THE
MODERN LAW REVIEW

Volume 61 **July 1998** **No 4**

The Normal Chaos of Family Law

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Over the last 20 years, different explanatory frameworks in family law have waxed and waned. John Eekelaar's *Family Law and Social Policy*,[1] which enjoys its twentieth anniversary of publication this year, was a pathbreaker in this respect. I first read it as an undergraduate, when it was still a recent book. I remember being fascinated by the methodological daring of it: for Eekelaar was suggesting that we could better understand family law if we thought in terms of its functions, of what it *did*. The idea that functionalism, an explanatory model associated with 1960's Parsonian family sociology, could be relevant to understanding law, struck me then as an exciting one.

Since then, legal scholarship has moved on, and family law in particular has felt the powerful imprint of both feminism and post-structuralism, to the extent that functionalist accounts, such as Eekelaar's, are probably not taken very seriously these days (after all, who gets to decide what those functions are and who judges whether family law does function as the model suggests?).[2] Instead, theoretical interest today centres on what might be termed 'constructionist' accounts of family law, that is, the way legal discourse privileges certain family forms, individual behaviours or orientations, or more generally 'constructs' sexuality, or our subjective sense of ourselves. Books that are representative of this trend would be Katherine O'Donovan's *Family Law Matters*[3] and Richard Collier's *Masculinity, Law and the Family*.[4]

I am convinced that both functionalist and constructionist accounts of family law offer rich insights[5] – but I'm not convinced that they tell the full story. This is

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Earlier versions of this article were delivered as seminars to the Postmodern Legal Theory Workshop at the University of Hong Kong, at the University of New South Wales and at Griffith University. I would like to thank Reg Graycar, John Murphy, Bill MacNeil, Shaun McVeigh, Peter Nygh and Stephen Parker for their valuable comments on those earlier versions, as well as the anonymous reviewers.

1 (London: Weidenfeld & Nicholson, 1978).
2 Eekelaar himself has substantially modified his own position: see 'Family Law and Social Control' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence, 3rd Series* (Oxford: OUP, 1987) ch 6.
3 (London: Pluto Press, 1993). Although O'Donovan's work is not exclusively constructionist in my sense, there is a strong constructionist thread to this book: for example, of the law of marriage, she suggests that it 'has a limiting effect on ontological possibilities – the ways in which we see ourselves, how we project our futures' (at 33).
4 (London: Routledge, 1995). Collier is an overt constructionist: his book aims 'to explore the construction of masculinity in areas of law pertaining to the family', *ibid* 1.
5 See, for example, the (in my view) highly successful deployment of a constructionist account in A. Diduck, 'The Unmodified Family: The Child Support Act and the Construction of Legal Subjects' (1995) 22 *Journal of Law and Society* 527.

because both schools of thought, although quite different from each other in many respects, have one feature in common: namely, that they tend to ascribe more coherence to law than it seems to me actually to possess, the better to enable it either to function, or to construct the world around us.[6] Yet it seems to me that to the extent that family law deals in ideas of what families are, how their members should deal with each other, and what the role of law and the state should be with regard to them, it is not coherent at all.

Instead, I want to suggest that many contemporary developments in family law can be characterised as chaotic, contradictory or incoherent. By 'family law' for these purposes, I mean primarily Anglo-Australian family law,[7] since England and Australia are the two jurisdictions with which, for reasons of personal history, I am most familiar. I suspect, though, that a lot of what I want to say may have application to family law in other jurisdictions. By 'chaos', I mean simply to convey a sense of disorder or lack of system, at least at the level of legal text.[8] But even this language may not be strong enough, and I shall also rely from time to time on what Frederic Jameson calls 'antinomy', that is, 'two propositions that are radically, indeed absolutely, incompatible, take it or leave it'.[9] Whereas contradictions are thought to be susceptible in the long run to productive resolution, antinomies are not. Family law, I shall suggest, is contradictory, disordered, incoherent and, in part at least, antinomic.

In saying this, I am not diagnosing a crisis of any sort. Indeed, I want to suggest that this is a perfectly normal state of affairs: normal, because family law engages with areas of social life and feeling – namely love, passion, intimacy, commitment and betrayal – that are themselves riven with contradiction or paradox.[10] Just as the family is the backdrop against which many of these contradictions are played out, so too is family law an arena in which some of these contradictions emerge in the language and form of law. So questions about rights, justice, autonomy, relationships and values rise to the surface of legal debate in ways that are often readily visible to even the untrained eye. It may be that family law is more cognitively open to its social environment, or less systematic, than other areas of law, so that it is easier to see a continuity between law and its context. But family law is more than just a specialised form of ethical debate or ideological text: it is also part of the wider legal system, and therefore to some degree autonomous, or disconnected from its environment, a fact which, as I shall argue, can contribute contradictions of its own.

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6 Writers of the constructionist school acknowledge that legal constructions of the family contain their own ambiguities (see, *eg* Diduck, *ibid* 538–542), but not (it seems) to the extent that they threaten to undermine the power of law to construct families in particular ways, or to convey particular ideologies about family life. In other words, the ambiguities, or contradictions, identified in constructionist accounts are kept within sufficient limits to ensure that the constructive project of law remains possible. My argument is that those contradictions may be more profound than this suggests, and that we must look beyond legal texts themselves to understand how those contradictions are stabilised or normalised.

7 I take this to refer only to 'private' family law (marriage, cohabitation, divorce, property, maintenance and children) and to exclude the 'public' law aspects of child care and medical treatment of children, although it may be that some of what I have to say could apply to both. There are, of course, important differences between English and Australian family law, in content, and constitutional and institutional setting. I have highlighted relevant differences where they seem relevant or important.

8 I shall suggest later that this chaos may serve some coherent political purposes.

9 'The Antinomies of Postmodernity', in *The Seeds of Time* (New York: Columbia UP, 1994) 1–2.

10 U. Beck and E. Beck-Gernsheim, *The Normal Chaos of Love* (Oxford: Polity, 1995) from which I have borrowed my title.

In some ways, the idea that chaos is normal may be more shocking than that of crisis, accustomed as we are to equate progress with system, coherence and the successful resolution of contradiction. In addition, to many lawyers, the suggestion that chaos is an inevitable feature of one's own discipline could be seen as an admission of failure, or of a lack of moral fibre. Nevertheless, I stick to it, because it seems to me to express an important truth.

In doing so, I am aware that I run the risk of positivising the subject: of focusing too much on the texts of the law, and not its practices. In anticipation of that, I shall be using the idea of chaos as normal to gain a sociological insight into the nature of legality at work in family law. I want to suggest that, contrary (or perhaps, in addition) to the assumptions of both the functionalist and constructionist schools, the rules or texts of the law do not completely determine practices (which, given my main thesis, is probably just as well). Instead, I want to draw on Pierre Bourdieu's suggestion that the logic of following a rule ceases at the point at which logic ceases to be practical,[11] that we should be cautious of assuming that the social world is determined only by rules, rather than the social practices and strategies of those (such as legal professionals) whose behaviour is oriented to, or addressed by, legal norms.[12] It is these practices, I suggest, that hold the chaos of family law at bay. The practices associated with family law are not my prime concern here. But I believe that we can gain a better understanding of the nature of those stabilising practices if we first understand the idea of normal chaos as a characteristic feature of the texts that provide their setting.

My procedure in this paper will be to consider a series of uncertainties that haunt family law. I shall argue that these uncertainties, or perhaps anxieties, are responsible to a large degree for the normally chaotic state of modern family law.

Normative anarchy?

