

What Makes the Family Special?

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3.1 INTRODUCTION: EU LAW AND THE FAMILY

Article 8 of the European Convention on Human Rights accords everyone the right to respect for their private and family life. Article 12 accords everyone of marriageable age the right to marry and found a family. The family is thus a significant and valuable social unit as far as the EU is concerned. However, inasmuch as under law a family is the locus of interrelated rights and responsibilities, as well being for its members a ground for benefits, it matters what counts as a family. Yet the European Union (EU) does not legislate on critical family issues such as divorce, the custody and guardianship of dependent children, and the financial responsibilities of spouses. The relevant laws are left to Member States although the EU does have rules, for instance, in those cases of spouses from different EU countries with different laws on divorce.

The EU also accords benefits to family members across different countries. These will be lost to UK citizens after Brexit in 2016.¹ Most centrally the EU guarantees freedom of movement between states. The Directive which accords this right to all EU citizens states that it should be extended to ‘all family members irrespective of nationality’.² Yet in that case, enjoyment of these benefits broaches important questions of who counts as a member of a family.³ There is an increasing body of case law by the Court of Justice of the

¹ H. Stalford, ‘The UK referendum on membership of the EU: Whither social welfare and family law?’ (2016) 38 *Journal of Social Welfare and Family Law* 115.

² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

³ G. Milios, ‘Defining “family members” of EU citizens and the circumstances under which they can rely on EU law’ (2020) 39 *Yearbook of European Law* 293. See also Chapter 7 by Michael Bogdan and Chapter 9 by Geoffrey Willems.

EU (CJEU) defining what it is to be a family member, and which has been criticised for its presumed traditional view of a ‘family’ as a nuclear one.⁴

The problem facing EU law concerning the family is simple and understandable. The family is valuable and should be legally protected but there need be no agreement across different EU states as to what counts as a family and who its members are. This, in turn, reflects major social developments and extraordinary changes in family structures over the last hundred years. These have led many not simply to point out that the traditional nuclear family no longer predominates, but to doubt both whether it is even possible to think of a single concept of ‘the family’, and whether the family deserves any special legal protection. In what follows, I examine these changes and evaluate the claims that the concept of a family no longer has meaning and that the family should not be seen as meriting a special status in EU or indeed in any national law. In sum, I conclude that there is such a thing as a family but that there can be reasonable disagreement about what should be defined as a family. At the end I shall say something about this in the context of moves to harmonise or even unify EU family law.

The essential changes in family structure are evident in all EU countries.⁵ However, they are nicely illustrated and evaluated in a recent UK Report. In September 2022, the UK’s Children’s Commissioner published Part One of a Review into Family Life commissioned by the government.⁶ In its own words, it ‘paints a unique and comprehensive picture of family life today. It focuses on what families look like in modern Britain, defines for the first time what exactly is protective about them, and looks at the unique experiences of children for whom the state is their parent.’ The Review was informed by interviews with thousands of children and families across the country, an analysis of existing data sets, and conversations with stakeholders and experts as well as a review of the existing relevant literature.

The Review intends that this comprehensive survey of family life can and should inform law, policy, and the provision of appropriate services in respect of the family. Two key claims of the Review are as follows. First, the traditional two-parent family is in decline in the UK (as it is elsewhere in

⁴ H. Stalford, ‘Concepts of family under EU law – Lessons from the ECHR’ (2002) 16 *International Journal of Law, Policy and the Family* 410. See also Chapter 2 by Alina Tryfonidou.

⁵ K. Kiernan, ‘Changing European families: Trends and issues’ in J. Scott, J. Treas, and M. Richards (eds), *The Blackwell Companion to the Sociology of Families* (Blackwell 2004).

⁶ Children’s Commissioner, *Family and its protective effect: Part I of the Independent Family Review* (2022) <www.childrenscommissioner.gov.uk/family/family-review/>.

Europe). Forty-four per cent of those born in the UK in 2000 will have spent some of their childhood up to the age of seventeen outside such a family compared with 21 per cent of children born in 1970. Second, what matters to their members is the quality of family relationships rather than the composition of the family.

From its survey of family members, four themes emerged: 'the emotional importance of connection within families; the importance of shared experience for family life; the unconditional support, both practical and emotional, from within families; and the strong, positive, and enduring relationships found in families. These factors were present in families of all shapes, sizes, and compositions.'

A simple summary might be as follows: the traditional family form is no longer the predominant one, but what is critical is whether and how the family, in whatever form it takes, is able to provide what it is that makes the family valuable and indeed special to its members. That claim is subject to two important critical responses: first, the multiplicity of family forms, of which the traditional family is only one, shows that there is no such thing as 'the family'; second, the family is neither unique nor special in providing what it is that is claimed to be its defining value. This double-headed response needs careful analysis not least because it would seem odd to deny both that there is such a thing as the family *and* that it is not special. What is 'it' if not 'the family'?

