds vulnerability as a universal human condition and caregiving as a social and systemic phenomenon.¹⁴ By emphasizing institutional accountability, it critiques formal equality and its reliance on formalism as inadequate for addressing the material realities and social and institutional interdependencies inherent in caregiving. In doing so, it challenges the liberal conceptualization of the family as an autonomous unit, instead emphasizing its role as an institution embedded within legal, economic and policy frameworks that determine how care is distributed and supported. By situating caregiving within broader institutional structures, this approach reveals the limitations of formal equality and individualistic policy assumptions, highlighting the necessity of a responsive state that anticipates and mitigates caregiving dependencies.

¹² V Skyрман, M Allelin, M Kallifatides and S Sjöberg, 'Financialized Accumulation, Neoliberal Hegemony, and the Transformation of the Swedish Welfare Model, 1980–2020' (2023) 47(4) *Capital & Class* 565.

¹³ Albertson Fineman (n 5) 12.

¹⁴ M Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133, 134; M Albertson Fineman, 'Beyond Equality and Discrimination' (2020) 73 *SMU Law Review Forum* 51, 55.

This critique is particularly salient in the Swedish context, where progressive family policies, such as universal childcare and parental leave, coexist with market-driven reforms like cash-for-care schemes and the increased privatization of elder care. While the collectivist ideals of *Folkhemmet* once positioned the state as a central caretaker, neoliberal reforms have undermined this foundation, shifting dependency management back onto individual families. Legal reliance on formal equality, exemplified by joint custody laws and mediation mandates, has further obscured systemic caregiving inequities. From a universal vulnerability perspective, embedding institutional responsiveness within family law is essential for fostering structural resilience and ensuring a legal framework that anticipates and mitigates caregiving dependencies.

In sum, this introduction has set the stage for a deeper exploration of how neoliberal reforms have eroded *Folkhemmet*'s promise and how a vulnerability-centred lens can help revive its collectivist spirit by recognizing caregiving as a universal social concern. Even in a country celebrated for egalitarian policies, formal equality alone cannot rectify structural imbalances when care responsibilities are privatized and left to family arrangements shaped by market logic. The following sections aim to illustrate these challenges historically (Sections 12.2–12.3), then move towards potential solutions that restore a collaborative, institutionally accountable model of caregiving within Sweden's broader dependency governance, recognizing caregiving as a structural reality requiring sustained state engagement (Section 12.4).

12.2. The *Folkhemmet* Legacy: From Collectivist Ideals to Embedded Dependency

12.2.1. Revisiting *Folkhemmet*: state-embedded solidarity and its limits

Rooted in social democratic ideals,¹⁵ *Folkhemmet* emerged as a transformative vision for Swedish society, articulated by Prime Minister Per Albin Hansson in 1928. Rooted in the principles of equality, mutual respect, and shared responsibility, *Folkhemmet* rejected liberal individualism, framing care and dependency as collective societal obligations. Hansson's declaration that 'the good home does not recognize any privileged or neglected members;

¹⁵ Recent historiographical research challenges the traditional view of Sweden's welfare state development as solely driven by the ideology of the social democratic party. As noted by Kjell Östberg, the welfare state and the establishment of universal suffrage were not merely the products of social democratic policy but also the result of intense pressure from social movements, particularly from the labour and women's movements. *Folkhemmet*'s rise was, in part, a compromise between social democratic ambitions and the bottom-up demands of these movements. The social democratic party, eager to maintain political power, accommodated the growing demands for democratic rights and social equality, leading to significant institutional changes that were driven from below, by movements whose influence on policy cannot be overstated. K Östberg, *Folk i rörelse: Vår demokratis historia* (Ordfront 2021) 160.

there are no favourites and no stepchildren'¹⁶ encapsulated a commitment to universal welfare provision. By embedding dependency management within state-supported institutions,¹⁷ *Folkhemmet* operationalized principles of shared social responsibility,¹⁸ aligning closely with a vulnerability-centred perspective that emphasizes institutional interdependence and accountability.¹⁹

However, the historical context preceding *Folkhemmet* reveals a starkly different narrative. At the start of the twentieth century, Sweden was among the most unequal countries globally. In 1903, the top 1 per cent of earners controlled 27 per cent of the national income, while the top 10 per cent controlled nearly half. This level of inequality paralleled modern-day Russia and Brazil. The introduction of *Folkhemmet* represented a deliberate state effort to address such disparities, rather than a reflection of inherent egalitarian traditions.²⁰ These early systemic inequities, particularly the disenfranchisement of rural and working-class groups, highlight how institutional frameworks perpetuated exclusion, laying the groundwork for later critiques within a universal vulnerability lens.

The institutionalization of caregiving under *Folkhemmet* reflected its governing collectivist principle.²¹ Early welfare policies such as universal

¹⁶ Hansson (n 1).

¹⁷ The state's role was not only to deliver services but also to ensure equality through active intervention, including social insurance and labour market policies, which laid the foundation for the relatively equal society by the 1970s. Bengtsson emphasizes that the welfare state was integral to achieving income equality by implementing effective reforms, particularly in the context of the post-war economic period. E Bengtsson, *Världens jämlikaste land* (Arkiv Förlag 2020) 423. See also Littmarck (n 11); P Leviner and T Holappa, 'Child Rights without Substance? – Swedish Public Welfare and the Invisibility of Children in Economic Support Cases' in A Kaldal, M Aspán, R Adami (eds), *The Rights of the Child: Legal, Political and Ethical Challenges* (Brill 2023) 34–57.

¹⁸ L Schön, *An Economic History of Modern Sweden* (Routledge 2020) 3.

¹⁹ In vulnerability theory, *dependency* denotes the universal human condition arising from embodiment and inevitable reliance on others and institutions for care and survival. By contrast, *interdependence* presupposes reciprocity between relatively equal parties. Fineman thus uses dependency to capture the unavoidable asymmetries of human existence, while reserving interdependence to describe the symbiotic relations between institutions.

²⁰ Bengtsson (n 17).

²¹ K Åmark, *Hundra år av välfärdspolitik: Välfärdsstatens framväxt i Norge och Sverige* (Borea Bokförlag 2005); B Sandin, J Sköld and J Schiratzki, 'Var går gränsen för statens ansvar? Upprättelseprocessen för dem som vanvårdats i samhällsvård ur ett historiskt perspektiv på normalitet, åga och barns rättigheter' (2022) 2 *Statsvetenskaplig tidskrift* 349; S Hort and G Olofsson, 'A Portrait of the Sociologist as a Young Rebel: Göran Therborn 1941–1981' in G Olofsson and S Hort (eds), *Class, Sex and Revolutions: Göran Therborn – A Critical Appraisal* (Arkiv Förlag 2016) 19–51; B Rothstein, 'Manufacturing Social Solidarity' in G Olofsson and S Hort (eds), *Class, Sex and Revolutions: Göran Therborn – A Critical Appraisal* (Arkiv Förlag 2016) 225–243; Å Lundqvist, *Family Policy Paradoxes: Gender Equality and Labour Market Regulation in Sweden, 1930–2010* (Policy Press 2011) 23–27, 43–51, 75–82.

childcare and maternity assistance (*mödrhjäl*p) institutionalized caregiving as a public concern. These measures recognized the societal significance of caregiving and sought to distribute its burdens equitably through institutional support.²² For example, maternity grants (*moderskapspenning*) provided financial support to certain caregivers, acknowledging the systemic nature of dependency. However, these policies often reinforced conventional household roles, framing caregiving as labour performed within the family sphere rather than a truly shared societal obligation.²³ This dynamic mirrors broader critiques in the vulnerability-focused approach, which emphasizes the need to address structural inequities embedded in caregiving systems.²⁴

12.2.2. The ‘autonomous family’ myth: structural exclusion and ongoing inequities

Despite its progressive aspirations,²⁵ *Folkhemmet* relied heavily on traditional family structures, exposing critical limitations. Welfare policies like the *husmorskontrakt* (housewife contract) incentivized one household member to remain in domestic roles, perpetuating systemic inequalities related to labour distribution.²⁶ Individuals who were sole or primary caregivers, whose caregiving contributions were equally vital, often found themselves excluded from benefits tied to traditional family structures. Research from the mid-twentieth century revealed disproportionately high poverty rates among those who lacked stable family supports, revealing gaps in the universal framework of *Folkhemmet*. Viewed through the lens of vulnerability theory, these exclusions highlight that shifting from mere formal equality to institutionally grounded equity is indispensable. Rather than leaving caregivers to navigate private burdens, legal frameworks must embed caregiving responsibilities in strong social supports, ensuring fair distribution across diverse family configurations.

However, the myth of the autonomous family, central to *Folkhemmet*’s structural design, obscured this social and institutional interdependence that

²² G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990) 28.

²³ Albertson Fineman, ‘Dependencies’ (n 9); M Albertson Fineman, ‘Masking Dependency: The Political Role of Family Rhetoric’ (1995) 81 *Virginia Law Review* 2181.

²⁴ Ibid.

²⁵ M Stanfors, ‘Familjen i välfärdspolitiken’ (2019) 3–4 *Socialvetenskaplig Tidskrift* 257; G Sainsbury, *Gender, Equality and Welfare States* (Cambridge University Press 1996); E Wennemo, *Care and the Welfare State: The Gendered Division of Labour in Sweden* (Stockholm University Press 2014); Duvander (n 2).

²⁶ Y Hirdman, ‘Om genuskontrakt’ (2000) 33(2) *Häften för kritiska studier* 29; Y Hirdman, *Genus: Om det stabila föränderliga former* (2nd ed, Liber 2001/2003) 125; Y Hirdman, *Med klaven tunga: LO och genusordningen* (Atlas 1998) 14, 49.

caregiving demands. By idealising nuclear families as self-sufficient units, public policies disregarded the reality that caregiving is not a self-contained function but one inherently shaped by economic, legal, and social institutions. This idealization masked the structural interdependence between the family and the welfare state, reinforcing the myth that families operate independently rather than within a system of institutionalized caregiving supports. For example, employers and markets benefited from the unpaid caregiving labour performed within families, while public policies failed to redistribute these burdens equitably. This reflects the critique of liberal individualism, which masks the systemic nature of caregiving vulnerabilities.²⁷ In short, even if *Folkhemmet* championed universal welfare, it inadvertently entrenched certain norms about who provides daily care, effectively rendering universal embodiment incomplete in practice.

To address these gaps, family law must move beyond formal equality and embrace institutional responsiveness, recognizing that caregiving is a collective societal function that necessitates strong structural supports. This shift is essential for reimagining family law in a way that is not only more inclusive but also better equipped to anticipate and mitigate the vulnerabilities experienced as a result of failures in both the public and private sectors.

12.2.3. *The neoliberal turn and the fragmentation of the welfare model*

While *Folkhemmet* espoused universalism, its implementation often fell short of its egalitarian ideals. Early welfare policies prioritized heteronormative nuclear families, marginalizing non-traditional caregivers and family units. This exclusion was particularly pronounced for those who did not conform to societal expectations of marriage and stable partnerships. For instance, lone caregivers faced systemic barriers in accessing state-supported childcare and financial aid, exacerbating their vulnerabilities.²⁸ Schön reveals that Sweden's reliance on global markets and the economic shifts post-1970s contributed to a growing fragmentation in the welfare system, despite the initial promise of

²⁷ M Albertson Fineman, 'Care and Gender' in Y Ergas, J Jenson and S Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalized World* (Columbia University Press 2017) 202–222.

²⁸ S Alm, K Nelson, and R Nieuwenhuis, 'The Diminishing Power of One? Welfare State Retrenchment and Rising Poverty of Single-Adult Households in Sweden 1988–2011' (2020) 36 *European Sociological Review* 198, 204. The study shows that poverty rates among single-adult households, including single parents, increased sharply after 1990, with single parents reaching nearly 30 per cent poverty by the end of the period. The poverty risks were exacerbated by cuts to welfare benefits and the absence of a second income buffer, showing how mass unemployment and welfare state retrenchment had disproportionately affected lone caregivers.

Folkhemmet.²⁹ These shifts caused systemic exclusions, especially experienced by those with less resilience, such as economic or familial support, despite the universalist policies in place.