A first uncertainty concerns the normative content of family law. There are two versions of this. The first queries whether family law has any normative content at all, and suggests that it is not real law. The second suggests that it does have a normative content, but that there is a plurality of legal norms stemming from two different, and perhaps inconsistent, ways of characterising legal obligations between family members. I shall suggest that while the first uncertainty is unwarranted (and that – on the contrary – family law exemplifies what might be called modern legalism), the second should be taken seriously.

Family law has a low status in both professional practice and in the academy. It is often described as a free for all in which there are too few rules, too much untrammelled discretion by decision-makers, too much attendance to the detailed particulars of each case and too much reliance on expert evidence. Family law reform is also said to be too much influenced by empirical studies instead of rationally established *a priori* principle.[13] Close scrutiny of family law reports, so the argument goes, will not yield an elegant and abstract doctrinal system, but little

11 '… [T]he logic of practice lies in being logical to the point at which being logical would cease to be practical': P.Bourdieu, 'Codification' in P. Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (London: Polity, 1994) ch 4.

12 Or, as N. Luhmann has put it, 'the legal system consists of all social communication that is formulated with reference to law': *The Differentiation of Society* (New York: Columbia UP, 1982) 122.

13 R. Deech, 'Divorce Law and Empirical Studies' (1990) 106 LQR 229.

more than specific and unanalysable instances of the exercise of a discretion, far too enmired in the factual specifics of each case to yield anything approaching a principle or *ratio*. As such, it is not real law, just a poor relation of the harder disciplines of the common law, a falling away from a proud legal tradition.[14]

I want to argue against this point of view, not only for reasons of professional pride, but also because I believe it is wrong. It is wrong, first, in suggesting that family law is somehow out of step with other areas of law or doctrine. On the contrary, I want to suggest that family law is in many ways a paradigm example of modern law, an exemplary case of what Marc Galanter calls 'new legalism'.[15] That is to say, it is an area of law that extensively incorporates materials or information from other disciplines, losing its distinctively legal flavour in the process, which Galanter calls 'de-differentiation';[16] and that it is an area of law that operates not by direct physical coercion or 'brightline' rules, but through 'indirect symbolic controls' which 'radiate messages', something Galanter calls a 'diffusion of legal authority'. I will return to this point in more detail later on. For the moment, I want to suggest only that far from straying from the true path of the law, family law may tell us a good deal about where mainstream legalism is headed.

There is a second reason why this view is wrong. This is that family law is not nearly as empty of rules, or shot through with discretion, as it would have us think. Instead, family law consists of a mix of both rules and discretion,[17] and that, if anything, there is a shift taking place *towards rules and away from discretion*, as I have argued elsewhere.[18] If we were to adopt, for example, Cass Sunstein's taxonomy of what he calls 'sources of law',[19] we would find plenty of examples in family law of each item in his list, spanning a continuum from untrammelled discretion, through presumptions, factors, standards, guidelines and principles to rules.

In fact, I want to argue that family law presents a particularly rich array of sources of law in Sunstein's sense, for reasons that are connected to the second version of the anxiety about normative anarchy that I mentioned earlier: the version that I said deserves to be taken seriously. This is that the normative pluralism at work in family law reflects uncertainty about its proper role or purposes.

To demonstrate this, I want to use Stephen Parker's suggestion that Anglo-Australian family law has oscillated uneasily between two different ways of conceptualising the role of law in relation to families:[20] that is, between seeing family law as primarily concerned, on the one hand, with the enforcement of rights between family members; and, on the other, as primarily concerned with consequences, or with maximising utility, so that family law is about weighing or balancing different interests in pursuit of an optimal outcome. So, for example,

14 It is difficult to provide evidence in writing of these views, but I have come across them many times in the world of practice and in the academy.

15 M. Galanter, 'Law Abounding: Legalisation around the North Atlantic' (1992) 55 MLR 1.

16 The extent to which law can successfully incorporate information from other disciplines has been called into question by Michael King and others: see, for example, M. King and C. Piper, *How the Law Thinks about Children* (Aldershot, Arena, 2nd ed, 1995).

17 For present purposes, the difference between the two lies in the extent to which the relevant legal norm seeks to constrain choice at the point of application by the decision-maker: the greater the constraint, the more 'rule-like' the relevant legal norm. As Sunstein puts it, a rule (for these purposes) amounts to 'the complete or nearly complete *ex ante* specification of legal outcomes': C. Sunstein, 'Problems with Rules' (1995) 83 *California Law Review* 953, 962.

18 'Reducing Discretion in Family Law' (1997) 11 *Australian Journal of Family Law* 309.

19 C. Sunstein, n 17 above; see also C. Sunstein, *Legal Reasoning and Political Conflict* (New York: OUP, 1996) 19–34.

20 S. Parker, 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 MLR 311.

the shift from the mid-nineteenth century rule that a father had an absolute right to custody of his legitimate children, to the twentieth century position in which decisions concerning the custody of children were to be decided according to what was in the child's best interests, could, in Parker's terms, be seen as a shift from a rights model to a utility model.

Parker suggests that this shift from rights to utility has been associated with a move from rules to discretion. But he also suggests that there is evidence over the last twenty years of a move back to a rights model in family law,[21] while there remains a continuing attachment to a utility ethic. All of this, he suggests, has led to a state of 'normative anarchy'.[22] A good example would be child support legislation, which was presented politically as a way of advancing the rights of children, or of enforcing parental responsibilities towards them, and as a deliberate move away from the old discretionary system, which was thought to produce uncertainty and inconsistency.[23] The child support scheme is notoriously rule-bound; yet it co-exists alongside the courts' statutory powers to redistribute property on divorce, which remains one of the best examples of discretion at work in family law, and is geared primarily to rewarding the past contributions, or meeting future needs of spouses out of the pool of family property.[24]

A more recent example of co-existence of rights and utility thinking comes from the recent Australian reforms to the Family Law Act 1975 (Cth) concerning children after divorce.[25] Here, the opening section of the new Part states clearly that children have a right of contact with both parents.[26] The concept of a child having a right is a new one in family law legislation. Decisions about children are usually made in accordance with the classic consequentialist formula that the court must decide a case in accordance with the child's best interests or welfare, rather than according to their rights. The new statutory right of contact owes its presence in the Australian law to the UN Convention on the Rights of the Child.[27] However, the new Australian provision qualifies this right of contact by reference to the child's best interests.[28] This means that the Family Court is presented with an issue framed simultaneously in terms of rights and utility, while being offered no guidance on how the relationship between a child's right to contact and a child's best interests are to be constructed in a particular case.

For example, suppose there has been violence inflicted by one of the child's parents on the other, and that as a result the mother (who, let us assume, is both the

21 See also J. Eekelaar, 'Families and Children: From Welfarism to Rights' in C. McCrudden and G. Chambers (eds), *Individual Rights and the Law in Britain* (Oxford: The Law Society/Clarendon Press, 1994) ch 10.

22 S. Parker, n 20 above, 312.

23 *Children Come First: The Government's Proposals on the Maintenance of Children* (London, HMSO, 1990) vol 1, para 2.

24 The emphasis is different in England and Australia: the former is more needs-related, the latter more contribution-oriented. However, interesting developments are under way in Australia, towards a greater emphasis on future needs (see *Mitchell and Mitchell* (1995) 19 Fam LR 44, citing the decision of the Supreme Court of Canada in *Moge* (1992) 43 RFL (3d) 345) and on reflecting a history of family violence in property awards (see, for example, *In the Marriage of Kennon* (1997) 22 FLR 1). Yet even these developments suggest the continued (and untheorised) co-existence of rights and utility thinking.