It is worth noting, first of all, that the Review lists the valued factors of family life in a chapter titled 'What defines family?' However, the word 'define' used here cannot mean identify or pick out what something is; rather it means what it is that makes something especially valuable. Yet, the counterpart to the summary claim quoted above, 'These factors were present in families of all shapes, sizes, and compositions' is 'These factors were nevertheless absent from some families of all shapes, etc.' This latter claim is not stated nor implied. But it is evidently true. Some families fail to provide the emotional support, connection, love, and enduring relationships that characterise other families. Hence, these features do not define what a family is; they do not hold true of all families. Rather they characterise what makes families that exhibit those features special. It also, importantly, motivates law and policymakers to support and facilitate the creation of those families that are special in the indicated sense.

The two elements of the response – that there is no such thing as the family and the family is not special – conjoin to subvert the importance the family assumes in law and policy. Expressed rhetorically and in a challenging manner, the response asks, why use legal and other measures to privilege

and protect ‘the family’ which no longer exists and which, anyway, lacks whatever might justify its special treatment?

In what follows, I will examine the double response. First, I want to rebut the claim that there is no such thing as ‘the family’; second, I want to defend the view that the family, minimally and functionally defined, is special. The first part has already been set out elsewhere, but I will summarise and further clarify my arguments in the following section.⁷

3.2 THE CONCEPT OF ‘THE FAMILY’

As Raymond Williams showed in his 1976 work *Keywords*, ‘family,’ deriving from ‘familiar’ (from the Latin ‘*famulus*’ which denotes a servant), was, initially, a household of servants and blood relations. After the seventeenth century and especially after the nineteenth, it came to connote the conjunction of a shared household or residence and ‘kin’ or blood relations. A family on this modern account is a set of consanguineous co-residential individuals. In its classic ‘nuclear’ form, the family comprises a married, heterosexual, couple with their biologically related offspring living in a single home.⁸

However, social, legal, demographic, and biological developments over the last hundred years – at least in the global North – have seen extraordinary changes in the family. This need no longer conform to the nuclear template. Its adult members may be single or plural; they need not be heterosexual, married, or in an intimate sexual relationship; the dependent children need not be biologically related to the adults; and there need not be a single shared residence.

The response from social science to these developments in family forms has been to resist the use of the term ‘the family’. According to a now familiar sociological orthodoxy, we should not use the definite article. Instead, we should pluralise or abandon nominative usage in favour of adjectives and adverbs. Thus, rather than talk about *the* family, we should use the term ‘families’.⁹ Or we should speak of ‘familial’ practices and ‘doing families’.¹⁰ At best, according to some, we might retain the noun and its definite article

⁷ D. Archard, ‘Family and family law: Concepts and norms’ in E. Brake and L. Ferguson (eds), *Philosophical Foundations of Children’s and Family Law* (Oxford University Press 2018).

⁸ R. Williams, *Keywords: A Vocabulary of Culture and Society* (Croom Helm 1976).

⁹ D. Gittins, *The Family in Question* (Macmillan 1985).

¹⁰ E. Dermott and T. M. Fowler, ‘What is a family and why does it matter?’ (2020) 9 Social Sciences 1. See Chapter 4 by Ségolène Barbou des Places.

but only with a qualifying and restrictive adjectival phrase, such as ‘post-modern’¹¹ or ‘post-familial’.¹²

I am unsympathetic to these moves and note that some sociologists have begun to criticise the orthodoxy.¹³ But here are my reasons in brief, summarising and further clarifying what is argued in my 2018 chapter.

First, I see no reason to abandon the use of a single concept simply because it covers a multiplicity of different instances. No one proposes giving up the concept of ‘house’ because houses come in different sizes and shapes, and have various kinds of material composition. Indeed, there is something entirely self-defeating about arguing as follows: there is such a diversity of families that we must conclude that there is no such thing as a family. How do you estimate, and take account of, that diversity unless it is a diversity of different examples of the same sort of thing? Consider, by way of a parallel, the entirely rhetorical question, ‘Since humanity exhibits such a diversity of individual humans, why should we speak of a single species *homo sapiens*?’

It might be argued, but I do not see this done even if it is sometimes suggested, that there are *so many* different kinds of families that the concept is stretched to a point where its boundaries are no longer clear. In this manner, it could be said, the concept somehow collapses under the weight of its multiplicity. Or, it is simply hollowed out of any content. It is a ‘zombie’ category, walking but dead and deprived of animating spirit. Yet why think this? The boundaries can remain clear between ‘family’ and other social category terms such as clan, tribe, friendship group, neighbourhood; the diversity – which is anyway surely not *that* extensive – can be celebrated as the richness of an ever-changing social form. Again, similarly, we might note and value the extraordinary variety of human beings without abandoning the species category.