The 1960s marked a significant shift in Swedish family policy, as post-war labour shortages and economic expansion rendered the traditional male breadwinner model insufficient to support the family.³⁰ In response, the state adopted policies supporting dual-earner households, such as extended parental leave and subsidized childcare. These initiatives addressed immediate economic precarities and created pathways for greater gender equality, particularly in the workplace. By 1982, women's labour force participation had risen to 83.5 per cent, reflecting the apparent success of these reforms. However, occupational segregation and wage disparities persisted, with women disproportionately represented in lower-paying, care-related professions. In addition, the pragmatic shift toward dual-earner households, while fostering economic inclusion, also revealed a structural tension: caregiving responsibilities were deemed largely a private responsibility, and pragmatic family arrangements and workplace discrimination resulted in men being cast as the primary earners, which relegated women to primary domestic and secondary economic roles.³¹ These dynamics emphasize the enduring link between inherent biological differences and the institutionalization of gender inequality, with women shouldering the lion's share of caregiving work within a privatized family even as they aspired to greater economic participation.

Despite progressive measures like subsidized childcare, cultural resistance, and economic disincentives limited their impact. Schön's analysis underscores how Sweden's economic landscape evolved with increasing reliance on global markets and decreasing public investment in social programs.³² As

²⁹ See generally Schön (n 18).

³⁰ B Jessop, 'Fordism and Post-Fordism: A Critical Reformulation' in AJ Scott and M Storper (eds), *Pathways to Industrialization and Regional Development* (Taylor and Francis 2005) 42–62; Å Lundqvist, *Family Policy Paradoxes: Gender Equality and Labour Market Regulation in Sweden, 1930–2010* (Policy Press 2011); R Lister, 'A Nordic Nirvana? Gender, Citizenship, and Social Justice in the Nordic Welfare States' (2009) 16(2) *Social Politics: International Studies in Gender, State & Society* 242; G Andersson, 'The Decline of Marriage and Family Building in Sweden: A Demographic Account' (1998) 65(2) *Population Studies* 183; E Bernhardt and G Hoem, 'Cohabitation and Fertility in Sweden' (1985) 17 *European Journal of Population* 81; S Ohlsson-Wijk, 'Sweden's Marriage Revival: An Analysis of the New-Millennium Switch from Long-term Decline to Increasing Popularity' (2011) 65(2) *Population Studies* 183.

³¹ S Gustafsson and R Jacobsson, 'Trends in Female Labor Force Participation in Sweden' (1985) 3(1) *Journal of Labor Economics* 256; Duvander (n 2).

³² Schön (n 18) 3.

Sweden became more integrated into global markets in the 1970s, the economic structures began to shift away from the post-war welfare model, exposing the fragility of *Folkhemmet*'s universalist promises. Sweden had initially embraced a strong welfare state characterized by full employment and extensive social benefits. However, by the 1980s, economic liberalization and labour market transformations began to erode this foundation. Public sector employment expanded significantly from the 1960s to the mid-1980s, reaching approximately 40 per cent of total wage and salary employment by the end of the decade. However, the subsequent economic downturn and policy shifts led to a marked decline in public sector employment, with a reduction of approximately 250,000 jobs between 1990 and 1994 – equivalent to a 5-percentage point decline relative to the working-age population.³³ This restructuring signalled Sweden's transition toward a more market-driven economy, with a decreasing role for state employment as a buffer against economic fluctuations.³⁴

The late twentieth century marked a paradigmatic shift in Swedish governance, as neoliberal ideologies dismantled the collectivist foundation of *Folkhemmet*. This transformation was characterized by the privatization of public services, fiscal austerity, and a redefinition of caregiving as a private family responsibility.³⁵ These changes prioritized market efficiency over collective welfare, fundamentally altering the state's role in dependency management.

The reliance on market forces to address these urgent social needs created a paradox: while the welfare state had been designed to protect individuals from market volatility, the very markets that Sweden embraced

³³ OECD, *OECD Economic Surveys: Sweden 1985* (OECD Publishing 1985) https://doi.org/10.1787/eco_surveys-swe-1985-en accessed 30 November 2025; B Holmlund, 'The Rise and Fall of Swedish Unemployment' (2003) *CESifo Working Paper Series 918/2003* https://www.cesifo.org/DocDL/cesifo_wp918.pdf accessed 30 November 2025; European Commission, *Labour Market Studies: Sweden* (Office for Official Publications of the European Communities 1997).

³⁴ Ibid.

³⁵ Skyrman, Allelin, Kallifatides and Sjöberg (n 12) 3–4; D Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005); L Mjøset, 'Nordic Economic Policies in the 1970s and 1980s' (1987) 41(3) *International Organization* 403; P Högfeldt, 'The History and Politics of Corporate Ownership in Sweden' in RK Morck (ed), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (University of Chicago Press 2005) 517–579; U Lundberg and K Åmark, 'Social Rights and Social Security: The Swedish Welfare State 1900–2000' (2001) 26(3) *Scandinavian Journal of History* 157–176; G Esping-Andersen, *Politics against Markets: The Social Democratic Road to Power* (Princeton University Press 1985); L Erixon, 'A Swedish Economic Policy: The Theory, Application and Validity of the Rehn–Meidner Model' (2000:13 Research Papers in Economics University of Stockholm, Department of Economics).

began to exacerbate systemic vulnerabilities. Privatized services, such as healthcare, elder care, and childcare, which were originally public goods under *Folkhemmet*, became commodified, pushing families to shoulder the costs. This reliance on privatized services left those without sufficient economic means exposed, while those in higher socio-economic brackets could afford access to quality care, thus perpetuating and deepening inequality. Schön's historical analysis reinforces the argument that Sweden's transition from a welfare state to a market-oriented governance structure did not fulfil the universal ideals of *Folkhemmet* for all segments of society.³⁶

By 2000, Sweden had transitioned from one of the most egalitarian nations to one with increasing inequality, with the wealthiest 10 per cent of the population earning over 6.6 times more than the least economically stable 10 per cent, compared to just 3.6 times in 1975.³⁷ This shift highlights the failure of increasingly liberal policies to address structural inequalities and the exclusionary dynamics that arose as Sweden embraced neoliberal reforms. The artificial divide between public and private spheres perpetuated systemic exclusions under *Folkhemmet*. By relegating caregiving to the 'private' realm, these policies obscured broader institutional dependencies shaping families' capacities to manage care. Employers benefited from unpaid caregiving labour but neglected to support the demands through workplace policies. Similarly, markets relied on families to absorb caregiving costs while minimizing their own obligations. These dynamics reveal structural inequities inherent in framing caregiving as a private concern rather than a societal responsibility.³⁸

Informal negotiations in family disputes, often resolved without sufficient institutional oversight, further perpetuated these inequities. For primary caregivers who carry most responsibilities, these practices amplify the experience of vulnerabilities. This dynamic mirrors the privatization of dependency management that the vulnerability-centred approach identifies

³⁶ Schön (n 18) 13–15.

³⁷ See World Inequality Database, 'Sweden' <https://wid.world/country/sweden/> accessed on 30 November 2025; Bengtsson (n 17). Sweden's shift away from its egalitarian model was driven by structural economic changes. Initially, labour movements, rather than capital, opposed the Fordist growth model, protesting workplace exploitation and gender inequalities. The late 1960s wildcat strikes led to the 1975 proposal for employee funds, aiming to transfer corporate profits to union-controlled funds. In response, the Swedish Employers' Federation (SAF) launched a neoliberal counteroffensive, reshaping socio-political dynamics. The 1976 conservative government pursued Keynesian policies before shifting to austerity. By 1982, the returning Social Democrats embraced supply-side neoliberalism, implementing currency devaluation, financial deregulation, and public sector cutbacks, leading to rising inequality and financial crises in the early 1990s.

³⁸ Albertson Fineman (n 4); S Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989).

as central to neoliberal governance.³⁹ When the state refrains from actively regulating or distributing caregiving roles, those with fewer resources or bargaining power bear a heavier load.

12.2.4. *Marketizing care: privatization and socio-economic divides*

Privatization emerged as a defining feature of neoliberal governance, reshaping caregiving services into commodities subject to market principles. As noted earlier, by the 1980s, Sweden's reliance on the public sector was already showing signs of strain, particularly as public sector employment share dropped from 38 per cent to 32 per cent.⁴⁰ This decline marked the beginning of a broader trend in which welfare services, including childcare, elder care, and healthcare, became increasingly privatized.⁴¹ Dependency, recast as a private burden, became invisible within the public sphere, removing caregiving from collective accountability and further entrenching inequities.⁴² By 2018, approximately 19.5 per cent of permanent residents aged 65 and older in residential care homes in Sweden were in privately managed facilities, reflecting a shift towards private provision of elder care that prioritizes cost efficiency over equitable access.⁴³

This shift is exemplified also in the introduction of the cash-for-care (*vårdnadsbidrag*) schemes, marketed as promoting parental 'choice' while reinforcing traditional caregiving roles.⁴⁴ However, this policy, while aimed at giving families more control, in practice disproportionately benefited higher-income households who could afford to opt out of state-provided services, while leaving lower-income households to shoulder the economic burdens of caregiving. A study revealed that rural families in Sweden were disproportionately affected by the cash-for-care policy, which, despite its intention to support families, exacerbated gender inequalities and led to challenges in accessing adequate elder care, particularly in areas where private providers dominate.⁴⁵ Rather than

³⁹ Albertson Fineman, 'Masking Dependency' (n 23).

⁴⁰ OECD (n 33); B Holmlund, 'The Rise and Fall of Swedish Unemployment' (2003) CESifo Working Paper Series No 918, 22–23.

⁴¹ J Sjöberg and J Sköld, 'Childcare for Sale: Mapping Private Institutions in Sweden 1900–1975' (2021) 14(1) *Journal of the History of Childhood and Youth* 113.

⁴² Albertson Fineman, 'Dependencies' (n 9).

⁴³ Socialstyrelsen, Statistik om äldre och personer med funktionsnedsättning efter regiform 2018 (Art.nr 2019-2-20, Socialstyrelsen 2019) 2, <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/statistik/2019-2-20.pdf> accessed 1 December 2025.

⁴⁴ Å-Z Duvander and AL Ellingsæter, 'Cash for Childcare Schemes in the Nordic Welfare States: Diverse Paths, Diverse Outcomes' (2016) 18 *European Societies* 1; G Giuliani and Å-Z Duvander, 'Cash-for-Care Policy in Sweden: An Appraisal of Its Consequences on Female Employment' (2016) 26(1) *International Journal of Social Welfare* 49.

⁴⁵ Giuliani and Duvander (n 44) 56–58.

alleviating caregiving burdens, these policies exacerbate vulnerabilities by failing to address caregiving's systemic nature, reinforcing its isolation as a familial obligation rather than a shared societal responsibility.⁴⁶ Recent policy adjustments in Sweden reflect tentative efforts to address these systemic inadequacies, yet they remain insufficient to provide comprehensive solutions. For example, the parental leave policy introduced on 1 July 2024, allowing parents to transfer up to 45 days of parental leave entitlement to grandparents or other relatives, facilitates caregiving support.⁴⁷ However, this measure risks reinforcing caregiving's privatization by continuing to rely on familial networks rather than advancing comprehensive and responsive public caregiving infrastructures. A vulnerability-focused analysis critiques these measures for perpetuating an illusion of choice that disproportionately burdens those less resilient with limited resources, who often lack access to affordable childcare or workplace accommodations. The critique extends further, emphasizing that illusory, formal reforms failing to address systemic inequities reinforce the privatization of caregiving responsibilities, thereby undermining the state's role in fostering resilience and equity.⁴⁸

12.2.5. Formal equality's legal footprint in neoliberal care

The principle of formal equality has also become a defining feature of Swedish family law, reflecting broader neoliberal legal transformations. Much as in other legal systems, Swedish family law presumes that treating individuals equally under the law ensures fairness and justice. Codified in Chapter 6 of the Parental Code (Föräldrabalken), this framework prioritizes procedural neutrality in custody arrangements and dispute resolution mechanisms, presuming that parents enter legal negotiations with equal bargaining power. While ostensibly neutral, formal equality before the law

⁴⁶ M Albertson Fineman, 'Contract and Care' (2001) 76 *Chicago-Kent Law Review* 1403; Albertson Fineman, 'Masking Dependency' (n 23).