25 Family Law Reform Act 1995 (Cth), inserting a new Part VII into the Family Law Act 1975 (Cth).

26 s 60B(2)(b) FLA 1975: 'children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development'.

27 Although the Convention has only been selectively incorporated into Australian law.

28 s 60(2) opens with the phrase: 'The principles underlying these objects are that, except when it is or would be contrary to a child's best interests . . .' with the 'right' to contact then listed as one of those principles.

victim and the primary carer of the child) would find continued contact between the father and the child deeply distressing. How is the child's right to contact to be given effect in those circumstances? On one view, the mother's feelings should be irrelevant to the issue of whether the child's right to contact should be vindicated:[29] the child is to be treated as a separate individual, free of all other relationships or connections, and whose developmental interests demand continued contact with both parents. Rights talk encourages this sort of individualisation of the right holder. But on another view, the child's interests may be seen as so intimately bound up with those of its primary carer that her feelings cannot be left out of account:[30] in other words, the child is both an individual *and* a participant in a network of relationships with others.

I suggest that there is more at stake here than merely a 'balancing exercise' between rights and utility: these are simply different, and incompatible, ways of approaching the task of conceptualising children and their needs, and of decision-making in such cases. In others words, Australian Family Court judges have been drawn into the tension between rights and utility, and left there with no map or guide. I will suggest later that this too is a growing phenomenon of modern family law: the delegation to the courts of what are, in effect, difficult decisions of politics, principle or philosophy, or what Galanter calls a 'second kind of politics'.

These normative conflicts, and the underlying uncertainties to which they give voice, are likely to intensify. This is because, it seems, family law in both jurisdictions is currently undergoing a shift in its grounding assumptions, a process which seems unlikely to abate. The main family law statutes enacted in each jurisdiction in the 1970s were 'no-fault' statutes.[31] They detached the consequences of divorce almost entirely from consideration of responsibility for the breakdown of the marriage. When it came to money and children, the removal of fault left no clear principle as the basis for decisions. Instead, they were to be dealt with according to utilitarian or consequentialist criteria: in the case of children, that their welfare was the paramount consideration;[32] and in the case of finances, that the court make those orders which (in Australia) were 'just and equitable' between the parties,[33] and (in England and Wales) were such as to place the parties in the

29 This is the view of the English courts: *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re P (Contact: Supervision)* [1996] 2 FLR 314; see S. Jolly, 'Implacable Hostility, Contact and the Limits of the Law' (1995) 7 CFLQ 228, and C. Smart and B. Neale 'Arguments against Virtue – Must Contact be Enforced?' [1997] *Family Law* 332.

30 This has been the approach of the Australian authorities, both before and after the introduction of the new Part VII: see, for example, *Grant and Grant* [1994] FLC 92–506 (contact refused where it would affect mother's capacity to parent); *B* v *B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (order restraining primary carer's geographical location refused). The comparison between England and Australia is instructive: the English courts seem to have moved rapidly towards a very strong presumption in favour of contact, despite the absence so far of a clear statutory basis for it (see n 29 above; and see s 11(4)(c) FLA 1996, which will introduce such a presumption for the purposes of that section when brought into force); while in Australia, the Family Court has so far resisted any suggestion of a presumption of contact, despite the statutory language of contact as a right of the child: see *B* v *B* (above) for a careful analysis of the implications of s 60B FLA 1975 (Cth).

31 Matrimonial Causes Act 1973 (*UK*); Family Law Act 1975 (Cth).

32 In the UK, strictly speaking, fault was irrelevant to custody decisions even before the 1973 Act, since the relevant criterion was the child's welfare; but case-law established that matrimonial 'guilt' or 'innocence' could have a bearing on custody decisions, at least to the extent that an adulterous mother was unlikely to be granted custody. This did not begin to alter until after the divorce reforms and the decentring of fault in the grounds for divorce: see Carol Smart, *The Ties that Bind* (London, Routledge, 1984), at 92–96 and 120–127 for a discussion of the relevant case-law.

33 s 79 Family Law Act 1975 (Cth). The process of arriving at a division of property under Australian law is more structured than this suggests, and involves a consideration, first, of the parties' respective contributions to the family property, followed by a consideration of future needs: see H. Finlay, B. Bailey-Harris and M. Otlowski, *Family Law in Australia* (Sydney: Butterworths, 5th ed, 1997) ch 6.

position they would have been in had the marriage not broken down.[34] As Carol Smart has put it, the 'axes of regulation' of divorce had shifted in the 1970s from morality (a fault-based system) to economics.[35] The regime established in the 1970s was associated with heavy reliance on judicial discretion.

More recently, however, there has been a move away from discretion towards greater emphasis on rules.[36] I have argued in greater detail elsewhere that the reasons for this can be grouped under two very broad heads.[37] The first is a concern to reduce the costs of family breakdown, both to the legal system and to the welfare state. The need to reduce public expenditure on the legal system (either directly on the court system, or through legal aid) has led to increased interest in 'bright line rules' that encourage parties to resolve their own disputes without going to court;[38] while the need to curb public expenditure on family breakdown led to the enactment of child support legislation, which enables public expenditure to be more accurately controlled and predicted.[39] The second is that there is now greater concern than previously to find some principled basis for family law. This in turn stems from a perception that the 1970s discretionary model has failed to deliver 'just' outcomes for men, women or children.[40] This has led to greater use of arguments for rights or equality, which have in turn pushed family law legislation towards the rule end of the spectrum, in the shape of fixed starting points or firmer guidelines or standards.

Taken together, these trends explain not only the introduction of child support schemes in both jurisdictions, and the growing use of the language of children's rights,[41] but also the concepts of joint parental responsibility,[42] and the developing

34 s 25 MCA 1973. This directive was subsequently removed, mainly on the grounds of its unworkability.

35 C. Smart, 'Marriage, Divorce and Women's Economic Dependency: A discussion of the Politics of Private Maintenance' in M. Freeman (ed), *State, Law and the Family* (London: Tavistock, 1984) ch 1, 9–10.

36 See n 17 above for a definition of terms.

37 'Reducing Discretion in Family Law', (1997) 11 *Australian Journal of Family Law* 309.

38 An example would be the Family Law Reform (No. 2) Bill 1995 (Cth), which, if it had not fallen with the Keating Labor government in 1996, would have introduced a presumption of equal contributions to matrimonial property, thereby coming close to introducing a presumption of equal sharing of matrimonial property on divorce. One argument made in support of the Bill was that '..the structured approach to the resolution of spousal maintenance and matrimonial property disputes laid down by the Bill should provide parties whose marriages have broken down with a clear and logical framework within which to discuss these issues, and facilitate their concluding agreements rather than depending on Court imposed solutions to their disputes, with a minimum of cost . . .': Family Law Reform Bill (No. 2) 1995, Explanatory Memorandum, paras 2 and 3.

39 See *Children Come First* n 23 above; on the background to the Australian scheme, see S. Parker, 'Child Support in Australia: Children's Rights or Public Interest?' (1991) 5 IJFL 24.

40 Evidence for this would include the growth of organised men's or fathers' rights groups formed to campaign around 'men's rights' issues such as child support, or contact and residence issues (see M. Kaye and J. Tolmie, 'Fathers' Rights Groups in Australia' (1998) 12 AJFL 19); the evidence that the discretionary system has signally failed to protect the economic interests of women on divorce, which has led to a re-theorisation of financial obligations between former spouses, especially spousal maintenance, in terms of rights (to equality of treatment or to compensation for loss) rather than a discretionary determination of need (see, for example, K. Funder, 'Australia: A Proposal for Reform' in L. Weitzman and M. Maclean, *Economic Consequences of Divorce: The International Perspective* (Oxford: OUP, 1992) ch 6; A. Diduck and H. Orton, 'Equality and Support for Spouses' (1994) 57 MLR 681); and the growing use of the language of children's rights, as evidenced by the UN Convention on the Rights of the Child. I am not suggesting that it will be possible to offer a coherent response to these competing demands for rights, merely that the fact that they are being made is evidence of growing discontent with discretion.