Second, I do not see how giving up the noun in favour of the adjective (‘familial’) or verbal form (‘to do families’) helps. ‘Familial’ has to be construed as describing everything which is like a family. Yet those who commend its use are also saying that they are unable to pick out or identify what that thing which serves to identify alike instances is itself like. Or ‘familial’ is to be understood as whatever is of or shares the nature of a family. But, again, what is it that has such a nature if not something, constant and single, that merits the title of ‘family’? Similarly, the awkward verbal construction, ‘doing families,’

¹¹ J. Stacey, *Brave New Families: Stories of Domestic Upheaval in Late Twentieth Century America* (Basic Books 1990).

¹² E. Beck-Gernsheim, *Reinventing the Family: In Search of New Lifestyles* (Polity Press 2002).

¹³ M. Gilding, ‘Reflexivity over and above convention: The new orthodoxy in the sociology of personal life, formerly sociology of the family’ (2010) 61 *British Journal of Sociology* 757.

presumably must be taken to mean that *something* is done. But those who use the phrase assert that it cannot pick out or identify *what* is being done.

Third, the conceptual challenge should be distinguished from a moral one. 'There is no such thing as the family' is a very different charge from 'there is no one thing the family should be'. It is certainly true that one response, that of conservative and traditionalist commentators, to the diversity of familial forms has been in the form of a lament for the disappearance or decline of the traditional family, the family as it should still be.¹⁴ However, it should be obvious that one can reject this kind of normative claim and refuse to share in the bemoaning of a lost ideal, whilst still insisting that there is such a thing as the family.

One celebrated way to confuse the conceptual and the moral claims is by appeal to 'persuasive definitions.'¹⁵ These are used by those who favour a particular understanding of what something ought to be. They do so by defining that thing in the terms they favour. In saying 'the family is to be defined as this sort of thing', they are actually saying, 'This is what the family *should* look like.' Thus, the family is by persuasive definition what they seek to persuade others it ought to be. Note that the chapter of the *Family Review* cited at the outset of this chapter might appear to answer its question, 'What defines family?', in persuasive terms.

Or those who use persuasive definition will argue that the family as they define it is what a 'real' or 'true' family looks like. However, persuasive definitions in whatever way they are constructed or employed can be exposed as such and resisted. Thus, it is perfectly possible to refuse to accept or endorse prejudicial or, indeed, honorific representations of the family. A conceptual claim should always be carefully distinguished from a normative one. Doing so permits drawing the conclusion that there are many kinds of family without favouring or rejecting any one kind over the others.

Fourth, one might try, as some have done, to ameliorate the confusing diversity of family forms by using certain adjectival qualifications. Raymond Williams, for instance, notes that 'nuclear' and 'extended' were used to distinguish between those family forms that took in many generations and that one which was restricted to parents and their children. In ordinary English usage, we often talk of our 'immediate' family to make a similar point. However, the adjectival usages recommended by some sociologists such as 'post-modern' and 'post-familial' have another purpose, namely that of deconstructing or subverting the noun that follows. It is a way of saying something

¹⁴ B. Almond, *The Fragmenting Family* (Oxford University Press 2008).

¹⁵ C. Stevenson, 'Persuasive definitions' (1938) 47 *Mind* 331.

like ‘This is the family but not as we know it’ such that we may take it that there is indeed no longer such thing as the family. Yet, once more, such an inference is unwarranted.

The statement in quotation marks alludes to the much-used remark (actually a misquotation) attributed to Dr Spock on encountering aliens in *Star Trek*, ‘It’s life, Jim, but not as we know it.’¹⁶ But Spock does not deny that Jim has observed a life form; he only asserts that it is one that is unfamiliar to both of them. It *is* life, but one that is new and strange. Why then should we think that ‘the family’ as a concept cannot encompass even the dramatically different forms it now takes, and thus be prepared to accept that something is a family even if it is one we have not previously known?

Fifth, it is important to distinguish two questions. There is a general, conceptual, one that asks what distinguishes ‘the family’ from other social kind terms. The other is one of individuation and counting. This first question asks whether or not something falls under the concept of the family. The second asks whether or not something is a single instance of a family or in fact comprises several families. Thus, we can in some contexts ask – as an intelligible question – whether a given group of adults and children should count as one or more families.

For instance, a ‘blended’ (or ‘bonus’ or ‘step’) family is formed when adults take on a parental role for children previously raised by other parents. So, it might be difficult to decide how many families a child belongs to when their initial parents, one or both, enter into new relationships with adults who already have custodial responsibilities for other children. If Mark’s father and mother separate, the latter creating a second family with her new partner and the partner’s children, and if care for Mark is shared across his father, his mother, and partner, how many families is Mark, and indeed his mother, a member of?