⁴⁷ E Hofverberg, 'Sweden: Parents May Now Transfer Parental Leave to Friends and Family' (Law Library of Congress 2024) <https://www.loc.gov/item/global-legal-monitor/2024-07-29/sweden-parents-may-now-transfer-parental-leave-to-friends-and-family/> accessed 30 November 2025. See also *Lag om ändring i socialförsäkringsbalken* (SFS 2023:905) (Amendment to the Social Insurance Code); *Socialförsäkringsbalken* (SFS 2010:110) 12 ch. 4a § (Social Insurance Code, as amended); *Social Insurance Code*, 12 ch. 17a §; 12 ch. 17b §; *Föräldraledighetslag* (SFS 1995:584).

⁴⁸ Albertson Fineman, 'Contract and Care' (n 46).

often disregards the material realities of caregiving, failing to acknowledge structural disadvantages that shape caregiving responsibilities.⁴⁹

The framing of autonomy as freedom from dependency reflects the broader neoliberal ethos shaping these legal reforms. Autonomy, in this context, obscures the inevitable dependence of human existence and absolves the state of its obligation to provide systemic supports. By prioritizing procedural fairness over substantive equity, Swedish custody law has increasingly failed to account for the lived experiences of caregivers, particularly those in structurally disadvantaged positions.

Mediation, a key mechanism within Swedish family law, exemplifies these limitations. Promoted through legislative reforms such as Prop. 2005/06:99, mediation is now encouraged as an alternative to court-imposed custody resolutions.⁵⁰ The process assumes equal bargaining power between parents, which is often absent in cases involving economic disparities, entrenched conflicts, or histories of domestic violence.⁵¹ Procedural neutrality ignores these asymmetries, reinforcing inequalities rather than mitigating them.

The consequences of this approach become particularly apparent in legal cases such as *NJA 1999 s. 451* and *NJA 2000 s. 345*, where formal equality frameworks failed to account for caregiving imbalances and inequities.

NJA 1999 s. 451 involved C.V.P., the mother, who had historically been the primary caregiver for the couple's three children, J., X., and Y. The father, G.P.R., petitioned for joint custody or sole custody, despite limited prior engagement in caregiving. The court acknowledged that C.V.P. had been responsible for the vast majority of daily caregiving tasks, including education, health, and emotional support, while G.P.R.'s involvement had been intermittent. Despite these caregiving imbalances, the court maintained joint custody, invoking the principle that shared parental responsibility should remain the default unless 'special circumstances' necessitated deviation. However, evidence presented during the proceedings indicated

⁴⁹ M Albertson Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92(6) *Boston University Law Review* 1713.

⁵⁰ The decline in Swedish court custody cases, falling from 4,872 in 2018 to just 2,123 in 2022, illustrates the growing state preference for out-of-court resolutions, including mediation. See Swedish National Courts Administration, 'Medlare i mål om vårdnad, boende eller umgänge' ['Mediators in cases concerning custody, residence, or contact'] <https://www.domstol.se/om-sveriges-domstolar/for-dig-som-aktor-i-domstol/for-dig-som-medlare/medlare-i-mal-om-vardnad-boende-eller-umgange/> accessed 1 December 2025.

⁵¹ M Eriksson, 'Contact, Shared Parenting, and Violence: Children as Witnesses of Domestic Violence in Sweden' (2011) 25 *International Journal of Law, Policy and the Family* 165. See also L Bruno, 'Contact and Evaluations of Violence: An Intersectional Analysis of Swedish Court Orders' (2015) 29(2) *International Journal of Law, Policy and the Family* 167; L Bruno, *Ofridstid: Fäders våld, staten och den separerande familjen* (Sociologiska Institutionen, Uppsala Universitet 2016); M Eriksson, 'Tackling Violence in Intimacy: Interacting Power Relations and Policy Change' (2013) 61(2) *Current Sociology* 171.

that G.P.R. exhibited coercive behaviours toward C.V.P., reinforcing the structural disadvantages she faced in caregiving and legal negotiations. Witness testimony detailed instances where G.P.R. exerted financial control over C.V.P., limiting her economic situation while failing to assume a proportionate share of caregiving responsibilities. By upholding joint custody, the ruling disregarded the material realities of caregiving and ignored the impact of coercive dynamics on parental collaboration. The procedural focus on formal equality prevented the court from acknowledging the structural inequities embedded in caregiving responsibilities, reinforcing systemic vulnerabilities rather than addressing them. The decision exemplifies how procedural neutrality can mask entrenched power imbalances, disproportionately burdening primary caregivers.

Similarly, *NJA 2000 s. 345* reveals the limits of mediation and procedural neutrality in high-conflict custody disputes. In this case, L.R., the mother, sought sole custody of her two children, citing the father's history of domestic violence, including a prior conviction for assault. The father, J.A., disputed these claims and argued that L.R. had obstructed his parental rights. Despite clear evidence of a hostile parental relationship and a documented history of domestic violence, the court initially upheld joint custody, assuming that shared parental authority remained in the children's best interests. However, as conflict escalated and mediation failed to produce a viable co-parenting arrangement, the Supreme Court ultimately awarded sole custody to L.R., recognizing that the severity of the dispute made joint custody unworkable. Notably, the court acknowledged that mediation had failed to mitigate the adversarial dynamic between the parents, reinforcing concerns that procedural neutrality does not adequately address power asymmetries in caregiving disputes. These cases highlight a broader pattern within Swedish family law, where mediation and joint custody frameworks privilege formal equality while failing to ensure substantive equity in caregiving outcomes.

From a vulnerability perspective, the family is not a self-contained unit but operates within a broader network of institutions – including the market, the workplace, and the state – which shape caregiving capacities. This challenges neoliberal assumptions that caregiving is a purely private concern. Instead, caregiving should be understood as an institutionally embedded function, requiring structural supports rather than reliance on private negotiations. At bottom, the concept of formal equality presupposes that no institutional constraints hamper either party's ability to negotiate or to parent effectively. Yet, as care responsibilities become increasingly privatized, individuals who shoulder the bulk of unpaid caregiving face financial and psychological disadvantages. Hence, the law's neutral approach to mediation and custody inadvertently sustains hidden values and inequities that a vulnerability-focused lens would otherwise bring to light. Employers, for example, benefit from the unpaid caregiving labour performed within families, which

sustains and reproduces the workforce. Yet employer practices often fail to account for the demands of caregiving, perpetuating systemic inequities that disproportionately affect those who carry out the majority of unpaid labour. Markets similarly rely on families to absorb the costs of dependency while minimising their own obligations.

The legal reliance on mediation operates as a privatized mechanism of dependency governance, legitimising the state's retreat from caregiving obligations. *NJA 1999 s. 451* demonstrates this shift: by upholding joint custody despite caregiving imbalances and unresolved conflicts, the court ignored the lack of institutional support, reinforcing the expectation that families privately resolve caregiving burdens. Procedural neutrality, while equal, failed to address the socio-economic disparities and emotional burdens borne by the primary caregiver. This outcome exemplifies the privatization of caregiving responsibilities, where families are expected to resolve complex dependencies without strong institutional mechanisms to support them.⁵²

Likewise, *NJA 2000 s. 345* highlights the flaws of procedural neutrality, as the court's initial preference for joint custody ignored the structural constraints on primary caregivers navigating coercive or high-conflict situations. Just as importantly, the Supreme Court's ultimate recognition that the mother should receive sole custody underscores how universal dependency, rather than idealized autonomy, defines family realities. Where structural supports and trauma-informed safeguards are missing, the individual burden falls most heavily on the already encumbered primary caregiver—revealing the urgent need for more responsive institutional engagement and proactive legal frameworks that acknowledge the inevitability of dependency, rather than relegating it to 'private' negotiation.

Yet, as the Vulnerability Theory would caution, court orders in isolation are insufficient to mitigate the long-term inequalities facing caregivers. Even when the law rightly denies joint custody in violent or high-conflict scenarios, it leaves untouched the deeper socio-economic and relational deficits that burden the primary caregiver. Without robust institutional infrastructures, comprehensive public benefits, trauma-informed mediation services and consistent legal advocacy, sole custody can become little more than a stopgap measure, forcing individuals to shoulder the most taxing elements of caregiving. From a universal dependency perspective, families require ongoing institutional support, not merely reactive judgments, to navigate the structural challenges that accompany care responsibilities. In

⁵² Leviner and Holappa (n 17) 34–57; T Ferrarini and Å-Z Duvander, 'Conflicting Directions? Outcomes and New Orientations of Sweden's Family Policy' (2010) *Stockholm University Linnaeus Center on Social Policy and Family Dynamics in Europe Working Paper* 4/2010 https://www.su.se/polopoly_fs/1.18703.1320939634!/WP_2010_4.pdf accessed 1 December 2025.

other words, the vulnerability critique goes beyond the outcome of a single case, urging us to create social and institutional mechanisms that anticipate and address the routine pressures faced by caregivers rather than relegating them to private, ad hoc solutions.

Emphasising universal embodiment in the critique means recognizing that no individual is inherently capable of bearing the full weight of caregiving in isolation. Instead, strong ties among public programs, workplaces, and social services are essential to distribute care tasks more fairly. Neoliberal strategies that expect families to handle these matters privately create structural disadvantages for those lacking resources or flexibility. Thus a Vulnerability Theory approach emphasizes the urgent need for legal reforms that move beyond procedural neutrality and instead embed caregiving protections within institutional frameworks. By shifting from a market-driven mediation model to one that recognizes caregiving as a shared societal function requiring institutional responsiveness, Swedish family law can work towards substantive structural support rather than formal proceduralism.

12.3. A Theoretical Critique of Swedish Family Governance: The Vulnerability Lens

A vulnerability-oriented perspective critiques the artificial dichotomy between the public and private spheres, which positions the family as a separate and self-contained entity. This division reinforces the privatization of caregiving and dependency, masking the interconnectedness of institutions that rely on family labour while failing to support it adequately. State policies that emphasize formal equality in family law disputes, such as joint custody arrangements, exemplify this dynamic by ignoring the systemic caregiving burdens disproportionately borne by those who have less socio-economic power. Similarly, market-driven policies like cash-for-care schemes perpetuate structural inequities by framing caregiving as a private choice rather than a social and systemic issue.

The family must be understood as an institution whose caregiving capacities are shaped not only by internal dynamics but by broader legal, economic and social structures. Employment laws, family leave policies and state-supported caregiving programs are not merely external supports but integral components that sustain the family as a caregiving institution. Without such institutional responsiveness, the assumption that families can independently manage caregiving responsibilities becomes a mechanism for state withdrawal rather than an affirmation of familial resilience. This lens critiques employer practices that externalize caregiving costs while benefiting from the family's reproductive labour. Similarly, state interventions, such as universal childcare, elder care, and parental leave, are critical in mitigating

the vulnerabilities created by market failures and employer neglect. Finally, market regulation of privatized caregiving services, including quality standards and affordability mandates, is essential to ensure equitable access and prevent the exploitation of families as 'captive consumers'.

The assumption that individuals can privately negotiate caregiving responsibilities through legally neutral mechanisms disregards the deeply embedded structural inequities that shape dependency management. Mediation, for instance, is presented as an equitable and non-adversarial approach, yet it assumes that both parties enter the negotiation with equal economic and relational standing. A vulnerability analysis exposes this assumption as flawed, revealing how individuals with caregiving responsibilities are often in weaker bargaining positions due to economic precarity, gendered expectations, or previous histories of control within familial relationships. Legal frameworks that centre on neutrality fail to account for these pre-existing imbalances, ultimately reinforcing rather than mitigating systemic caregiving inequities.

Moreover, a vulnerability perspective highlights how caregiving is not merely an interpersonal obligation but a structurally embedded phenomenon that must be institutionally supported. The family is often regarded as the primary institution for managing dependency, serving as the foundation for caregiving and social reproduction. However, the family does not exist in isolation; it operates within a broader network of interdependent institutions, including the market, employers, and state structures, which collectively shape its capacities and responsibilities. This interrelation challenges the simplistic privatization of caregiving often assumed in neoliberal paradigms, where dependency is relegated to the 'private' realm of family life. Instead, the family must be understood as an embedded institution, intricately connected to and shaped by external structures that influence its ability to fulfil caregiving roles effectively.