41 s 60B(2)(b) Family Law Act 1975 (Cth).

42 This concept is contained both in the Children Act 1989 (UK) (s 2) and in the new Part VII of the Family Law Act 1975 (Cth) (s 61C). There are some differences, most notably in the position of the unmarried father. For a comparative discussion, see R. Bailey-Harris and J. Dewar, 'Variations on a Theme – Child Law Reform in Australia' (1997) 9 *Child and Family Law Quarterly* 149.

interest in clearer, more rule-like frameworks, for resolving questions of property distribution and spousal maintenance on divorce.[43] However, this trend towards rules, or at least towards legal norms that are closer to the rules end of the spectrum, has not been comprehensive: instead, there has been a steady incursion of rules into a discretionary framework, with no overhaul of the fundamental premises of the system. This has led to the normative pluralism, or anarchy, that Parker identifies.

To summarise the argument so far: family law is not just a discretionary gloop beneath all serious intellectual enquiry, but presents us with a rich array of normative types; and this reflects an underlying uncertainty about what the proper basis for the law should be in the area of family relationships. This uncertainty has intensified as the original 1970's model of family law has steadily been displaced by concerns with justice and efficiency. This produces the sort of uncertainties I have just identified.

I am not suggesting that the system is unworkable in consequence of this state of affairs. After all, I have said that this chaos is normal; and the fact that judges are faced with apparently contradictory, or even antinomic, statutory provisions may not be the problem it first appears.[44] This is mainly because judges are only a small part of the picture: instead, the relevant audience for these antinomic statements is not a court, but parents, legal advisers and counsellors or mediators. For such an audience, the authority of these statutory provisions is more diffuse, at least in the sense that there is no need to make a rational decision about how to weigh rights and utility in a way that is open to public scrutiny. Those who negotiate privately are relieved of the burden of justifying their outcomes to anyone other than themselves,[45] and perhaps the cursory scrutiny of a judge. This is the sort of thing I take Galanter to be referring to when he talks of modern legalism operating through 'indirect symbolic controls' and by 'radiating messages': the task of modern law is to set the tone for private ordering, or alternative dispute resolution, rather than to confer measurable entitlements that one might expect to see enforced in a court room.[46]

I'm not denying, of course, that much private negotiation takes place in the 'shadow of the law', and that the law's shadow needs to be well defined if private agreement is to be feasible.[47] Equally, I think it is easy to underestimate the extent to which legal provisions are translated by professional advisers and others in a way that may make the law seem clearer than it is, as well as the way in which other aspects of the legal process (eg, delays in getting court hearing dates) confer

43 See n 30 above. For more general discussion of the problem of discretion in family law, and specific proposals for clearer legal frameworks, see J. Eekelaar, 'Family Justice: Ideal or Illusion? Family Law and Communitarian Values' (1995) 48 *Current Legal Problems* 191, 211–215; Ira Mark Ellman, 'The Misguided Movement to Revive Fault Divorce, and Why Reformers should look instead to the American Law Institute' (1997) 11 *International Journal of Law, Policy and the Family* 216, 229–237, discussing American Law Institute, *Principles of the law of family dissolution: Proposed final draft, Part 1* (1997); J. Thomas Oldham, 'ALI principles of Family Dissolution: Some Comments' (1997) 3 *University of Illinois Law Review* 801.

44 Nor am I suggesting that this is unique to family law, although I think the clash of what Parker describes as competing 'ethical impulses' is particularly strong here.

45 O. Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 93.

46 Writing of the new Part VII of the Family Law Act 1975 (*Cth*), Richard Chisholm has suggested that the legislation is as much concerned to alter 'attitudes and perceptions' as to make identifiable changes to the rules: see 'Assessing the Impact of the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 177, 185.

47 R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950

bargaining endowments that may be just as effective as a clear-cut legal shadow in encouraging the parties to come to terms.[48]

This takes us back to the point made at the outset about rules and practices. By accepting the textual or ethical antinomies of much of modern family law as a fact, we can better appreciate the importance of the stabilising practices of interpretation that surround it.

How much autonomy?

There is another sort of uncertainty at work in family law, this time concerning the extent to which individuals should be free to arrange their familial obligations for themselves, before, during or at the end of their relationship. To begin with, there is the familiar disagreement between those who, on the one hand, would advocate the removal of all status-like relationships from family law (such as marriage), and their replacement by freely-contracted ones (eg, pre-marriage or cohabitation contracts, and surrogacy arrangements);[49] as against, on the other, those who would insist that familial relations are properly regulated by community-imposed norms that are not freely negotiable between the parties.[50]

Related to this is the tension that arises at the termination of a relationship between encouraging parties to agree between themselves over children and money without going to court, while at the same time removing some matters, like child support or the recovery of legal aid funds through the statutory charge, from the scope of private negotiation or agreement.[51] There may be powerful public policy reasons for allowing private agreement free rein in some areas, but not others. This sets up a tension, because the non-negotiability of some items may make agreement on other matters more difficult (for example, because a child support liability may not be known for some time because of delays or inefficiencies in the system of assessment). Similarly, there is the difficulty of striking the right balance between respecting private agreement on the one hand, and, on the other, applying sufficient independent scrutiny to privately negotiated agreements to guard against unfairness or exploitation, or to protect childrens' interests.[52]

48 See generally: R. Ingleby, *Solicitors and Divorce* (Oxford: OUP, 1992); G. Davis, S. Cretney and J. Collins, *Simple Quarrels* (Oxford: OUP, 1994); C. Piper, *The Responsible Parent; A Study in Divorce Mediation* (Hemel Hempstead: Harvester, 1993); A. Sarat and W. Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (New York: OUP, 1995).

49 eg L. Weitzman, *The Marriage Contract* (New York: Prentice Hall, 1981); M. Field, *Surrogate Motherhood* (Cambridge Ma: Harvard UP, 1988).

50 eg M. Glendon, *Abortion and Divorce in Western Law* (Cambridge Ma: Harvard UP, 1987) and (from a very different perspective) M. Fineman, *The Neutered Mother* (London: Routledge, 1995); for discussion, see M. Minow and M. Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4.

51 R. Ingleby, 'Buy Now, Pay Later: The Hidden Costs of Negotiated Settlements to Matrimonial Disputes' [1988] *Journal of Social Welfare Law* 50, discussing the intended and unintended limits placed on the parties' ability to make private agreements on divorce. In both jurisdictions, private ordering of child support liabilities is permitted, even encouraged, but against the background of the statutory liability.