That question makes good sense. However, the fact that it might appear to be a difficult question to answer does not yet give us a reason to abandon the concept of the ‘family’. Rather, it prompts us to acknowledge that the diversity of familial forms allows in some cases for individuals to belong to more than one family, as well as to see how problematic it may be to count and agree on the number of some interlinked families. Yet for all those difficulties, we can still operate with an understanding of what a family is. We know what it means to say that Mark is a member of this or that family. It is merely that individuating each instance that falls under the conceptual category is more complex than it once was.

¹⁶ E. Knowles, *Oxford Dictionary of Quotations* (Oxford University Press 2009).

Here is a nice comedic example from the movies. In the film *Help*, there is a scene in which its stars, the Beatles, are seen entering the front doors of what appear to be four adjacent relatively humble terrace houses and are commended by a neighbour for still being ‘so natural’.¹⁷ In fact, as we, the viewers, follow the Beatles inside, we are able to see that behind those separate doors is a single luxury space they all inhabit, albeit with distinguishable features and facilities peculiar to each of them. How many houses should we say there are then? Four or one? These questions can be asked, and puzzled over, without the need to stop employing the concept of a house.

Sixth, change in types and forms of family does not necessarily make a concept of family applicable at one time and inapplicable at another later time. It is wrong to claim, as one sociologist does, that, “There is no single concept of the family which is true for all historical periods and in all places.”¹⁸ What might be meant is that the kinds of family you would have seen several hundred years ago are not those that one sees now. But this is true of many things that change and evolve over time. These are yet further examples of things about which a Dr Spock may say that they are not ‘as we know them’.

Certainly, some things change so significantly that the manner in which they were initially understood and defined is no longer adequate. Something can change its characteristics without ceasing to be the same thing. Here is a simple example. In 2019, Jaguar, the motor manufacturer, asked Oxford University Press to change its online dictionary definition of a ‘car’. This was, ‘A road vehicle, typically with four wheels, powered by an internal combustion engine and able to carry a small number of people.’ The problem was that this excluded their electric motor-driven vehicles.¹⁹

What should be said of this example is that the original concept of a ‘car’ was poorly defined or managed in a manner that meant it was incapable of anticipating or accommodating change. We should not say that with the advent of the electric vehicle, something other than a car had been created, nor that there are different concepts of ‘car’ at different times. The essential idea of a self-powered, moving people carrier has been unchanged. There have always been cars from the first invention of the automobile, but their diversity is now such that we need a broader, more inclusive, concept. So it is, with changes in what remains recognisable as ‘a family’.

¹⁷ ‘The Beatles at Home, from the Film *Help!*’ <www.youtube.com/watch?v=Yx_7xjpySKo>.

¹⁸ D. Cheal, *Sociology of Family Life* (Blackwell 2002) 4.

¹⁹ R. Schreiber, ‘Jaguar asks the Oxford English Dictionary to change its definition of “car”’ (*Hagerty Media*, 15 August 2019) <www.hagerty.com/media/news/jaguar-oxford-english-dictionary-definition-of-car/>.

3.3 THE FAMILY OF FAMILY LAW

The foregoing only shows that there can be a single concept of the family and that the diversity of whatever falls under the concept does not of itself invalidate the continued usage of such a concept. It does not answer the question of how that concept is to be defined. Since the focus of this collection is 'the family in EU Law' we should address the question of what it is that the law regards as a family. This is important because the status of any family member is a source of obligations, rights, benefits, and exemptions. Thus, for instance, those who are parents have enforceable duties of care for their dependent children; children are legally protected against abuse and harm; families are the recipients of state benefits; family members are exempt from certain requirements (such as that of testifying in a criminal trial against another member); the inheritance of property takes account of familial relations; and so on. In EU law, the dependant members of a migrant worker's family have rights of entry into that state where the worker is employed.²⁰

Herring has suggested that there are five possible ways for the law to understand and define a family: an ordinary, common-sense usage; an idealised definition; a functional definition; a formalistic definition whereby the family is identified as that which has certain properties; and a 'self-definition' approach whereby you are a family if you think you are.²¹

The problem with the first is that an appeal to ordinary language cannot solve familiar problems of how to understand what the law requires. Or it simply reduces any disagreements or conflicts concerning such requirements to disputes about what words, ordinarily and customarily, mean. An oft-used example is that of what 'vehicle' means as for instance in the case of *Garner v Burr*.²² H. L. A. Hart used the hypothetical example, subsequently much quoted and used, of a legal rule that forbids you taking a vehicle into the public park. 'Plainly,' he said, 'this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes?'²³

In response to these rhetorical questions, judges and legal commentators may move from an appeal to the indeterminacies of ordinary usage of words to an attempt to clarify what the purpose or original intention of any statute or law was: what were the vehicles that the park rule makers intended to forbid

²⁰ Milios (n 4).