The role of the state in fostering resilience is not discretionary but fundamental to ensuring the equitable distribution of caregiving responsibilities. A responsive state actively engages in structuring institutions that mitigate vulnerability rather than leaving families to navigate dependency management in isolation. While Sweden's social policies have historically included universal parental leave and subsidized childcare, the continued reliance on market-driven solutions, such as private elder care and flexible parental leave schemes, has created disparities that disproportionately impact those with fewer economic resources. A vulnerability approach emphasizes the need to rethink these policies as part of a broader system of interdependent caregiving responsibilities and, more broadly, to reintegrate caregiving into institutional structures, ensuring that no household is left to absorb these burdens alone.

12.4. Toward a Responsive State

Sweden's approach to dependency management reflects a fundamental tension between two distinct state paradigms: the *restrained state* and the *responsive state*. The restrained state limits its role to facilitating individual autonomy and market efficiency, delegating caregiving responsibilities to private and familial spheres. This paradigm views the state as a passive arbiter, relying on procedural neutrality and minimal intervention to maintain the illusion of fairness. However, such an approach often neglects the systemic inequities and dependencies that shape caregiving dynamics, perpetuating structural vulnerabilities. By contrast, the responsive state accepts responsibility for the societal institutions it has shaped and actively seeks to foster resilience and equity. It views individuals and institutions as intertwined, symbiotic, and interdependent – not only with one another but also with the state and its apparatus. Institutions are shaped through law, and their operation profoundly affects individual options, opportunities, well-being, and the state's capacity to govern effectively. From this perspective, the state's role in institutionalizing caregiving is not merely instrumental but foundational, recognizing caregiving as a public good embedded within responsive and coordinated institutional frameworks.

A truly responsive state would also recognize that the social contract does not rest solely on individuals' economic productivity but on the state's reciprocal obligation to structure institutions that account for the full range of human needs across the life course.⁵³ Dependency is not an anomaly or exception to self-sufficiency; it is a constant condition that legal frameworks must anticipate and address. This means shifting from viewing caregiving as an individual responsibility, mitigated only through conditional benefits, towards embedding it as an ongoing obligation of the legal and political order itself. Furthermore, the legal recognition of caregiving as a structurally embedded function would demand a re-evaluation of policies that condition support on market participation. A vulnerability-responsive framework rejects the logic that caregiving should be subordinated to labour market incentives, as this framework fails to recognize that economic structures themselves rely on the hidden labour of unpaid care. This critique demands policy solutions that de-privatize dependency and ensure that state intervention is not merely compensatory but constitutive of a more equitable caregiving system.

From a vulnerability standpoint, any meaningful approach to restructuring care and welfare must begin by exposing and rejecting the liberal fiction of

⁵³ See generally Albertson Fineman (n 5); Albertson Fineman (n 9); M Albertson Fineman 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in M Albertson Fineman and A Greer (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 13–28; Albertson Fineman, 'Beyond Equality and Discrimination' (n 14).

self-sufficiency that underlies many legal and policy frameworks. Vulnerability Theory emphasizes that *every* human being is and will remain dependent at various times across the life course – whether due to childhood, illness, disability, advanced age, or economic precariousness. This recognition of universal and unavoidable vulnerability compels us to focus on how social institutions can cultivate the resilience necessary for individuals and communities to thrive. Unlike compensatory or piecemeal reforms that target discrete ‘problem’ groups, Fineman’s conception of the ‘vulnerable subject’ urges policymakers to acknowledge that *all* citizens require structural forms of support, such as accessible caregiving, healthcare, and education, simply as a function of the human condition. In this sense, the law is not merely a neutral arena for private ordering; rather, it actively produces and allocates social advantages, protections, and burdens. By redesigning these legal and policy architectures to address vulnerability holistically, the state moves beyond sporadic, market-oriented ‘solutions’ and affirms caregiving as a shared responsibility central to collective well-being. Here, state legitimacy hinges on its ability to anticipate shifting dependencies, evenly distribute resources, and sustain institutional frameworks that respond proactively to the full spectrum of human needs, thereby fostering genuine resilience rather than merely masking underlying inequalities.

12.4.1. Institutionalizing caregiving as public responsibility

The international community has sought to address caregiving and dependency through legally enforceable rights frameworks, most notably the United Nations Convention on the Rights of the Child (UNCRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These instruments aim to establish caregiving as a protected responsibility, ensuring that children and caregivers receive institutional support and legal recognition. However, while they represent an important normative commitment, a purely rights-based paradigm remains inadequate to address the deeper structural inequities that shape caregiving. Rights frameworks typically rest on a liberal understanding of autonomy, presuming discrete individuals claiming entitlements. In contrast, a vulnerability lens reveals that rights alone do not guarantee robust institutional support, nor do they ensure that caregiving obligations are equitably borne by the broader social body. By focusing primarily on individualized protections, a rights approach can inadvertently obscure the continuous, embodied dependence that underpins human existence. The state must do more than simply refrain from violating rights; it must actively build, maintain, and adapt institutions that anticipate the inevitable ebb and flow of dependency across the life course. Such a commitment demands coordinated governance, public investment, and legal structures that integrate caregiving into the bedrock of

societal organization, thereby transcending the formal and often superficial protections offered by a purely rights-centric framework.

Within the Swedish context, these theoretical limits become evident when we examine the nation's celebrated but still incomplete childcare and elder care systems. While Sweden has historically invested in universal childcare and elder care services, these systems require significant enhancement to ensure equitable access and quality. Policies such as universal childcare, comprehensive parental leave, and equitable workplace accommodations demonstrate the transformative potential of embedding caregiving within institutional structures.⁵⁴ Universal childcare programs, for instance, have been linked to increased female labour force participation and reduced gender economic disparities.⁵⁵ Sweden's parental leave system, widely recognized for its inclusivity, allows parents to share 480 days of leave per child, with 90 days reserved exclusively for each parent to encourage balanced participation.

However, despite these progressive measures, significant gaps remain. Some caregivers continue to take a disproportionately high share of total parental leave, reinforcing existing imbalances, and economic precarity. This disparity is exacerbated by cultural norms and financial pressures, as households often prioritize higher-earning members' continued workforce participation over equitable leave sharing. From a Vulnerability Theory perspective, these issues highlight the need for structural reforms that integrate caregiving into institutional design, ensuring that parental leave policies promote substantive equity rather than reinforcing existing socio-economic disparities.

A responsive state should embed mechanisms that prevent economic precarity from influencing caregiving decisions, ensuring that leave policies account for structural inequities rather than merely offsetting them. To redistribute caregiving responsibilities more equitably, Sweden should transition from voluntary parental leave policies toward a model of compulsory, non-transferable paternity leave. Research indicates that fathers are more likely to take leave when it is neither optional nor transferable to the mother, ensuring a more balanced caregiving structure.⁵⁶ By institutionalizing caregiving responsibilities through state-mandated leave structures, rather than

⁵⁴ Albertson Fineman, 'Dependencies' (n 9).

⁵⁵ AA Arnalds, Å-Z Duvander, GB Eydal and IV Gislason, 'Constructing Parenthood in Times of Crisis' (2019) 27(3) *Journal of Family Studies* 420, 435; AA Arnalds and Å-Z Duvander, 'Arranging Childcare in Two Nordic Countries: A Comparison of ECEC Start in Iceland and Sweden' (2023) 35 *Journal of Family Research* 471, 488.

⁵⁶ Å-Z Duvander and M Johansson, 'What Are the Effects of Reforms Promoting Fathers' Parental Leave Use?' (2012) 12 *Journal of European Social Policy* 177, 183; Å-Z Duvander and T Ferrarini, 'Sweden's Family Policy and the Increase in Fathers' Parental Leave Use' (2013) 10 *Social Policy and Administration* 304, 309; L Haas and T Rostgaard, 'Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gender Division of Leave' (2011) 9 *Community, Work & Family* 65, 66.

relying on market incentives, Sweden can disrupt entrenched caregiving norms and foster long-term gender parity in dependency management.⁵⁷ Universal childcare programs, while accessible in Sweden, also require additional investments to address rural–urban disparities in availability and quality. Expanding childcare hours to align with non-standard working schedules and integrating caregiving infrastructures within public institutions would mitigate accessibility challenges for economically disadvantaged families.

12.4.2. Structuring care: institutional and workplace protection

Equitable workplace accommodations, such as flexible scheduling, caregiving leave beyond parental benefits, and employer-sponsored childcare, are essential to bridging the gap between caregiving responsibilities and workforce participation. Swedish labour policies have made strides in this area, but many employers still fail to fully accommodate caregiving demands, disproportionately affecting those who already shoulder most of the unpaid labour. A vulnerability lens critiques the privatization of these challenges, advocating for collective solutions embedded within institutional frameworks, such as mandatory workplace policies for caregiving accommodations and enhanced enforcement mechanisms.

Caregiving responsibilities must be viewed in relation to broader legal structures, including employment protections and social welfare policies, which directly influence the ability of families to manage dependency. Although Sweden's parental leave policies provide a foundation, a greater emphasis on equitable usage across different segments of the population is necessary to challenge entrenched norms and redistribute caregiving responsibilities more evenly. Markets, too, must be held accountable for their role in perpetuating caregiving inequities. Privatized caregiving services, such as elder care and childcare, should, at a minimum, be regulated to ensure affordability, quality, and equitable access.

A vulnerability-focused critique of neoliberal individualism emphasizes the urgency of treating caregiving as a public good, embedded within institutional frameworks designed to promote resilience, equity, and shared responsibility.⁵⁸ Moving forward, Sweden can fortify its once-proud tradition of universal welfare by systematically aligning workplace mandates, market regulations, and family law with the recognition that all individuals will, over time, rely on caregiving structures to secure their well-being. Even the most progressive policies cannot overcome deeply embedded social and economic inequalities without concurrent institutional change. Universal embodiment emphasizes that no policy can

⁵⁷ See Grandahl, Stern and Funkquist (n 7).

⁵⁸ Albertson Fineman, 'Masking Dependency' (n 23); Albertson Fineman, 'Contract and Care' (n 46).

remain effective if it is disconnected from real-life contexts, such as workplaces that still penalize flexible schedules or part-time roles, or households facing financial trade-offs when non-traditional earners attempt to share leave.

Bridging policy and practice thus requires a systemic realignment of market incentives, cultural messaging, and legal mandates. To foster these changes, educational campaigns and public discourse must challenge traditional roles and emphasize the societal value of unpaid caregiving labour. Schools and workplaces can play a transformative role by integrating caregiving education into curricula and implementing policies that support work–life balance. Legislative reforms should explicitly incorporate principles of relational equity into the Swedish Parental Code, ensuring that caregiving contributions are recognized and supported. Universal caregiving programs, including childcare and elder care, must be adequately funded and accessible to all families, regardless of income or geographic location. Collaborative governance frameworks that integrate state, market, and community contributions can operationalize the principle of universal embodiment, recognizing that each life stage may present care needs that exceed purely private solutions.

12.4.3. Reconfiguring mediation

A vulnerability-centred approach requires reconfiguring mediation and family law to recognize that all individuals, at different points in their lives, rely on caregiving structures and may experience heightened dependencies.⁵⁹ Consequently, mediation cannot assume atomistic, self-sufficient parties but must be structured to address the inevitability of dependency and the diverse ways individuals encounter it. By integrating a systematic consideration of emotional, financial, and relational factors that shape caregiving negotiations, these approaches ensure that mediation does not reinforce existing disparities but instead accounts for the complexities of caregiving dynamics. Rather than focusing solely on ‘vulnerable groups’, such frameworks should uphold the universal principle that anyone may encounter situational or structural constraints, whether due to health challenges, unexpected economic shifts or relational power imbalances.

By providing consistent support structures, accessible legal guidance, and ongoing professional oversight, these practices should reflect what Fineman terms ‘responsiveness’: an institutional commitment to protecting and enhancing resilience for all citizens, not merely those deemed ‘at risk’.