52 See J. Eekelaar, *Regulating Divorce* (Oxford: OUP, 1991) at 145–154, discussing the judicial scrutiny accorded to, and the enforceability of, property consent orders. Where children are involved, some have expressed concern that the child's voice may not find expression in the process of private ordering: see R. Dingwall and D. Greatbach, 'Who's in Charge? Rhetoric and Evidence in the Study of Mediation' (1993) *Journal of Social Welfare Law* 367, 379: 'It may well be that parents sincerely *think* they are doing their best for their children; it is indisputable that, if asked, they will *claim* that they are doing the best for their children; but it is also clear that, given the opportunity, they rarely demonstrate unequivocally that they *are* doing the best for their children'. See also M. Richards, 'But

Another instance of the tension between autonomy and coercion can be seen in the recent Family Law Act 1996 (UK). The 1996 Act seeks to pursue two objectives simultaneously. The first is what might be termed behaviour modification, that is, the use of divorce law and procedures to influence, and specifically to discourage, divorcing behaviour; or, failing that, to ensure that divorcing couples are made to honour their responsibilities to each other and their children (by making final arrangements over money and property) before being allowed to remarry.[53] The second is the informalisation or delegalisation of divorce, and specifically the displacement of lawyers by mediators as the central actors in the divorce process.[54] The 1996 Act signals a major shift towards mediation as the primary means of resolving disputes,[55] and was associated both with a concern to reduce legal aid expenditure on divorce (since, it is said, mediators are cheaper than lawyers)[56] as well as with the more general rhetoric of self-determination or party control.[57] In short, the 1996 Act seeks both to give the parties greater autonomy while at the same time seeking to influence how they use it.

The significance of these changes can be best appreciated if some historical background is briefly sketched in. The 1969 divorce legislation in England and Wales was characterised by a number of assumptions. The first was that there was relatively little that the law could do to stop married couples divorcing, and that the best that could be hoped for was that the marriage could be buried with 'a minimum of distress, bitterness and humiliation'.[58] Indeed, it has been suggested that a dominant purpose of the UK divorce reform legislation was to promote divorce and the consequent regularisation of informal relationships through

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What about the Children? Some Reflections on the Divorce White Paper' (1995) 7 *Child and Family Law Quarterly* 223. The Family Law Act 1996 seeks to address this by reminding parents at every opportunity of the need to consider the welfare, wishes and feelings of their children: see s 8(9)(b) (information sessions to include information about the importance to be attached to the welfare, wishes and feelings of children); s 12(2)(a)(ii) (legal representative to inform parties of the need to consider the child's welfare, wishes and feelings); s 27(8) (mediators to encourage parents to consider the welfare, wishes and feelings of their children, and mediator to consider whether child should express wishes and feelings in the mediation); s 64 (power to make rules for the separate representation of children in certain proceedings). In each case, though, the question arises of how the child's 'welfare, wishes and feelings' are constructed, and by whom: see. L. Trinder, 'Competing Constructions of Childhood: Children's Rights and Children's Wishes in Divorce' (1997) 19 *Journal of Social Welfare and Family Law* 291.

53 'The Government's proposals will result in a harder divorce process for everyone, in the sense that they will be required to spend time reflecting on whether their marriage can be saved and, if not, to face up to the consequences of their actions and to make arrangements to meet their responsibilities before the divorce is granted': *Looking to the Future: Mediation and the Ground for Divorce* (Cm 2799, 1995) para 4.16.

54 S. Cretney, 'Lawyers under the Family Law Act' [1997] *Family Law* 405.

55 See, eg, s 13 FLA 1996 (directions with respect to mediation); s 29 FLA 1996 (amending s 15 Legal Aid Act 1988).

56 'The government is satisfied that … family mediation will still prove to be more cost effective than negotiating at arm's length through two separate lawyers and even more so than litigating through the courts': *Looking to the Future* n 53 above, para 5.20.

57 'Unlike current legal processes, mediation is a flexible process which can take into account the different needs of families, and differing attitudes and positions of the parties … [M]ediation can enable them to plan for the future at a pace which suits them both and within a timescale which does not push them into making hasty and ill-considered decisions': *ibid* para 5.5. Eekelaar has noted that 'alternative dispute resolution has roots *both* in counter-cultural movements of the 1960s and 1970s *and* the new-rightist ideology of the 1980s. On the one hand, freedom from lawyers and the claims of 'legal rights' seems to open out a more caring ethic, when responsibilities will replace self-interest. But the goal of self-determination can also promote individual assertion, each person trying to strike the best deal for himself or herself': 'Family Justice', n 43 above, 205.

58 Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* Cmnd 3132 (London: HMSO, 1966) para 15.

remarriage.[59] Although the statute referred to the need to promote reconciliation, there was little to lend this objective any substance.[60] Instead, the decision to divorce was to be the private decision of the parties, and the law's role was to assist them to effect that decision while acting as go-between or arbiter between the parties as to its terms: a sort of social service, in other words. There was not an overwhelming emphasis on out-of-court settlement. The doors of the court were theoretically open to all, and thanks to legal aid, irrespective of means.

A comparison between this model and that presented in the 1996 Act is instructive. The opening section of the 1996 Act contains a statement of 'general principles' to which the courts, or any person exercising functions under the Act, shall have regard.[61] In this statement, we can detect two differences from the 1969 model of divorce. First, there is an explicit principle of 'marriage saving': 'the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage'.[62] Second, there is now an explicit reference to cost: 'a marriage which has irretrievably broken down and is being brought to an end should be brought to an end...without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end'.[63] The reference to 'the procedures to be followed' indicates a clear preference for the cheaper procedures, ie mediation or other alternative dispute resolution mechanisms. Although mediation is not to be compulsory, pressure to use mediation in preference to consulting lawyers is to be applied to legally aided parties (itself a further departure from the earlier model).[64]

The principle of marriage-saving represents a significant departure from the previous model in that it seeks explicitly to use the divorce process itself as a means of affecting divorcing behaviour. Gone is the idea that the role of law is to facilitate and implement private decisions: it now seeks to influence the decisions themselves. For example, it is a condition of obtaining a divorce that the parties have reached agreement on financial matters.[65] The purpose of this provision is twofold: first, to bring home to the parties the real implications of a divorce, in the hope that they might change their minds;[66] and, second, to bring pressure to bear on the parties to agree arrangements swiftly, and also presumably at reduced cost, by making the divorce conditional on that agreement.[67]

In seeking to pursue simultaneously the objectives of behaviour modification and of party control or informalisation, the Act creates rich possibilities of

59 C. Smart, 'Regulating Families or Legitimating Patriarchy? Family Law in Britain' (1982) 10 *International Journal of the Sociology of Law* 129. The predominant objective of the reform was, of course, liberal and humanitarian in spirit, in putting an end to the fault-based divorce law: see S. Cretney, 'Divorce Reform in England: Humbug and Hypocrisy or a Smooth Transition?' in M. Freeman (ed), *Divorce: Where Next?* (Aldershot: Dartmouth, 1996) ch 3 for an account of the 'cruel, anachronistic and hypocritical' pre-1969 fault-based divorce law.

60 s 6(1) Matrimonial Causes Act 1973 (certificate of petitioner's solicitor).

61 s 1 FLA 1996.

62 s 1(b) FLA 1996

63 s 1(c)(iii) FLA 1996

64 s 15(3F) Legal Aid Act 1988 (inserted by FLA 1996).

65 s 3(1)(c), 9 FLA 1996. This is additional to the requirement that the court decide not to exercise any of its powers with respect to the children of the family: see s 11, replacing s 41 MCA 1973. Australian law still retains the 'declaration of satisfaction' procedure that used to appear in English law in s 41 MCA 1973: see s 51A(1)(b) FLA 1975 (Cth).

66 'When faced with the problems of dealing with the practical consequences of divorce, some couples may come to realise that they need to reconsider their position, and, perhaps with the help of counselling, find some way of renegotiating their relationship so that they and their children can have a future together': *Looking to the Future*, n 53 above, para 4.33.