²¹ J. Herring, *Family Law* (Pearson 2017) 3–4.

²² *Garner v Burr* [1951] 1 KB 31.

²³ H. L. A. Hart, 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 593, 607.

entry to? We might thus insist that we need to know what the purpose of any instance of family law is if we are to clarify what exactly is the family that is its subject. In this manner, any appeal to ordinary language uses of family must ultimately be couched in terms other than that simply of what words mean and, for instance, consider what lawmakers intend a law of 'the family' to do. Words alone will not deliver what is needed.

The problem with the second, idealised, definition of 'family' is that it conflates a conceptual question of what a family *is* with an ethical question of what a family *ought to be*. As I argued earlier, the conceptual and normative issues at stake in discussions of the family need to be carefully separated and separately addressed. Above all, it is a mistake – made by those who use persuasive definitions – to answer the conceptual question in disguised normative terms, such that the family is what the definer thinks it should be.

The problem with the final definition, one of self-definition, is that it is simply unacceptably permissive and overinclusive. It allows anyone to define the family in any terms that suit them. Moreover, it will generate irresolvable problems of conflicting self-definition, whereby different individuals may disagree as to whether they are or are not members of one and the same family.

My own preference is for a minimal functional definition whereby a family is 'a multigenerational group, normally stably co-habiting, whose adults take primary custodial responsibility for any dependent children'.²⁴ I will not defend this definition here. However, I think it has the benefits of tolerating the diversity of familial forms noted, is morally neutral, and permits an independent evaluation of both what makes the family as such a valuable social institution and what makes some kinds of family better than others. It allows that evaluation to be made in terms of which familial forms better discharge the essential custodial role of rearing children. The definition thus honours the distinction between normative and conceptual matters, but permits an answer, without presuming what that is, to the question of what is good about the family and what counts as a good family.

3.4 FROM FAMILY TO INTIMACY

What is interesting about using a formal definition of the family is that it may reinforce what we could call the demoting of the concept of 'the family'. By 'demoting', I mean ceasing to regard the family as of special social worth. The use of the formal definition does this by raising the question of whether

²⁴ D. Archard, *The Family: A Liberal Defence* (Palgrave Macmillan 2010) 10.

or not what families have in common makes them uniquely valuable. To explain, if we fail to find a single unifying concept of the family in terms of its institutional structure (such as a particular set of relationships between its members), we might attend to those features of it that are appealing and attractive. Along these lines, we find the idea that families display certain qualities such as those of affectionate companionship, intimacy, and sharing. Remember that the Review into Family Life, cited at the outset, precisely defined the family in terms of an important emotional connection, shared experience, unconditional support, and enduring positive relationships between the members of families.

Yet such qualities can be found in other areas of the personal life of individuals. In this vein, Carol Smart's *Personal Life* argues that the family has no particular importance or centrality in a 'personal life' that encompasses 'all sorts of families, all sorts of relationships and intimacies, diverse sexualities, friendships and acquaintanceships'.²⁵

What – it will be said – is valuable about the family are those properties exhibited by certain kinds of personal relationship. But these are not exclusively possessed by the family. What follows for family law is critical: the special privileges of legal recognition and protection afforded to 'the family' in virtue of those valued qualities, it will be argued, should be extended to these other non-familial relationships. We should thus move from the 'family' to 'familiarity'²⁶ and recognise at law 'households' 'not defined by either sexual partners or familial relationships, but rather by a shared emotional economy'.²⁷

To summarise: the answer to the question of what makes the family special and merits its particular legal status is, roughly but nevertheless very startlingly simply, 'nothing'. First, there is no such thing as 'the family' (only 'familial' practices and 'doing families'). Moreover, second, what makes the 'familial' valuable does not make the family special. For what is true of the 'familial' is true also of the 'familiar', namely the intimacy and affectionate companionship of non-familial relationships such as friendship. The law should acknowledge this.

3.5 THE GOODS OF FAMILY

Thus far, I have tried to answer the first claim, namely that there is no such thing as 'the family'. I want now to attend to the second argument, namely that

²⁵ C. Smart, *Personal Life: New Directions in Sociological Thinking* (Polity 2007) 188.

²⁶ A. Diduck, 'Shifting familiarity' (2005) 58 *Current Legal Problems* 235.

²⁷ A. Bottomley and S. Wong, 'Shared household: A new paradigm for thinking about the reform of domestic property relations', in A. Diduck and K. O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge 2006).

what makes the 'familial' valuable extends beyond the family to other personal relationships, and thus the law should give a special status to more than the family. I noted earlier the oddity of denying both that there is such a thing as the family *and* that it is special. But it is open to someone to accept even reluctantly that there is something meriting the title of 'the family' but refuse to accord it any special status.