⁵⁹ See generally Albertson Fineman (n 5); Albertson Fineman, ‘Beyond Equality and Discrimination’ (n 14); M Albertson Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20(1) *The Elder Law Journal* 71.

Through such reforms, the state recognizes caregiving, and the negotiation of caregiving responsibilities, as a collective social concern, fostering a legal landscape that actively anticipates and mitigates dependency rather than relegating it to private negotiation. The reliance on market-based or private family arrangements inevitably overlooks the ways in which law actively shapes conditions of dependency. Consequently, mediation cannot treat caregiving disputes as isolated, private matters; it must be systematically supported by institutional scaffolding that anticipates and mitigates power imbalances, financial disparities, and cultural assumptions about caregiving roles.

This critique of ‘procedural neutrality’ also extends to mediation’s underlying assumption that parties negotiate from relatively equal positions. From a vulnerability perspective, legal mechanisms must continuously monitor and rebalance these interactions through mandatory screening protocols, ongoing mediator training, and universal cost supports, regardless of income or social status, to ensure that neither party is effectively forced into suboptimal agreements. Such an approach transforms mediation into a process that reaffirms our dependence, obligating the state to cultivate the conditions under which *all* citizens can engage in caregiving responsibilities without sacrificing their economic security or personal well-being.

In Sweden, these shortcomings make apparent the urgent need for structural reforms that move beyond the illusion of procedural neutrality in mediation. The state must take active responsibility for ensuring that caregiving negotiations occur within an institutional framework that acknowledges the material and social inequities caregivers face. Policies such as subsidized childcare for those engaged in mediation, mandatory mediator training on power dynamics and trauma, and the establishment of accessible legal advocacy mechanisms for caregivers with limited economic resources are not discretionary enhancements but necessary components of a system that takes caregiving seriously.

A vulnerability-centred approach insists that caregiving negotiations are never purely individual or voluntary but are shaped by institutional structures, including labour markets, legal norms, and socio-economic constraints, that distribute burdens unevenly. Mediation must therefore be reconfigured to acknowledge these embedded inequities, ensuring that caregiving responsibilities are not merely ‘privately’ resolved but institutionally recognized and equitably supported.

12.5. Conclusion: Implications for Future Reforms

Rethinking caregiving and dependency away from neoliberal schemes, this chapter has challenged the dominant liberal conceptualisation of the family as a private, autonomous unit. Instead, it has argued that the family must be

understood as a structurally embedded institution, shaped by state policies and legal frameworks that determine how care is distributed and supported. While this recognition has historically informed Sweden's collectivist approach to caregiving, shifts in governance over time have increasingly undermined this foundation.

The gradual erosion of *Folkhemmet's* collectivist principles and Sweden's increasing reliance on neoliberal governance have progressively reshaped caregiving responsibilities, prioritizing market efficiency and procedural neutrality over substantive equity. These shifts have placed growing burdens on those with fewer resources, reinforcing existing inequalities and highlighting the limitations of legal formalism in addressing the material realities of dependency. From a vulnerability perspective, caregiving is not a temporary challenge but an enduring human condition that demands continuous institutional engagement rather than ad hoc, compensatory interventions. Sweden's shift toward privatized caregiving, through cash-for-care schemes and outsourced elder care, has deepened socio-economic disparities, as the state has gradually reframed caregiving as a private rather than institutional responsibility.

In response, a recalibrated legal and policy framework must recognize caregiving as a shared institutional obligation rather than a privatized burden. Legal mechanisms must go beyond symbolic entitlements to provide substantive protections that embed caregiving as a public good. This includes non-transferable paternity leave, stronger employment protections for caregivers, and enforceable regulations on privatized care services to ensure affordability, accessibility, and quality. A truly responsive state does not merely acknowledge dependency – it anticipates and mitigates its effects through legal and institutional design. Moreover, it recognizes caregiving not as an economic externality but as a fundamental pillar of societal cohesion and resilience.

Sweden's trajectory offers both a cautionary example and a broader reflection on the challenges of sustaining collectivist caregiving frameworks under evolving economic pressures. Countries facing similar transitions must recognize caregiving protections as structural imperatives rather than discretionary policies.

Ultimately, reaffirming caregiving as a collective social responsibility is key to strengthening Sweden's commitment to structural equity and resilience. This shift would move Sweden beyond the fiction of the family as an autonomous caregiving unit and instead acknowledge it as an institution shaped by and dependent on legal and economic structures. By expanding public institutional support, reinforcing legal protections, and implementing redistributive policies, Sweden can ensure that caregiving remains embedded as a fundamental public good rather than an individualized burden relegated to private negotiation.

Loneliness and Care: Rethinking the Role of Family Law

Jonathan Herring

13.1. Introduction

This paper will propose a new purpose for family law. Family law has traditionally seen itself as concerned with the regulation of sexual relations and parenting. In many jurisdictions this has been done through the promotion of marriage as the status within which sexual relations and child-rearing should take place. I argue in this article that contemporary Western societies require us to rethink this core role of family law. I propose that family law should instead focus on the two major contemporary issues.

First: carework. Family law should refocus itself on providing a legal framework within which care is valued, rewarded, and protected. This should extend more widely than the care of children to cover all forms of care.

Second: loneliness. It is becoming clear that loneliness and social isolation is a major source of distress and, as argued in this chapter, a breach of rights to social interaction. There should be a duty on the state to facilitate social interaction and combat the problems of loneliness.

While listed as two separate issues, they are in many ways the same thing. They recognize that humans are inherently vulnerable and relational. Caring relationships are key to our well-being. Recentring on the promotion, nurturance, and regulation of these caring relationships will require a rather different-looking form of family law to the current one, but one that is better addressed at the major issues facing society.

13.2. Traditional Understandings of Family Law and Current Challenges

In the past, a primary function of family law was ‘channelling’.¹ Schneider explains that this channelling is a ‘pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative’.² This was applied in relation to family law by Linda McClain in these terms: ‘a basic purpose of family law is to support fundamental social institutions, like marriage and parenthood, and to steer people into participating in them’.³

In short, this channelling promoted a socially, religiously, and legally acceptable framework (marriage) within which couples could engage in sex, become parents and raise children. Family law played its part in this by providing a legal status and formal recognition to certain kinds of relationship (particularly marriage and parenthood) and, indeed, not providing recognition of other forms of relationship (such as cohabitation). This reflects the traditional approach that family law is primarily about getting people into and out of marriage. When cohabitation is discussed, the debate is often centred around whether unmarried cohabitants should be treated in the same way as married couples, with marriage being the default standard model against which other relationships are compared.⁴

Lynn Wardle expresses the traditional family law view in this way: ‘Marriage is the primary expression of and preferred locus for the most meaningful and socially beneficial forms of intimate belonging’.⁵ Family law historically reflected this and provided married couples with a special status with which came a set of rights and protections. That created an attractive background against which to enter into intimate relationships. But access to marriage and parenthood was restricted. As Schneider explains, marriage was seen as ‘monogamous, heterosexual, and permanent’.⁶ As regards parents, the couple:

should be married to each other. They are preferably the biological father and mother of their child [...]. They should assure [the child]

¹ C Schneider, ‘The Channelling Function in Family Law’ (1992) 20 *Hofstra Law Review* 495.

² *Ibid*, 496.

³ L McClain, ‘Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law’ (2007) 28 *Cardozo Law Review* 101, 102.

⁴ R Auchmuty, ‘Feminist Responses to Same Sex Relationship Recognition’ in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar 2020) 163–179.

⁵ L Wardle, ‘The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage’ (2011) 25 *BYU Journal of Public Law* 287, 289.

⁶ Schneider (n 1) 306.

a stable home, particularly by staying married to each other, so that the child lives with both parents and knows the comforts of security.⁷

Through family law, marriage, and parenthood are given ‘social currency’, meaning they become the natural focus of people’s family lives.⁸ The standard life course of marriage, parenthood, and death was seen as the accepted model, which influenced even those who deliberately rebelled against it.⁹ The law played its role in normalizing, supporting, and upholding marriage and parenthood, as understood in the traditional ways previously described.

In this way, as Ellman points out, family law was ‘designed to affect people’s behaviour in some ways that policymakers believe desirable’.¹⁰ Of course, this may not be the only role that family law plays, but it is an important one.

Alison Diduck, offering a contemporary understanding of family law, writes:

[I]f family is the environment that we live in and what we do as a parent, child, or former or current partner, family law to me is any form or means of regulating, supporting, or governing that environment, those actions, and their consequences. It is, for example, the so-called private law of marriage and civil partnership including their formation, dissolution, and consequences, but it is also the so-called public law not only of child protection or domestic violence but also the likes of pensions, employment, tax, housing, social benefits, and immigration. Each of these areas of family law affects both our public and our private living; each has both public and private consequences.¹¹

While this offers a wide view of what counts as family law (including, for example, tax and social benefits), it is still rooted in the partner and parent model of family life. It means sex and blood ties are presented as the meat and bones of family law. Sex is seen as the defining feature of the kinds of relationships that constitute families and so are subject to family law. Even if marriage’s privileged status is questioned, the concept of the nuclear family, with the two parents of opposite sex and their children, still has a powerful hold over family law as the ideal into which all other would-be families must

⁷ Schneider (n 1) 307. See also Aassve et al, [Chapter 10](#), this volume, for a discussion of current social views on the ‘ideal family’.

⁸ Ibid.

⁹ J Herring, *Law through the Life Course* (Bristol University Press 2022).

¹⁰ I Ellman, ‘Why Making Family Law Is Hard’ (2003) 35 *Arizona State Law Journal* 699, 701.

¹¹ A Diduck, ‘What Is Family Law For?’ (2011) 64 *Current Legal Problems* 287, 288. From an economic perspective, see Grossbard, [Chapter 9](#), this volume.

fit.¹² It hardly needs to be said that this image of family law has increasingly come under challenge in recent years. Three main sources may be identified.

First, the traditional marriage/parenthood model of family law has simply ceased to reflect reality. Sex outside of marriage is rampant. Children in the UK are now more likely to be born outside marriage than within it.¹³ If the institutions of marriage and legal parenthood are intended to provide a secure framework for adult intimate relationships and adult–child relationships they are simply failing to provide that for many relationships.

Second, we have seen an increase in the importance attached to autonomy.¹⁴ Marriage and parenthood, with a one-size-fits-all model of regulation, fail to acknowledge the diversity in relationship forms. The traditional legal regulation in relation of parenthood designating as the father the husband of a woman who gives birth, seems a million miles away from a gay sperm donor contacted by a lesbian couple seeking an informal sample of sperm. With an increased use of prenuptial agreements, the alternatives to marriage, such as civil partnership, and increasing complexity over the allocation of parenthood in cases of technologically assisted reproduction, we are seeing that the law is seeking to allow people to set for themselves the kind of legal regulation they wish rather than having one imposed by the law in a pre-formatted model.¹⁵

Third, the very structures offered by society in terms of marriage and parenthood are under challenge. While presented as offering stability, protection, and security, they have faced sustained challenge by feminist commentators that they enable and perpetuate patriarchal oppression of women.¹⁶ Marriage is the means by which care is privatized and devalued, sexual abuse can become legitimate and women's work is devalued.¹⁷

This chapter does not seek to assess the merits of these kinds of objections, and there are plenty more that can be made.¹⁸ It will, however, proceed on the assumption that the current structures of family law are hopelessly outdated.¹⁹ In particular, they are failing to meet the pressing needs of the

¹² K Horsey and E Jackson, 'The Human Fertilisation and Embryology Act 1990 and Non-traditional Families' (2023) 86 *Modern Law Review* 1472. See also Palazzo and Cardoso, [Chapter 7](#), this volume.

¹³ Office for National Statistics, *Births in England and Wales: 2022* (Office for National Statistics 2024).

¹⁴ D Chambers, 'The "Legalization" of the Family: Toward a Policy of Supportive Neutrality' (1985) 18 *University of Michigan Journal of Law Reform* 805.

¹⁵ Herring (n 9).

¹⁶ C Chambers, *Against Marriage* (Oxford University Press 2019).

¹⁷ M Albertson Fineman, *The Autonomy Myth* (New Press 2004).

¹⁸ Chambers (n 16).