67 'This is said to emphasise the responsibilities of marriage and parenthood', *ibid* para 4.26.

potentially unworkable contradictions.[68] This is partly because behaviour modification implies precisely a loss of party control or autonomy. This is evident in the way in which the emphasis on informalisation or party control is, paradoxically perhaps, associated with a more interventionist divorce procedure: there are requirements of attendance at information sessions,[69] of regular court hearings to keep the parties moving towards agreement,[70] and near mandatory requirements to attend mediation (especially for legally aided parties).[71] If divorce law is to perform a marriage saving (or behaviour modifying) function, it seems it will be far more interventionist than the system it replaces.

And in spite of the emphasis on removing lawyers, with the hoped for benefit of cost-reduction, one can instead see rich potential in the Act for increased litigation in the divorce process, and for the *increased* involvement of lawyers, where almost none existed before. For example, the requirement that financial arrangements be agreed before a divorce can be obtained is subject to a number of exceptions.[72] It is not difficult to foresee those exceptions becoming extensively litigated. So, whereas the legislation of the 1970s was credited with having transformed the divorce process from a legal to a bureaucratic one,[73] it seems that the 1996 Act is likely, in part, to reverse the trend, but against a background of an official policy of seeking precisely, and explicitly, the reverse.

I am suggesting, in other words, that the twin goals of behaviour modification (or marriage saving) and informalisation (or cost reduction) found in the 1996 Act are incompatible with each other and may contain internal contradictions.[74] This is one example of the paradoxes facing legislators seeking to reinstate so-called 'family values' into family law; they are often the same ones who are also keen to reduce public expenditure of any sort. The result is that the contradictions of such legislative policies are played out in the realm of law and administration. I will argue later that this transfer of political issues to the legal realm is a characteristic feature of much modern family law and that such legislation, being rarely workable in its own terms, must be understood as seeking to perform some other expressive function, as seeking to replace a vanished system of collective or shared values by legislating them back into existence.

How much law?

Another uncertainty, which has led to what I shall argue are chaotic consequences, surrounds the proper role of the law itself in resolving family disputes. This has arisen most noticeably in the context of children. Law, it has been argued, is not a

68 'There seems to be something of an unresolved conflict here between the brusque managerialism of modern judicial administration and the social work ideologies underlying much mediation practice …': S. Cretney, n 59 above, 51.

69 s 8 FLA 1996.

70 The Law Commission proposed a compulsory preliminary assessment 12 weeks after the initiation of the period for reflection and consideration (*The Ground for Divorce*, Law Com No 192 (London: HMSO, 1990) at paras 5.50–2) a proposal that was referred to favourably in the Green Paper (*Looking to the Future: Mediation and the Ground for Divorce, A consultation paper*, Cm 2424, 1993, ch 11) but was not discussed in the White Paper.

71 See n 64 above.

72 Schedule 1, FLA 1996.

73 M. Freeman, 'Divorce without Legal Aid' [1976] *Family Law* 255.

74 For example, the move towards informal procedures may remove the choice between mediation and legal representation for those who cannot to pay their own lawyer's bills: legal aid may be available only for mediation.

suitable framework for making decisions about children: when it comes to information about children's needs in particular cases, law, it is said, simplifies, individualises, excludes, distorts, exaggerates, compartmentalises and, above all, 'enslaves child welfare science'.[75]

This point of view has most elegantly been put by Michael King and his collaborators, drawing on autopoietic theories of law.[76] This body of thought emphasises the system-like nature of law: and as a system, law encodes or interprets its environment in its own terms. In the case of law, that interpretive code is a simple binary one of legal/illegal. As a consequence of this inability of law to reconstruct information from other disciplines except in these oversimplified terms, law distorts the messages, or inputs, from other disciplines (such as child psychology), and goes off in pursuit of questions (such as fault, causation or blame) that have little bearing on what a child 'really' needs. This is an important argument, especially in the context of a legal system that commits itself (as both those under review do) to promoting the child's welfare or best interests as its paramount concern. If a child's needs are ultimately unknowable by law, then the objective of promoting them through law is, arguably, pointless.

Although a number of points could be made in response at a theoretical level (for example, that it is not always clear whether this is a descriptive claim only, or an evaluative one),[77] I shall confine myself to observing that something like this point of view has found its way into official thinking. For example, the 1989 Children Act expressly sets out to reduce the role of law to a minimum in children's cases, on the assumption that parental agreement is best for children and, by implication, that law is harmful.[78] As a result, the Children Act 1989 rests on the view that legal processes should only be invoked where there is parental conflict: legal process is constructed, as it were, as concerned only with dispute resolution. Something similar is found in the recent Australian equivalent, which contains the express statement of principle that parents of children should, wherever possible, agree arrangements between themselves,[79] (although, as I have suggested elsewhere, the Australian law does not seem to imply that parental agreement and court scrutiny of those agreements are wholly exclusive of each other to the same extent as the Children Act 1989 does).[80]

The construction of law as harmful to children was again evident in the Green and White Papers leading to the Family Law Act 1996, and in this context was used as an argument for reducing the grip of lawyers on the divorce process. For example, throughout the Green Paper, connections were continually drawn between lawyers, legal process and conflict, and the Paper stressed again and again how bad conflict was for children.[81] It was a theme that also meshed nicely

75 See M. King and C. Piper, n 16 above 136–138.

76 M. King and C. Piper, *ibid*; M. King and J. Trowell, *Children's Welfare and the Law: The Limits of Legal Intervention* (London, Sage, 1992).

77 See J. Eekelaar, 'Family Justice: Ideal or Illusion? Family Law and Communitarian Values' (1995) 48 *Current Legal Problems* 191, 197–203 for a discussion of King's position.

78 C. Smart, 'Losing the Struggle for Another Voice: The Case of Family Law' [1995] 18 *Dalhousie Law Journal* 173.

79 s 60B(2)(d) FLA 1975 (*Cth*).

80 J. Dewar, 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) compared – Twins or Distant Cousins?' (1996) 10 *Australian Journal of Family Law* 18.

81 For example: '… if spouses are relieved of *open hostility and conflict caused or exacerbated by the legal process* … they may have the space and peace to reflect on what has gone wrong in their marriage. With help, they may find a means of renegotiating their relationship so that they and their children may have a life together': *Looking to the Future: Mediation and the Ground for Divorce* (London: HMSO, 1993), para 4.13; see also C. Piper, 'Divorce Reform and the Image of the Child' (1996) 23 *Journal of Law and Society* 364.

with the public expenditure objectives of the government, since the removal of lawyers from a central role in the divorce process would pave the way for significant reductions in legal aid expenditure.[82]

These developments serve to intensify (but are not in themselves responsible for) what the French legal sociologist Irene Thery has described as 'the disarray, the incoherence and the contradictions of the socio-legal system of post-divorce regulation'.[83] Although referring to French divorce law in the early 1980s, I think what she said then applies with considerable force to the current Anglo-Australian law and procedure for dealing with post-divorce arrangements for children. Thery's point is that the concept of the 'welfare of a child', or of a child's best interests, has no determinate meaning outside the process through which that issue is addressed. We might say, in other words, that the notion of welfare or best interests *is the effect of the procedure adopted to determine it*, rather than resting 'out there', awaiting discovery. This point is different from the argument that the 'welfare principle' has no determinate content, or that it is a cover for unarticulated values.[84] Instead, the point is that the principle *can* be given a determinate meaning, but that those meanings cannot be understood independently of the procedure by which that meaning is produced; and that the legal system exercises no systematic control over those meaning-producing procedures.