Here is a schematic formulation of this second argument which I will express using the language of 'goods'. By goods I follow standard usage in Anglo-American political philosophy, and John Rawls in particular, by seeing them as those things that it is rational for individuals to want and to seek.²⁸ The argument to which I wish to respond then runs as follows: something (the family) is commended for legal recognition because it promotes certain goods. However, these goods are also promoted by other relationships. Thus, the law should recognise those relationships to the same extent that it already does the family.

To clarify further, it helps, if and when we talk about goods, to distinguish private, exclusive, goods and non-exclusive public goods. In simpler terms, the goods of relationships can be either private, that is enjoyed only by those in the relationship, or public in that everyone can enjoy them. They can of course be both; the fact that relationships have private goods does not exclude them from also having public goods. Take, for example, friendship: the intimacy, mutual support, and affection that characterises a friendship is valuable only to those who are the friends in question. However, if friendships can also underpin social solidarity, promote public health, assist compliance with the law, and support the economy, then friendship realises public goods enjoyed by all in society.²⁹

Having clarified what is to be understood by goods, we can respond to the second argument (that non-familial relationships deserve the same special legal status as familial inasmuch as the former promotes goods to the same degree as the latter) by showing either that the private goods promoted by different relationships differ in their quality and value; or by showing that the family promotes particular public goods besides those private goods that might be of equivalent value with non-familial relationships.

Hence, in what follows I want, first, to concentrate on private goods and consider two ways in which one might argue that the private goods of family membership are different from those of other relationships such that the family is 'special' in the right way. I will then be able to show how the public

²⁸ J. Rawls, *A Theory of Justice* (Oxford University Press 1999) §15 and VII.

²⁹ E. J. Leib, 'Friendship and the Law' (2007) 54 *UCLA Law Review* 631.

goods of the family – if not the private goods alone – suffice to establish its special nature.

The first account of the putatively special nature of the private goods of the family is taken from Brighouse's and Swift's influential book on the family and justice, *Family Values*. They think that there is a particular, distinctive, and non-substitutable interest that adults have in acting as a parent, forming a relationship with a dependent child, and promoting that child's interests. This is a view they develop in offering a reason why a liberal egalitarian can reasonably think that the existence of families need not promote injustice. Its particular relevance in the present context is that, for them, the good of being a parent is both a private one and one that is not realised by other relationships such as friendship. I am thus not concerned with whether Swift and Brighouse do show that the existence of families can be congruent with justice, but rather with making use of their key idea that the family serves interests of a particular and, indeed, unique kind.

Swift and Brighouse argue that 'intimate relationships with others are essential for [people's] lives to have meaning'. Further, the intimate relationship of a parent with his/her child is 'sui generis', 'unique', and productive of 'a distinctive contribution to [a parent's] well-being'. 'Other intimate relationships have their own value, but they are not substitutes for a parenting relationship with a child.'³⁰

This is a powerful and important claim but it does not show that the family is special in the way that is needed to accord the family its privileged legal status. Why? It is conceded by Brighouse and Swift that the private goods of parenthood are not goods for all adults:

So the claim that the relevant relationship goods make a powerful contribution to the flourishing of the [individual] does not imply that those goods are good for everybody ... [T]here may be people who do not need to be parents; those who ... could indeed flourish fully without [parenting], and those whose lives would actually be diminished by their being parents.³¹

This is an important concession. And there are two elements to the concession. The first is that something's being of unique, non-substitutable, value to some does not mean that it is of such value to all persons: the goods of parenthood are not goods 'for everybody'. The second element of the concession is that those who do not value the goods in question need not thereby

³⁰ H. Brighouse and A. Swift, *Family Values: The Ethics of a Parent–Child Relationship* (Princeton University Press 2014) 87–88.

³¹ Ibid 100.

suffer a shortfall of private goods: some individuals will ‘flourish fully’ without those goods of parenthood.

Taken together, the concession undercuts the claim that only the family can supply those valuable private goods that would justify according to it a status denied to other relationships. That would be the case if someone could not enjoy those goods that are necessary for a ‘fully flourishing’ life outside the family. Yet, some individuals do not derive value from the family *and* nevertheless live lives that are no less good in sum. For instance, some individuals will enjoy the same level of well-being as those who have families through securing the private goods of non-familial intimate relationships.

It may be true, as Brighouse and Swift aver, that other intimate relationships have their own value, but one that is no substitute for that of parenting. But something can be just as valuable as another thing without it having the same *kind* of value. For instance, there might be no substitute for the taste of truffles, but someone who dislikes that taste need not lack what is needed to have a complete gustatory meal experience; other, albeit different, tastes may suffice for a meal that is as satisfying to the diner as the one with truffles. A taste can be unique and non-substitutable without being one that is special in the sense of necessary for any fully satisfactory meal.