¹⁹ JE Halley, 'What Is Family Law?: A Genealogy Part I' (2011) 23 *Yale J.L. & Humanity* 1.

time. Domestic abuse is rife;²⁰ care work is unequally allocated in terms of gender and is devalued;²¹ and gender-based poverty is extensive.²² Social mores have changed so that a legitimizing context for sexual relationships (other than mutual consent) is not needed.

So where does family law go from here? To some, the answer may be to abandon family law or, at least, for it to collapse into contract and tort law, with statutory provisions dealing with a few specific issues.²³ That, however, will not be the approach taken here. Instead, I argue that the role of a legal regime to support and recognize certain kinds of relationship and to be promoting and protecting these is sound. The problem is deciding which relationships need promoting. We no longer need a particular social structure within which sexual relationships are permitted: such matters are better left to individual conscience. Instead, we should focus on providing a legal framework ensuring that they are fully consensual.²⁴ We no longer need a social construction to encourage people to move in together or to produce children. People are making their own decisions in that regard. There are, however, two major social issues that family law can be remodelled to address: care work and loneliness. It is these that I will address next.

13.3. Care

A major problem facing those writing about care is providing a definition of care.²⁵ That creates a problem for lawyers. Without a satisfactory definition, legal responses are difficult to formulate. Often cited in the ethical literature is Joan Tronto and Berenice Fischer's definition of care: 'A species of activity that includes everything we do to maintain, continue and repair our 'world' so that we can live in it as well as possible. That world includes our bodies, ourselves and our environment.'²⁶

This is in many ways an admirable definition, but it is hard to see it being used in a legal context. First, its terms are so vague and potentially

²⁰ J Herring, *Domestic Abuse and Human Rights* (Intersentia 2022) ch 1, 1–18.

²¹ J Herring, 'The Caring Subject' in S Hennette Vauchez and R Rubio-Marín (eds), *The Cambridge Companion to Gender and the Law* (Cambridge University Press 2023) 237–268; see also Moradi, [Chapter 12](#), this volume.

²² UN Women, *Progress on the Sustainable Development Goals: The Gender Snapshot 2023* (UN Women 2023).

²³ Albertson Fineman (n 17).

²⁴ J Herring, 'Rethinking Sexual Crimes: From Women's Consent to Men's Responsibility' (2023) 17 *Anatomia do Crime* 19.

²⁵ For a sophisticated analysis, see I Chadha-Sridhar, 'Care as a Thick Ethical Concept' (2023) 29 *Res Publica* 405.

²⁶ J Tronto and B Fisher, 'Toward a Feminist Theory of Caring' in E Abel and M Nelson (eds), *Circles of Care: Work and Identity in Women's Lives* (SUNY Press 1990) 40.

overinclusive, that it would lead to legal interventions that would be inadequately targeted. Second, legal definitions have to be susceptible to evidence produced in court. The kinds of issues raised in Tronto and Fischer's definition seem to be the kind that are hard to prove.

It is interesting that two prominent legal discussions of care have advocated an approach that relies on 'markers of care' rather than a definition as such. I have suggested the markers of meeting needs: respect, responsibility, and relationality.²⁷ Caracciolo di Torella and Masselot advocate the use of four such markers: constant ongoing responsibilities; absence of choice; financial, physical, emotional costs and emotionally sensitive personal connection.²⁸ This kind of approach is not unknown in the law; it is found, for example in the definition used by the European Court of Human Rights in relation to terms such as 'torture' and 'family life'. Traditionally, however, law has relied on bright line definitions, which are susceptible to proof in courts, in order to target interventions.

There are two fundamental problems with care work in our society.

First, care work is inadequately valued or recognized within society, our economy or legal system. Care comes with huge economic and social disadvantages, for which there is no legal recognition or compensation. This work is enormously important to individual and societal well-being, and it yet is either unpaid or very badly paid.²⁹ This creates considerable financial costs for carers. The United Nations Economic Commission for Europe found: 'There are also significant hidden costs of informal care to carers. These include the opportunity costs of lost earnings, careers and pension entitlements, as well as the health consequences of the physical and psychological burden experienced.'³⁰

Second, the distribution of care work is hugely unbalanced in terms of gender. The vast majority of care work is undertaken by women.³¹ It hardly needs to be added that these two points are connected. As Martha Nussbaum has written:

Any real society is a caregiving and care-receiving society, and must therefore discover ways of coping with these facts of human neediness and dependency that are compatible with the recipients and do not exploit the caregivers. This [...] is a central issue for gender justice.³²

²⁷ J Herring, *Caring and the Law* (Hart 2013) 11–45.

²⁸ E Caracciolo di Torella and A Masselot, *Caring Responsibilities in European Law and Policy* (Routledge 2023).

²⁹ Albertson Fineman (n 17).

³⁰ UNECE, *The Challenging Roles of Informal Carers* (UNECE 2019) 2.

³¹ Herring (n 21).

³² M Nussbaum 'Care, Dependency and Social Justice' in P Lloyd-Sherlock (ed), *Living Longer: Ageing, Development and Social Protection* (Zed Books 2004) 275–299.

The failure to value care is explicable to a large part by the understanding of the self and what is important to the self. The vision of the self-promoted by the law is of an isolated, independent, self-sufficient, autonomous man. As a result, the rights the law tends to protect are those of autonomy, privacy, and self-determination. Moreover, the law primarily operates to protect economic interests. This is reflected in the kind of law students study at university, which tends to be tailored to the kind of work that is more profitable in the workplace, such as commercial law. Our law graduates are well-trained to advise well-heeled businesspeople on their rights of autonomy, freedom of contract, and presumption of innocence. They would be ill-equipped to advise the welfare recipient, the exhausted mother of a disabled child or the care home resident with dementia. These base assumptions of the law mean that certain activities are valued and encouraged: in particular, the production of money and capital, whereas other activities, such as care work, are devalued.

Such a law is ill-suited to the caring relationships in which we live. Realities where autonomies are mixed, meaning is found in sharing experiences, and flourishing is discovered in the mingling of our lives. It is not coincidental for any of these points that these privileges extend into the realms that typically men operate in and devalue the worlds of women. This sidelining of care and the aggrandizing of what is labelled ‘economically productive’ help sustain and reinforce the patriarchal oppression of women. Hence in the law, the injured pedestrian can receive compensation for lost wages but not for the loss of an ability to care; the welfare recipient is encouraged to find paid employment – their care work counts for nothing; the GDP of a country is loudly trumpeted by the government, but there is silence about the levels of care provided.

At a theoretical level, three tools in particular are used in legal policy currently to devalue care. The first is the concept that care work is a ‘private’ matter.³³ Fineman critiques the view that the state should primarily focus its interventions on the public world of commerce, paid employment, and matters of national significance.³⁴ This means that what happens in individuals’ homes should be private and no concern of the state.³⁵ Care, particularly where it is within ‘the home’ and is unpaid, is not the business of the state or the law.

The second is the idea of choice. Autonomy is highly prized in the law.³⁶ Individuals choose to care and do so out of love, aware that its rewards are

³³ Albertson Fineman (n 17).

³⁴ Ibid.

³⁵ This is well-captured in C Pateman, *The Sexual Contract* (Polity Press 1988).

³⁶ C Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Hart 2009).

not financial. The state should respect that choice and not seek to interfere in personal decisions through the legal regulation of care.

The third is the notion of value. In the eyes of the law, with the focus of economic productivity, care has no economic value of the kind that can be recognized in private law. Damages cannot be awarded for the inability to care. Care work cannot be seen as having value, save through the prism of paid employed care, and there it is the performance of tasks that are valued, not caring.³⁷

The primary area of law in which a value is attached to care is family law, but even family law does so in a very limited way – namely through financial orders on divorce. Lord Nicholls in the English decision of *White v White* explained that the ‘starting point’ for financial orders on divorce was that a couple’s assets should be shared equally.³⁸ The justification for this was that each party had contributed equally to the marriage and ‘[t]here should be no bias in favour of the money-earner and against the home-maker and the child-carer’.³⁹ In saying this, he rejected the previous case law, which had, broadly speaking, been based on an assumption that an employed spouse had earned their money and should keep it but on divorce could be required to meet the needs of the childcaring spouse. Such an approach did not value the care provided during the marriage but was focussed on enforcing the promise in the ‘marriage contract’ that the parties should financially support each other.

This valuing of care is, however, strikingly limited. It is only a valuing of care within marriage, and there is no valuing of care for relationships outside that context. This includes not just the standard examples of mother caring for children but also care beyond that (e.g. in a cohabiting relationship, care in ‘families of choice’;⁴⁰ care for older parents; children caring for parents;⁴¹ and care between friends) even though the carer may have contributed to the relationship as much as a spouse. Further, in financial relief proceedings, the care is valued in terms of wealth created by the other spouse, typically the husband. So the financial value attached to care provided to a millionaire’s family will be worth significantly more than the care provided to an

³⁷ J Herring, ‘Personal Budgets: Holding onto the Purse Strings for Fear of Something Worse’ in T Feiler, J Horder and A Papanikitas (eds), *Marketisation, Ethics and Healthcare* (Routledge 2018) 84–98.

³⁸ [2001] 1 AC 596.

³⁹ *Ibid.*, [65].

⁴⁰ S Marvel, ‘The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage’ (2015) 64 *Emory Law Journal* 2047.

⁴¹ J Herring, ‘Children Care’ in B Clough and J Herring (eds), *Disability, Care and Family Law* (Routledge 2022) 51–65.

impoverished family. This reflects the difficulties the law has in valuing things that are not connected to economic productivity.

So what would a family law look like if it sought to focus its attention on caring relationships rather than sexual ones? I will identify four elements that such a family law may adopt.

13.3.1. Promotion of care

As mentioned, the current framework of family law promotes and privileges marriage. Instead, the focus ought to be on promoting care as a valuable and important activity. Care is essential to the flourishing of human beings because everyone is vulnerable. As Catriona Mackenzie, Wendy Rogers, and Susan Dodds explain: ‘To be vulnerable is to be fragile, to be susceptible to wounding and to suffering; this susceptibility is an ontological conditional of our humanity.’⁴² There is an extensive literature on the meaning of vulnerability and it is not possible to do it justice here.⁴³ It should be emphasized that vulnerability, here, is not being used in the sense that is commonly discussed in the media and by politicians. There, particular groups are defined as vulnerable and in need of care and protection. By contrast, the claim of universal vulnerability theorists is that vulnerability is an inevitable part of the human condition. If we are all vulnerable, then our caring relationships are essential to our survival. Yet our caring relationships are part of what makes us vulnerable.

The importance of care is highlighted by the concept of universal vulnerability. Martha Albertson Fineman has explained that in this way:

The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity. Of course, between these ends, loss of capacity and dependence may also occur, temporarily for many and permanently for some as a result of disability or illness. Constant and variable throughout life, individual vulnerability encompasses not only damage that has been done in the past and speculative harms of the distant future, but also the possibility of immediate harm. We are beings who live with the ever-present possibility that our needs and circumstances will change. On an individual level, the concept of vulnerability (unlike that of liberal

⁴² W Rogers, C Mackenzie and S Dodds, ‘Why Bioethics Needs a Theory of Vulnerability’ (2012) 5 *International Journal of Feminist Approaches to Bioethics* 11, 12.

⁴³ F Sherwood-Johnson, ‘Constructions of “Vulnerability” in Comparative Perspective: Scottish Protection Policies and the Trouble with “Adults at Risk”’ (2013) 28 *Disability & Society* 908.

autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe.⁴⁴

It is because we are vulnerable beings that care is central. We all have needs, and the meeting of needs in caring relationships is a universal experience. There will be few, if any, stages during anyone's life when they are not in caring relationships. Eva Feder Kittay, Bruce Gennings, and Angela Wassuna explain:

People do not spring up from the soil like mushrooms. People produce people. People need to be cared for and nurtured throughout their lives by other people, at some times more urgently and more completely than at other times.⁴⁵

It should, therefore, be a foundational role of the state and any legal system to promote and maintain caring relationships. As Maxine Eichner writes:

Because of its interest in the health, well-being, and dignity of its citizens, the liberal state has a vital interest in the success of relationships that foster caretaking, and should provide these relationships with the institutional support that will help them flourish.⁴⁶

The lack of respect shown to care work means the state is given a 'free ride'. Women, in particular, fulfil the state's responsibility to those needing care, but the state gives no recognition of that. This leaves women and those involved in care pauperized. It gives rise to a structural debt owed by society to carers which 'must be recognized, and payment accomplished, through policies and laws that provide both some economic compensation and structural compensation to caretakers'.⁴⁷

We need, therefore, recognition and valuing of caring relationships in the law. This can be by giving legal status to these relationships; through the recognition that the promotion of caring relationships should be the primary goal in judicial decision making; and through economic acknowledgment of the value of care through tax breaks and welfare payments. These are similar

⁴⁴ M Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1, 67.