Thery points out that a legal system may adopt one of four different ways of determining a child's best interests after parental divorce or separation: by relying on parental agreement, by relying on the child's own wishes, by relying on judicial resolution of conflict and, finally, by relying on the specialist or expert, for whom 'the interest of the child is run together with the capacity of the adults to accept their situation and their past'.[85] Each is a different way of giving meaning to the concept of welfare or best interests, possibly leading to different results; yet the legal system itself exercises no coherent control over which one is adopted. The most significant factor in determining which one applies is whether there is parental conflict: because conflict is seen as a sign of a risk-laden divorce, and because law is increasingly constructed as pre-eminently about settling disputes, parents in conflict will be drawn into the legal system, and to judicial and expert scrutiny, in a way that harmonious parents will not. And yet, from the point of view of the child, parental conflict as a distinguishing mark is an arbitrary one (as well as being hard to define precisely).

I'm not suggesting that this is a new feature of the divorce process. It's an inevitable feature of any legal system that does not inquire in detail into every divorce, and which recognises or encourages other ways of resolving matters. I am suggesting, though, that recent developments in both jurisdictions, and particularly the clearer separation of agreeing from disagreeing parents, makes the lack of coherence all the more obvious. It is a logic of intervention/non-intervention that has more to do with the careful use of limited judicial resources than anything else.

82 A similar process seems to be under way in Australia: see White Paper, *The Delivery of Primary Dispute Resolution Services in Family Law*, Attorney General's Department, August 1997; and Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues paper No 22 (ALRC, 1997).

83 I. Thery, ' "The Interest of the Child" and the Regulation of the Post-divorce Family' (1986) 14 *International Journal of the Sociology of Law* 341.

84 eg, H. Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267.

85 n 83 above, 353. Even professional constructions of the child's wishes may vary: see L. Trinder, 'Competing Constructions of Childhood: Children's Rights and Children's wishes in Divorce' (1997) 19 *Journal of Social Welfare and Family Law* 291.

The tendency to construct law as concerned only with dispute resolution is, of course, disingenuous. Parties who mediate, or negotiate between lawyers, will do so against the backdrop of the messages radiating from legislation: and this feature of modern legalism is heavily exploited in modern family law, as I have already suggested. So, those who argue that the law is in retreat from children's cases – that children's issues are being 'privatised' – are, in my view, wide of the mark.[86] Instead, we can say that the reach of law is being extended, but in a more attenuated, diffuse and, as Thery suggests, incoherent way.[87]

Uncertainty about relationships

There is another type of uncertainty at work in family law: an uncertainty about relationships, especially relationships between parents and children. Family law deals in the legal consequences of relationships and, as we have seen, there is doubt about what those legal consequences should be, or how they should find expression. I want to suggest now that there is a logically prior uncertainty about what is to count as a relationship at all for legal purposes. I shall argue that the uncertainties we encounter here reflect a wider anxiety about what meanings we give, or interpretations we place on, relations we have with others; specifically, what marks off family relationships from other types of relation. In the context of parent/child relations, this anxiety stems, inter alia, from the growing dissociation of sex from marriage, and of procreation from the act of intercourse.

It has become common to think of social arrangements, like the family, gender or the sexual division of labour, as social constructions, or a set of superstructures, that rest upon some natural base. The natural facts of human existence are universal; what varies is the social construction we place upon those facts. Yet, as we begin to exert more control over the 'natural' processes of reproduction, especially through reproductive technologies, so it becomes more difficult to think of a realm of natural facts that are independent of social intervention. Motherhood, for example, was once considered an obvious natural fact; yet surrogacy arrangements, or the transfer of genetic material from one womb to another, puts in doubt what was once thought explicit. At the same time, natural facts that were once invisible and which had to be inferred, such as paternity, are now made explicit, through techniques of DNA testing.[88]

This apparent collapse of an independent realm of the natural creates problems when it comes to defining relationships: and since law is an important way of marking out relationships in an authoritative way, it is scarcely surprising that this uncertainty about relationships should have been felt in law. Two divergent tendencies can be observed. In the context of paternity or fatherhood, there has been a shift from social to biological understandings of relationship. Marilyn Strathern argues that the stigma that once attached to a 'natural' or illegitimate child demonstrates this difference: illegitimate children were not regarded as related to their fathers, because 'they did not reproduce their procreative parents

86 A. Bainham, 'The Privatisation of the Public Interest in Children' (1990) 53 MLR 206.

87 King's autopoietic model of law seems to me to ignore this feature of law, so that by stressing the degree to which experts and law are in conflict at a systemic level, he overlooks those ways in which experts may draw on legal authority to enhance their own.

88 M. Strathern, *Reproducing the Future: Essays on Anthropology, Kinship and the New Reproductive Technologies* (London: Routledge, 1992); *After Nature: English Kinship in the Late Twentieth Century* (Cambridge: Cambridge UP, 1992).

socially'.[89] Modern thinking about kinship displaces the social legitimacy of kinship with what she calls 'the legitimacy of natural facts'.[90] Paternity, in other words, is increasingly defined in terms of genetic relationships. This is reflected in law, which has increased the legal status of the genetic link in an attempt to capture more men within the embrace of familial obligation; and to ensure, as Richard Collier would have it, that the legal authority of a father over children is not undermined by the demise of marriage as a social practice.[91]

However, what Strathern calls an 'exaggerated attention to biological idiom'[92] is not universal. Two examples, drawn from the United Kingdom, will suffice. The first comes from the rules concerning paternity of children born as a result of assisted reproduction contained in the Human Fertilisation and Embryology Act 1990. Here, legislators have exercised explicit choices about defining relationship, in a context where giving primacy to the 'legitimacy of natural facts' would usually lead to results that are at odds with those intended by the participants. After all, assisted reproduction is usually resorted to precisely because parents cannot reproduce themselves genetically. As a result, the legislation lays down some convoluted definitions of parental status, using a combination of the old fashioned presumption of legitimacy, genetics, as well as a more diffuse concept of social parenting expressed through the notion of 'undergoing the treatment together'.[93]

The definition of paternity adopted in these provisions reflects, more than anything, the type of parents whom the state is prepared to reproduce through the provision of fertility services: namely, the two parent,[94] heterosexual, preferably married, parents.[95] In legal terms, though, the steps required to achieve this can lead to strange results. For example, the Act creates the possibility of a child being fatherless;[96] and there is direct discrimination between children, hinging on marriage, in the context of the 'parenting order' procedure, which permits commissioning parents under a surrogacy arrangement to apply, in certain circumstances, to have the child declared 'theirs'. The procedure is available only to married couples,[97] even though elsewhere in the law affecting children, it has been explicit policy since the mid-80s to remove as far as possible the legal consequences flowing from the marital status of a child's parents.[98]

Another example is the treatment of men's claims in court to seek to prove, by way of blood test evidence, that they are a child's father. Although most reported decisions assume that the genetic 'truth' should be uncovered,[99] there are some striking exceptions. Perhaps the best known is *Re F*.[100] Here, the English Court of Appeal refused a man's application for a blood test on the ground that the child's mother was happily married, and that the man's attempted assertion of paternity, even if upheld, would not make any practical difference to the child's living arrangements. In other words, the Court of Appeal deliberately suppressed the

89 *After Nature*, *ibid*, 52.
90 *ibid*.
91 R. Collier, *Masculinity, Law and the Family* (London: Routledge, 1995).
92 n 89 above, 52.
93 ss 27–29 HFEA 1990.
94 s 13(5) HFEA 1990 makes it a condition of a licence under the Act that a licencee have regard, *inter alia*, to the 'child's need for a father' (presumably, a 'social' rather than genetic father).
95 See J. Dewar, 'Fathers in Law?: The Case of AID', in R. Lee and D. Morgan (eds*), Birthright: Law and Ethics at the Beginnings of Life* (London: Routledge, 1989) ch 7.
96 If, for example, no man falls within s 28.
97 s 30(1) HFEA 1990.
98 In this context, of course, the term 'parent' begs the question at issue.
99 *S* v *McG*; *W* v *W* [1972] AC 24.
100 [1993] 1 FLR 598.

genetic information available through blood testing in favour of maintaining the harmony of the child's marital or social family. *Re F* was roundly criticised at the time as 'luddite';[101] but it could be seen merely as evidence of an older social, rather than biological, understanding of kinship. Indeed, the degree of criticism it attracted, and the swiftness with which it seems now to have been overruled,[102] merely serve to emphasise the degree to which legitimacy is now attached to the 'natural facts'. And yet it is worth remembering that it is only comparatively recently that those 'natural facts' have been available as 'facts' at all.