The sense in which Brighouse and Swift define the private good of parenthood does not suffice to show that the family should receive special legal protection. If other intimate relationships have equal, albeit not the same kind of, value as parenting, then the law should grant those relationships the same status as parenthood. That leaves unaccounted for the putatively public good of parenthood to which I will return.

The second account of why the family realises importantly different private goods than those of other relationships is noted by some sociologists who have been critical of the move to demote the family as a social institution. What such a demotion or ‘circumvention’ of the concept of family risks losing, they argue, is the powerful sense of belonging to a familial ‘we’ that individuals have and which they value highly. This feeling of who we are extends both into the past and into the future: ‘a sense of responsibility, reverence and respect for ancestors that has both sociopolitical and spiritual components; and a sense of generational continuity that passes knowledge about previous generations down to future generations’.³²

The British Broadcasting Corporation’s (BBC) very popular series, *Who Do You Think You Are?* comprises episodes in which a well-known individual

³² R. Edwards, J. McCarthy, and V. Gillies, ‘The politics of concepts: Family and its (putative) replacements’ (2012) 63 *British Journal of Sociology* 730, 736.

explores their ancestry. The results can be surprising and on occasion shocking. However, the programme's pleasure for the viewer lies in the reactions of the celebrities at the disclosures of a past they may not have previously known about but which on being found out matters greatly to them. That is the case even when a discovered ancestor is long dead. The programme is described by the broadcaster as follows: 'Lost connections and unfamiliar histories are revealed as celebrities trace their family trees. Discover stories of courage, joy, sacrifice and resilience – everyone has a tale to tell.'³³ That everyone does have a tale to tell is what makes the family of special value to its members.

Note, too, that this sense of temporal or historical continuity can be felt and valued by everyone inasmuch as we are all the children of parents, and all of us have ancestors even if some of us do not become parents. Moreover, those who do not themselves have children can still view the young within their extended family – our nephews and nieces, for instance – as giving them a sense of a 'future generation' that is special to them.

It is hard to see how this valued sense of 'having a tale to tell' about one's place in an ongoing history can be realised by non-familial relationships. Friendship, for example, does not, as the family does, extend back over time and forward across generations. Moreover, the value of what one could call a narrative identity would seem to be one that is both universal (we all value having such an identity) and unique in the sense of not having any equivalent outside the family. Here then is a way in which the private good of the family is both non-substitutable and, very plausibly, of greater value than any good of non-familial intimacy.

3.6 THE PUBLIC GOOD OF FAMILY

Moreover, this sense of continuous attachment to a past and a future can also be represented as a public good, in that such feelings of connection to the family can extend to our sense of belonging to the society in which our families flourish. Indeed, this was the claim of Edmund Burke who famously argued, 'To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.'³⁴ The family is just such a 'little platoon' by connection to

³³ BBC, 'Who do you think you are?' <www.bbc.co.uk/programmes/b007t575>.

³⁴ E. Burke, *Reflections on the Revolution in France* (first published 1790), (Penguin 1968) para 75.

which our affection to others is broadened to encompass our co-citizens and humanity as a whole.

Brighouse's and Swift's accounts may not suffice to show that the family serves private goods that other relationships cannot match. But they also see the family as having a public good. This is because it serves the interests of children as well as parents. Indeed, they believe that children should be raised by adults because that relationship of parenthood which is of value to the latter also serves the well-being of the former. They think that parenthood ought to promote the interests of children. Parents owe a fiduciary duty of care to dependent children and their rights are, in consequence, appropriately constrained.³⁵

This suggests the most important way in which the challenge to the special status of the family can be met. This is especially so if the idea of the family as a 'little platoon' remains unpersuasive. We can grant that both friendships and intimate personal relationships do promote significant private and public goods. Nevertheless, we can and should insist that the family does something else, namely rear children. This is precisely what a functional definition of the family draws attention to. The family is essentially that social institution within which children are brought up. It is such an institution even if it also can and does provide affectionate companionship to its members.³⁶ In short, the family may not be able to compete with non-familial institutions if the standard of comparison is the quality of intimacy enjoyed but it will outrank those other relationships if what matters is the functional role the family uniquely fulfils.

It is worth adding that, although not an essential functional role, the family can and does often provide support and care across generations but in a reverse direction to that of rearing children. This is the case when the elderly parents are looked after by their adult children.

That primary functional role is important inasmuch as it ensures the graduation to adulthood of children and their eventual occupancy of those social roles – as citizen, worker, parent, and others – that ensures the stable reproduction of any society over time. Of course, in discharging that role the family is not beyond criticism. Indeed, it is subject to a range of familiar criticisms from psychoanalytic, Marxist, feminist, and countercultural commentators. It is probably best not to answer these criticisms by insisting that the family is a flawless social institution, every instance of which is ideal. Rather, we should attempt what I have described elsewhere as a 'Churchillian

³⁵ Brighouse and Swift (n 30) Part Three.