⁴⁵ E Feder Kittay, B Jennings and A Wassuna, 'Dependency, Difference and the Global Ethic of Longterm Care' (2005) 13 *Journal of Political Philosophy* 433, 434.

⁴⁶ M Eichner, *The Supportive State: Families, Government, and America's Political Ideals* (Oxford University Press 2010) 124.

⁴⁷ Albertson Fineman (n 17) 69.

to the kinds of way marriage was promoted in the past; it is suggested that these be shifted over to care.

13.3.2. *Sharing costs of caring*

Stepping back, if it is acknowledged that care is essential to human well-being and that it is a responsibility of the state to meet people's core needs, the key question then becomes who is to meet the costs associated with that care? Currently, that largely falls on individuals, particularly women. The state has a core interest in ensuring that the distribution of care work is fair and that its burdens are shared equally. In particular, the state has a role in ensuring that the division of care work does not exacerbate gender inequality.⁴⁸ This is an important issue, and there is no doubt that the answer is complex.

A care-based approach would require a radical rethinking of state support for carers. This would include ensuring that those undertaking care in the home are at the very least not placed into poverty and that they receive welfare payments that acknowledge the value of their contributions. It would also mean the state offering practical support such as alternative care provision (respite care) so that those giving care can have a break.⁴⁹ It would require a rethinking of labour law so that employees are given rights to enable them to combine paid employment with caring responsibilities. Indeed, labour law needs to recognize caring work as work. As Judy Fudge explains:

[F]eminist labour law scholars have emphasized the importance of including caring and domestic labour, whether paid or unpaid, performed in a private household within the domain of labour law, and have been at the forefront of grappling with the specific dynamics governing affective or embodied labour.⁵⁰

She adds that this would mean:

If unpaid, but socially necessary, reproductive work is considered to be as valuable as paid labour to individual and social development, employers would not be able to design jobs based on the assumption that it is the worker's private and individual responsibility to adapt their caring responsibilities to the temporal requirements of the job. Instead, working-time norms would be designed on the assumption that all

⁴⁸ On this, see also Moradi, [Chapter 12](#), this volume.

⁴⁹ For details, see Herring (n 27) 46–87.

⁵⁰ J Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22 *Legal Studies* 1, 1.

workers engage in domestic labour for others and women would no longer be expected to shoulder the economic burden of unpaid care work. Similarly, if unpaid care work is considered to be as valuable as paid work, benefits provided to workers on maternity and parental leave would no longer be just a proportion of the worker's wage but equivalent to it.⁵¹

13.3.3. The protective function

A key role for family law is to prevent abuse within relationships. At the moment domestic abuse interventions are focussed on marriage and cohabiting relationships. For example, in England and Wales, under section 1, Domestic Abuse Act 2021, domestic abuse only occurs between those who are 'personally connected', defined in section 2 to cover those who are, or have been married, cohabitants, in an intimate relationship, or relations. Again we see the focus on sexual, or presumed, sexual relationships. However, it is argued here that the violence, structural inequality or coercive control that can mark domestic abuse can occur in non-sexual as well as sexual relationships. It is the intimacy of the relationship, not its sexual nature, that is key to the wrong in domestic abuse. Restricting domestic violence to marriage or marriage-like relationships has meant that some forms of abuse have gone without an effective remedy. For example, elder abuse and abuse by teenagers of their parents all miss out.⁵² Focussing domestic abuse on intimate caring relationships, rather than marriage or marriage-like relationships will be a more effective response.

13.3.4. Care-based parenthood

The legal determination of who is the parent of a child is significant because parenthood is a status with legal and social significance. Parenthood in English law (and in many other jurisdictions) has traditionally been understood in biological terms. Essentially, the father is the man whose sperm produced the child; and the mother is the woman whose egg did. Prior to the advent of DNA and other biological testing, presumptions were used as to who was the biological parent (e.g. that the woman who gave birth to the child was the mother and that the husband of the woman who gave birth was the biological father).⁵³ In effect, this gave a special privilege to marriage. It was hard to find evidence to rebut the presumption of parenthood for

⁵¹ Ibid, 3.

⁵² Herring (n 20) 19–58.

⁵³ *P v Q and F* [2024] EWCA Civ 878.

husbands (in effect, it would need to be shown that the husband was living away from the wife at the time of the conception).⁵⁴ Unmarried partners were not presumed to be parents, although they could seek to prove paternity (typically by demonstrating they stayed overnight with the mother at the time of the conception).⁵⁵ Although the presumption in effect privileged marriage, officially it was the biological link that was key rather than marital status per se. That was made clear by the fact that the language of presumption was used in relation to husbands and the fact the courts were willing to rebut that presumption when there was sufficient evidence to do so.

The use of the presumptions is still very much part of English law, although the advent of DNA testing has made it easier to determine biological truth rather than relying on presumptions of genetic connection, as the law used to do. Technology has also meant that the law has departed from the biological model of parenthood in some cases, most notably in cases of assisted reproduction. Hence, under the Human Fertilisation and Embryology Acts 1990 and 2008, egg and sperm donors are not treated as parents of a child, despite the biological link, and partners of the mother can be treated as parents, even without a genetic link.⁵⁶ However, these are seen as exceptions to the general rule,⁵⁷ which emphasizes the importance of the genetic link.⁵⁸

I would argue that the emphasis on biology or marriage as the marker of parenthood is misconceived. Caring for a child should generate the privileged parental position, not a mere biological connection.⁵⁹ The allocation of parenthood is a fine example of how the caring self and women's labour are sidelined in favour of a property-based or status-based approach.

Returning to the argument that parenthood should be allocated on the basis of a caring relationship, parenting is about doing not being. As Judith Masson explains: 'Parenting by doing acknowledges the reality of looking after children by recognising adult-child relationships. Parenting by being reflects a wish to identify for the child and the state people with responsibility for the child, regardless of the practical role they are playing or want to play in the child's life'.⁶⁰

⁵⁴ Section 26 of the Family Law Reform Act 1969 states that the legal presumptions of paternity can be rebutted on the balance of probabilities.

⁵⁵ *P v Q and F* [2024] EWCA Civ 878.

⁵⁶ Human Fertilisation and Embryology Act 2008, ss 42–44.

⁵⁷ *AB v. Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034.

⁵⁸ For more detail on the legal allocation of parenthood see A Margaria, *The Construction of Fatherhood* (Cambridge University Press 2019) 4–18.

⁵⁹ See also Peleg, [Chapter 11](#), this volume.

⁶⁰ J Masson, 'Parenting by Being; Parenting by Doing – In Search of Principles for Founding Families' in J Spencer and A du Bois-Pedain (eds), *Freedom and Responsibility in Reproductive Choice* (Hart 2006) 132.

The status of being a parent is one of responsibility and needs to be earned by dedicated care to the child, not merely a biological link and not fixed at birth. It is the changing of the nappy, the wiping of the tear, and the working out of math together that makes a parent, not the provision of an egg or sperm. This puts caring at the heart of parenthood. There are several reasons why this is appropriate.

First, we should recall that at the heart of child law should be the welfare of child. In other words, we should give parental status to the person who is best placed to meet the responsibilities and use the rights of being a parent. That will be the person who knows the child best and has shown commitment to promoting the welfare of the child. That is the person who cares for the child day in day out. This explains also why it might make sense for a genetic father to be obliged to pay child support (that will benefit the child) but not to be given the parental authority to make decisions concerning the child (if he does not know the child well, the father making decisions will not benefit the child).

Second, parenthood should be understood as a responsibility that should be earned, not a right that nature grants. A genetic tie may represent no more than a brief sexual encounter and is an insufficient basis for asserting claims over a child.⁶¹ We should not be seeking to give rights to parents who claim children but seeking to allocate parenthood based on the needs of the child.⁶²

Third, where possible in family law, the legal labels should match a child's understanding. So a child's parents should be the person the child will treat as a parent. That will be the person who is carrying out the parental role in the child's life, not the person whose genetic material was used to create the child. In some cases this will not match the heterosexual married model on which many legal systems are based, which assume that a child has one mother and one father.⁶³ It means there is no problem in recognizing that, in a same-sex relationship, a child can have two mothers or two fathers, both of equal standing; something impossible if biology is emphasized. We can also start to recognize the network of people that can play a role in a child's life. This includes recognition of the extent to which children care for other children.

⁶¹ J Wallbank, '(En)Gendering the Fusion of Rights and Responsibilities in the Law of Contact' in J Wallbank, S Choudhry and J Herring (eds), *Rights, Gender and Family Law* (Routledge 2009) 93–118.

⁶² B Bennett Woodhouse, 'Hatching the Egg: A Child-centered Perspective on Parents' Rights' (1993) 14 *Cardozo Law Review* 1747.

⁶³ F Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Families* (University of British Columbia Press 2011).

So an understanding of the caring self reveals that our understanding of parenthood should shift from focusing on blood ties to focusing on the caring relationship between child and adult. Rights should flow from the relationship with the child, not the blood tie. As a result, we should move away from the idea that a child can have only two parents. Further, in terms of legal rights, a range of adults might, depending on the context of their particular relationship, have a say in certain areas of the child's life. But the extent and nature of those rights will depend on the relationship.

13.4. Loneliness

The second major role I would suggest for family law is to respond to loneliness. It is becoming increasingly apparent that loneliness is for many people a major social problem. The Office for National Statistics⁶⁴ reports that, in 2022, 6 per cent of respondents in England (some 3 million people) reported feeling lonely often or always. Only 20 per cent reported that they never felt lonely. The issue has a clear gendered dimension with women being nearly twice as likely to feel lonely some of the time as compared with men. It is also heavily impacted by age: half a million older people go at least five or six days without speaking to anyone, and 3.9 million older people state the television is their primary source of company.⁶⁵ Of course, it should not be assumed that being lonely is unwanted or harmful, but it often is and is associated with some harmful impact.⁶⁶ Holt-Lunstad et al's research indicates that loneliness is likely to increase your risk of death by 26 per cent.⁶⁷ HM Government have also noted that:

Feeling lonely often is linked to early deaths – on a par with smoking or obesity. It's also linked to increased risk of coronary heart disease and stroke; depression, cognitive decline and an increased risk of Alzheimer's. It's estimated that between 5% and 18% of UK adults feel lonely often or always. And when we feel socially rejected, it triggers a response in our brain similar to one from experiencing physical pain.⁶⁸

⁶⁴ National Statistics, *Wellbeing and Loneliness – Community Life Survey* (ONS 2023).

⁶⁵ Age UK, *All the Lonely People* (Age UK 2018).

⁶⁶ Campaign against Loneliness, *How Loneliness Affects Health* (Campaign against Loneliness 2023).

⁶⁷ J Holt-Lunstad, TB Smith, M Baker, T Harris and D Stephenson, 'Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review' (2015) 10 *Perspectives on Psychological Science* 227.

⁶⁸ HM Government, *A Connected Society A Strategy for Tackling Loneliness – Laying the Foundations for Change* (HM Government 2018) 6.