To sum up: I have suggested that our understanding of relationships has altered. This is partly because of changes in marital and procreative behaviour, and partly because we now have more knowledge and more choices. What was once explicit has been placed in doubt, and vice versa. The social and legal construction of relationships no longer seems to take 'after nature': what is natural is itself an act of creation. In making choices about relationship, there has been a tendency to give primacy to the so-called 'natural facts', but this has not been either a uniform or consistent phenomenon. Again, the pattern is one of unevenness and inconsistency, reflecting wider uncertainties about what constitutes connection between individuals; but also perhaps reflecting a logic of bolstering paternal authority, drawing on whichever means are most conveniently at hand to link men to children.

Legislating utopias: the first and second politics of family law

In this section, I want to draw together some threads I have so far allowed to hang loose. Using Marc Galanter's richly suggestive article on 'legalisation',[103] I have already suggested that family law exemplifies a modern form of legalism, and that it increasingly takes the form of what he calls a 'second kind of politics'.

At various points, I have argued that family law legislation is contradictory and replete with antinomies; but I have also suggested that this is normal, and does not pose a serious threat to the system. One reason for this is that family law increasingly performs an expressive function, designed to influence behaviour in a general rather than detailed way. For example, recent legislation on divorce (in England and Wales) and parenting after divorce (in both England and Australia) is best understood as setting out general aspirations on how to divorce well: adults should be reasonable, self-denying, conciliatory, and fully conscious of the implications of their actions for themselves and for others. In this sense, then, modern family law is concerned to 'radiate messages' precisely as Galanter suggests – to steer behaviour in a general rather than specific way – and, as such, it can accommodate a certain level of contradiction or antinomy. Of course, few adults match up to this paragon; but this serves merely to open up a gap, in which transgressions will be penalised as the system seeks to normalise divorcing behaviour in accordance with the legislative ideal.

101 J. Fortin, '*Re F:* The Gooseberry Bush Approach' (1994) 57 MLR 296.

102 *Re H (Paternity: Blood test)* [1996] 2 FLR 65: 'In my judgment every child has the right to know the truth unless his welfare clearly justifies the cover-up. The right to know is acknowledged in the UN Convention on the Rights of the Child 1989 … and in particular Art 7 which provides that "a child has, as far as possible, the right to know and be cared for by his or her parents" … [T]he clear intent of the article is that there are two separate rights, the one to know, and the other to be cared for by, one's parents', per Ward LJ, 80–81. This suggests an insistence on the genetic truth, coupled with a more inclusive conception of 'parent'.

103 See n 15 above.

Another reason for family law's ability to survive its own contradictions is the power of law itself to appear to give effect to shared values while not actually doing so. Instead of providing a decisive and clear statement of principle, law, as Galanter puts it, increasingly 'provides resources and opportunities for the pursuit of our competing commitments', and in doing so becomes a 'second kind of politics'.[104] To put it another way, law more and more becomes the context in which those contradictions or oppositions that cannot be resolved politically are worked through. I would argue that this is the case in family law: that in seeking legislatively to re-constitute a sense of organic or collective family values around the family and divorce, legislators have in fact created a set of inconsistent principles and commitments – whether between rights and utility, or autonomy and community – while at the same time using law to give the appearance of having created shared values; and then have off-loaded the detailed working out of those contradictions to the legal system.[105]

'Law like love'?[106]

That family law should be in a chaotic state is perhaps scarcely surprising, given the social facts with which it routinely deals. Family law engages the passions as no other part of our legal system does: and it is the hallmark of passion that it must exceed rationality. As Luhmann has put it, passion exhibits a paradoxical 'imperative of excessiveness': 'both the semantics of love and the external presentation of love involve a more or less pronounced distancing from *raison* or *prudence*. Showing that one could control one's passion would be a poor way of showing passion'.[107]

Not only are the passions engaged, family life itself is criss-crossed by contradictions. Beck and Beck-Gernsheim point to a series of tensions or paradoxes inherent in what they call 'modern love'. They suggest, for example, that we place more and more store in love as the route to self-discovery and 'authenticity'. Yet this sense of 'love as a secular religion', as the means by which we become conscious of ourselves, creates a paradox of its own: for authenticity demands that when love fades, we move on. As they say, 'love has become inhospitable, and the ever higher hopes invested in it are meant to buttress it against the unpleasant reality of what seems like a private betrayal. ''Everything will be better next time around'': this consoling cliche combines both aspects: the hopelessness and the hope, elevating both and individualising them. All this is comical, banal, tragic-comic, sometimes even tragic, full of complications and confusions . . .'[108] The family is the theatre in which these tragi-comedies and

104 M. Galanter, 'Law Abounding: Legalisation around the North Atlantic' (1992) 55 MLR 1, 23.

105 Conferring discretion on decision-makers is a common technique in this context. Carl Schneider calls this phenomenon the creation of 'rule-compromise discretion', that is, discretion given to decision-makers where lawmakers cannot agree on what the rules should be: see 'Discretion and Rules: A Lawyer's View' in K. Hawkins (ed), *The Uses of Discretion* (Oxford: OUP, 1992) ch 2, 65.

106 Another borrowing, this time from W.H Auden 'Law like love' *Collected Shorter Poems* (London: Faber, 1966):

> Like love we don't know where or why
> Like love we can't compel or fly
> Like love we often weep
> Like love we seldom keep.

107 N. Luhmann, *Love as Passion: The Codification of Intimacy* (Oxford: Polity, 1986) 67.

108 U. Beck and E. Beck-Gernsheim *The Normal Chaos of Love* (Oxford: Polity, 1995) 3: '. . . love is the new centre round which our detraditionalised life revolves'.

confusions are played out, and it is not surprising that their mark should be felt in family law.

How, though, can this advance our understanding of the subject? I argued earlier that chaos is not a threat to the functioning of family law, because it is held at bay by the practices of legal and other professionals associated with its day-to-day interpretation, application and administration. This suggests that an important focus for family law research should be the manner in which the chaos of family law is stabilised or translated into solutions or outcomes in particular cases. There is, of course, already a substantial body of empirical research in family law, but not all of it takes the production of ordered meanings out of chaos as its starting point.

Having said all this, I do not want to overstate the distinctiveness of family law, partly because I suspect that other areas of law could equally be described as chaotic, but also because I have argued that family law is an exemplary instance of modern legalism. By this I mean that family law is deliberately directed to a variety of audiences, not just judges and litigants; that it is de-differentiated and diffuse; that it seeks to describe good behaviour, in sufficiently general terms to accommodate a certain level of contradiction, but sufficiently precisely to form the basis for criticism of transgressors; and that it offers a range of rhetorical strategies for resolving issues that, in a society characterised by radical disagreements over the terms of family life, cannot be resolved by other means. As such, I suggest that family law deserves a higher status than it is sometimes granted.