³⁶ D. Popenoe, 'American family in decline, 1960–1990' (1993) 55 *Journal of Marriage and the Family* 527, 529.

defence' of the family.³⁷ Winston Churchill famously said of democracy that 'it is the worst form of government, except for all the others'.³⁸ In similar fashion, we can say of the family that it is the worst institution in which to bring up children, apart from every other alternative. We can also allow that different familial forms serve the function of rearing children in better or worse ways.

Thus, the family provides a range of both private and public goods, and the former for both parents and children. Children benefit from being brought up in families, parents benefit from discharging their custodial duty of care, and society benefits from the inter-generational stability provided by inducting the next generation into their adult social roles. All of these goods are promoted by the family in ways and to an extent that is not true of non-familial intimate relationships. This, then, is the basic argument for the claim that the family deserves a legal status that is not merited by those other relationships.

However, one last point is in order. It is arguable – indeed it is highly plausible to think – that when the family displays those qualities that characterise the best of non-familial relationships, it is better at rearing children. These qualities are most obviously the strong bonds of affectionate companionship and reciprocal commitment. As we have seen, Brighouse and Swift think parents must fulfil the fiduciary duty of care for their children. That ensures that the children's well-being is at least good enough. But we can reasonably add that the well-being of children is advanced more if those adults who have custodial care of them are bound by a high degree of mutual commitment. This is persuasively argued by Anca Gheaus.³⁹

If this claim is true, we have a reason not just to protect the family as a social institution but to promote those familial forms that can display these valued qualities. Arguing for this claim displays the merits of using a functional definition of the family and of clearly separating conceptual and normative issues. For we can agree that the concept of the family does capture a distinctive kind of social institution without at the same time begging normative questions of which are better or worse instances of the institution. Nevertheless, if the family is defined as an institution whose adult members have primary custodial care for the children, we can at least understand how we might go about evaluating two issues: first, whether the family does a better job of rearing children than other social institutions; and, second, which forms or kinds of family do a better job of rearing children than other forms.

³⁷ Archard (n 24) 68.

³⁸ W. Churchill, Speech in the House of Commons, Hansard (11 November 1947).

³⁹ A. Gheaus, 'Is the family uniquely valuable?' (2012) 6 *Ethics and Social Welfare* 120.

3.7 CONCLUSION

To conclude: the concept of ‘the family’ as functionally defined has survived momentous changes in society and endures across the multifarious forms it can take. The concept of ‘the family’ is not made redundant by these changes and is not a historical relic left behind by progress. It survives and indeed flourishes in its diversity. The family does have a unique and special value in the number and quality of goods it serves. The law – at both national and transnational levels – rightly protects that value and may seek to make of families the best that they can be in serving these goods and in discharging its indispensable functional role of rearing children.

At the outset I noted that EU law acknowledges that the family is a special social unit but has a problem with agreeing what shall count as a family and who are its members. It does so whilst worrying that the privileging of some familial forms might be counted as discriminatory. For instance, when defining who family members are for the purpose of extending the scope of the right to free movement to ‘family members’, who should count as a ‘partner’ – only a married spouse or could, and should, it also include a same-sex but unmarried partner?⁴⁰

One way to resolve these problems would be by harmonising or indeed by unifying EU family law across all Member States. This has been extensively discussed but the prospects for such an institutional unification of substantive family law seem some way distant.⁴¹ In the discussions, there is often emphasis on the fact that the family law of any Member State is indissolubly linked to a particular national culture (its ‘sentiments and traditions’) or to a stage of social development (assessed by reference to what is seen as a generally progressive arc of change). Whatever the explanation of the pessimistic assessment of the likelihood of its occurrence, any uniformity of family law across the EU would require the imposition on Member States from the ‘top down’. This would be viewed as politically unacceptable and probably unworkable. Indeed, one reviewer of the prospects for harmonisation of family law notes that, in Europe, it could only mean political integration, and that, in consequence, ‘Uniform family laws will signal the demise of the nation state, if not the end of politics.’⁴²

⁴⁰ J. Guth, ‘When is a partner not a partner? Conceptualisations of “family” in EU Free Movement Law’ (2011) 33 *Journal of Social Welfare and Family Law* 193.

⁴¹ W. Pintens, ‘Family law in Europe: Developments and perspectives’ (2008) 41 *The Comparative and International Law Journal of Southern Africa* 155.

⁴² D. Bradley, ‘Family Law’ in J. M. Smits (ed) *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 269.

Nevertheless, it must be stressed that there is no inconsistency in a presumption underlying EU family law that the family does exist and does have value, whatever the various forms it assumes in different national jurisdictions. To repeat the essential claim of this chapter: the changes in the forms taken by the family should not and need not be taken as showing that there is no usable single concept of the family nor that it does not merit special legal protection.