Loneliness is associated with a wide range of medical condition, including severe depression. The National Academies of Sciences, Engineering, and Medicine explains: ‘Social isolation and loneliness are associated with poor physical and mental health outcomes, including higher rates of mortality, depression and cognitive decline.’⁶⁹

They go to give some specific examples:

- Social isolation has been associated with an approximately 50 per cent increased risk of developing dementia.
- Loneliness among heart failure patients has been associated with a nearly four times increased risk of death, 68 per cent increased risk of hospitalization, and 57 per cent increased risk of emergency department visits.
- Poor social relationships (characterized by social isolation or loneliness) have been associated with a 29 per cent increased risk of incident coronary heart disease and a 32 per cent increased risk of stroke.⁷⁰

13.4.1. Definition of loneliness

Loneliness is not easily defined.⁷¹ HM Government⁷² have adopted a definition created by Perlman and Peplau: ‘a subjective, unwelcome feeling of lack or loss of companionship. It happens when we have a mismatch between the quantity and quality of social relationships that we have, and those that we want’.⁷³ Valtorta and Hanratty explain that loneliness is constituted of social and emotional loneliness: loneliness is a subjective negative feeling associated with a perceived lack of a wider social network (social loneliness) or absence of a specific desired companion (emotional loneliness).⁷⁴ A leading group of medical clinicians described it in this way:

⁶⁹ National Academies of Sciences, Engineering, and Medicine, *Social Isolation And Loneliness in Older Adults: Opportunities for the Health Care System* (The National Academies Press 2020) 49–62.

⁷⁰ Ibid.

⁷¹ A Gordy, HHW Luo, M Sidline, and K Brownlee, ‘The Missing Measure of Loneliness: A Case for Including Neededness in Loneliness Scales’ (2022) 19 *International Journal of Environmental Research and Public Health* 429.

⁷² HM Government (n 68) 2.

⁷³ D Perlman and L Peplau, ‘Toward a Social Psychology of Loneliness’ in R Gilmour and S Duck (eds), *Personal Relationships* (Academic Press 1981) 55.

⁷⁴ N Valtorta and B Hanratty, ‘Loneliness, Isolation and the Health of Older Adults: Do We Need a New Research Agenda?’ (2012) 105 *Journal of the Royal Society of Medicine* 518.

Loneliness is a subjective negative experience that results from inadequate meaningful connections, where ‘inadequate’ refers to the discrepancy or unmet need between an individual’s preferred and actual experience.⁷⁵

It is notable that these definitions have some common features. First, they emphasize that loneliness is a subjective experience. Second, it is a description of an emotional state rather than a physical one. A person may be physically close to people (e.g. they may work in an office) but lack any intimate connection. They may know and interact with quite a number of people but not have a close friendship or relationship. Third, the definition also emphasizes that this is a negative experience. This is not uncontroversial, but under it, those who are content with the extent of their social interaction are not defined as lonely. Fourth, those writing on the topic also emphasize that loneliness can be acute (transient) or chronic (enduring). Of course, it may also vary in the severity of the impact.⁷⁶

13.4.2. *A right to social relationships*

Kimberley Brownlee in her magnificent book *Being Sure of Each Other* highlights two care needs that people have: social access needs and social contribution needs.⁷⁷ We need to have contact and connection with other people, and we need to contribute to the well-being of others. She promotes:

- A right to minimally adequate access to decent social contacts and connections and;
- A human right to be supported in our efforts to sustain others.⁷⁸

She explains that we are social beings with ‘non-contingent, fundamental social access needs and social contribution needs that generate morally urgent demands’.⁷⁹ It is, of course, difficult to *prove* the importance of these. However, she highlights the fact that childhood neglect is now recognized as a major source of harm. There is also strong evidence from human psychology about the importance of a relationship. We can see too, she suggests, from

⁷⁵ T Prohaska, V Burholt, A Burns, J Golden, L Hawkey, B Lawlor et al, ‘Consensus Statement: Loneliness in Older Adults, The 21st Century Social Determinant of Health?’ (2020) 10 *BMJ Open* e034967.

⁷⁶ L Hawkey, M Browne and J Cacioppo, ‘How Can I Connect with Thee?: Let Me Count the Ways’ (2005) 16 *Psychological Science* 798.

⁷⁷ K Brownlee, *Being Sure of Each Other: An Essay on Social Rights and Freedoms* (Oxford University Press 2020).

⁷⁸ *Ibid*, 39–74.

⁷⁹ *Ibid*, 38.

‘rent a family’ and other interventions, that people have a strong drive to form and maintain social connections.

She claims that these rights can be explained on the basis that respecting persons means respecting the nature of humanity. And the nature of humanity is that we are people for whom relationships are key for our identity, flourishing, and health.⁸⁰ Further, she argues that human rights are moral rights to the conditions necessary for realizing a minimally good human life, and the fulfilment of fundamental social needs constitutes one such condition. She argues that protection from social deprivation is necessary to exercise many other rights such as health, autonomy, and political rights.⁸¹

In a similar way Martha Nussbaum writes of a core human capability, namely the one for emotions that she sees as including ‘[b]eing able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger’.⁸² She is not alone in emphasizing the importance of relationships to people’s well-being. Joseph Raz includes ‘warm and trusting relations with family and friends, stormy and enthusiastic involvement with other people, many hours spent having fun in good company’ as an objective good for people.⁸³ Relationships are at the core of our identity. As Vanessa May puts it:

[W]e are inherently relational beings: we gain a sense of self in relationships with and in relation to other people [...], while striving to maintain human bonds in order to belong constitutes a ‘fundamental human motivation’.^[84] As relational beings, we learn to ‘perceive ourselves through the eyes of others’^[85] and ‘we know who we are because [...] others tell us’.^{86,87}

A novel aspect of Brownless’s analysis is the emphasis on the need to contribute to others. She breaks this down into three interests:

⁸⁰ J Herring, *Law and the Relational Self* (Cambridge University Press 2019).

⁸¹ Brownlee (n 77).

⁸² Ibid, 33–34.

⁸³ J Raz, *The Morality of Freedom* (Oxford University Press 1988) 306.

⁸⁴ R Baumeister and M Leary, ‘The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation’ (1995) 117 *Psychological Bulletin* 497.

⁸⁵ N Crossley, *Reflexive Embodiment in Contemporary Society* (Open University Press 2006) 88.

⁸⁶ R Jenkins, ‘Categorization: Identity, Social Process and Epistemology’ (2000) 48 *Current Sociology* 7, 11.

⁸⁷ V May, ‘When Recognition Fails: Mass Observation Project Accounts of Not Belonging’ (2016) 50 *Sociology* 748.

First, we have a fundamental need to contribute directly to specific other people's survival and well-being. This need can fall short of loving others, but includes many of the attitudes and behaviours that naturally go with love. For ease of expression, let's call it our *need to sustain* others. Second, we have a human right to be protected in our efforts to sustain others. Third, when we are denied the means to sustain others, we are victims of a grave injustice, which I call *social contribution injustice*.⁸⁸

She goes on to explain:

We have deep needs both to be dependable and to be depended upon by other people. This need is rooted in our self-interest, other-interest, and group-interest. Denying us the social resources we need to be able to sustain other people threatens our self-interest in many ways, by denying us the protection we should have to meet our moral responsibilities to dependants and associates, to learn from others how to be inclusion-worthy, and to improve our skills as a social contributor. Wronging us as social contributors also wrongs our loved ones, since we are mutually invested. Denying us the means to sustain them robs both us and them of meaningful love-labour; it alienates us from our caring efforts and from the people we seek to sustain.⁸⁹

The importance of these two linked rights is that relational good involves both the giving and receiving of reassurance. A relationship that is entirely giving and involves no receiving is not a relational good. A person who is simply the recipient of 'charity' will not have their contribution needs met if they are not facilitated in giving back.⁹⁰

If the case for these rights to social relationships is made out, what is the role for family law?

13.4.3. Family law responses to loneliness

First, family law has, as previously explained, been used to promote marriage as a privileged status. This, in part, is by giving it legal recognition and rewards. It is, therefore, well-placed to find ways of recognizing and

⁸⁸ Brownlee (n 77) 65.

⁸⁹ Ibid, 67.

⁹⁰ J Wittrock, 'A Human Right to Friendship? Dignity, Autonomy, and Social Deprivation' (2022) 36 *The International Journal of Human Rights* 1590.

promoting relationships of emotional value that combat people's loneliness. It can do this by 'by encouraging and helping people to establish relationships and maintain existing relationships'.⁹¹ Just as the state through marriage sought to promote a particular kind of intimate relationship, the state has a duty to promote social relationships of the kinds that Brownless promotes. It might do that in three ways.

13.4.3.1. *Promotion/creation*

The state has a duty to promote stable social connections. It can do this by providing schemes that encourage or enable such relationships to take place.⁹² Note this involves providing the opportunities for social interaction but does not compel them. There are plenty of examples of the kind of programmes that can address loneliness in the Government's own policy document. To give just one example: Centre 81 is a skills and activities centre for people with disabilities in Great Yarmouth. Funding will allow the project to create a supportive place for people to socialize within the newly refurbished Yare House, providing a welcoming coffee and lunch space with the opportunity to take part in a range of different activities such as crafts, cooking, and woodwork.

More broadly, it can do this by encouraging conversations around loneliness, reducing stigma and encouraging public bodies to be alert to ways they can address the issues.⁹³

13.4.3.2. *Enabling*

In some contexts, individuals may require more than the opportunity to enter social relationships. Carys Banks has done some excellent work looking at the loneliness challenges faced by people with learning difficulties. She calls for 'the support worker role can be reshaped to better support people with learning disabilities to become socially connected across their lives more generally'.⁹⁴ As she notes the 'professional distance' encouraged in the support worker role can inhibit the extent to which the care worker can enable and encourage emotionally meaningful relationships to exist.

Another example may be older people.

⁹¹ B de Vries, 'Four Types of Anti-Loneliness Policies' in K Brownlee, D Jenkins and A Neal (eds), *Being Social* (Oxford University Press 2022) 275.

⁹² S Collins, 'A Human Right to Relationships?' in K Brownlee, D Jenkins and A Neal (eds), *Being Social* (Oxford University Press 2022) 31–51.

⁹³ HM Government, *Tackling Loneliness: Annual Report* (HM Government 2023).

⁹⁴ C Banks, 'Loneliness in the Lives of People with Learning Disabilities: Where Are We Going Wrong?' (2021) *Academia Letters* 264, 264.

Age NI – Living Well Moyle, Northern Ireland:

Living Well Moyle provides wraparound support for older people through a guided conversation with a Living Well coordinator during which individuals identify goals and agree on a plan. Volunteers then provide ongoing support to the individual, helping them reconnect to their local community, be more physically and socially active, build capacity, confidence and resilience, and achieve the goals they set for themselves.⁹⁵

13.4.3.3. Removing barriers

Part of the obligation to promote emotionally meaningful relationships is to remove barriers to them. Bouke de Vries identifies several potential barriers to emotional relationships:

- To address legal barriers, states might e.g. loosen legal restrictions on family reunification and outlaw solitary confinement in prisons.
- To address physical barriers, states might e.g. subsidize the construction of wheelchair ramps and require retirement homes and hospitals to be built in places where they can be easily reached (e.g. near bus stops or train stations).
- To address temporal barriers, states might e.g. reduce the length of standard working hours and ban night shifts in professions where night work is not essential.
- To address psychological and behavioural barriers, states might e.g. subsidize relationship counselling and make social skills training a mandatory subject in schools.⁹⁶

13.4.4. New values for family law

As mentioned in the introduction, the two key themes of this chapter, namely care and loneliness, are closely connected. These highlight the importance of connection and relationality. Family law in the past prioritized the values of privacy, autonomy, and certainty, as previously described. These are premised on values connected to a particular understanding of the self: as a self-interested individual governed by rationality and economics. These

⁹⁵ Ibid, 265.

⁹⁶ de Vries (n 91) 274–286.

values, however, mean little in reality of our family lives, which are dominated by love, sacrifice, care, and where our selves are created in and through our relationships.⁹⁷ We need therefore to move away from prioritizing autonomy in family law and towards developing law that promotes caring relationships.

13.5. Conclusion

Family law for too long has emphasized the importance of promoting marriage and parenthood. This is a narrow understanding of what we need as individuals or as a society. We no longer need social institutions to regularize sexual relationships or the raising of children. Today we need to find ways of respecting care, ensure its fair sharing and combating the blight of loneliness. This chapter has sought to promote a new vision for family law: one that recognizes we are vulnerable, interdependent individuals, whose strength and reality are not in our autonomy but in our relationships with others. Caring is essential for our own individual well-being and flourishing society. We need a family law that is refocussed on promotion of caring relationships and combatting loneliness as its primary aims.

⁹⁷ Herring (n 80).

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