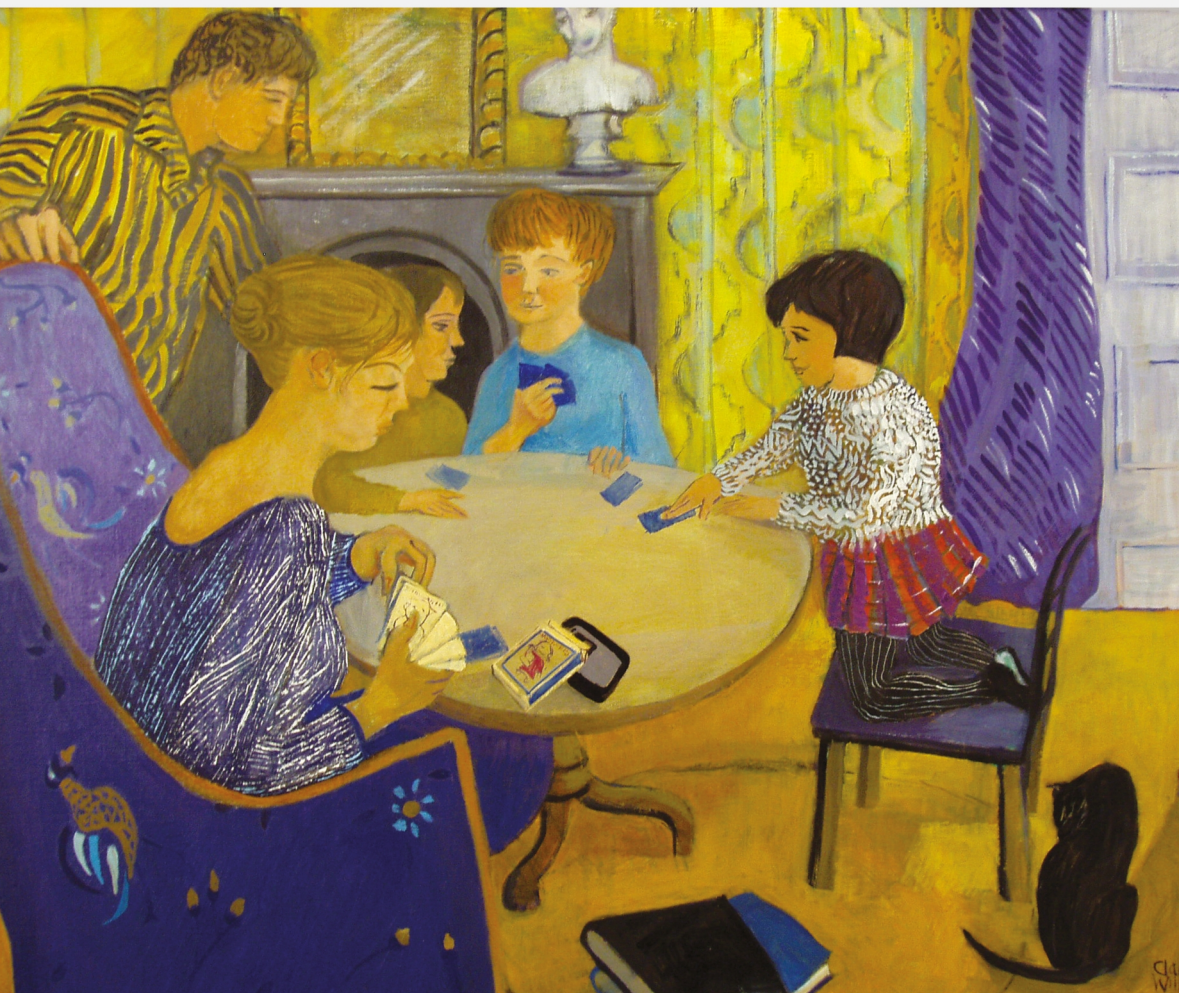
Gillian Douglas

Obligation & Commitment in Family Law



OBLIGATION AND COMMITMENT IN FAMILY LAW

A tension lies at the heart of family law. Expressed in the language of rights and duties, it seeks to impose enforceable obligations on individuals linked to each other by ties that are usually regarded as based on love or blood. Taking a contextual approach that draws on history, sociology and social policy as well as law and legal theory, this book examines the concept of obligation as it has been developed in family law and the difficulties the law has had in translating it from a theoretical and ideological concept into the basis of enforceable actions and duties. Increasingly, the idea of commitment has been offered as the key organising principle for the recognition of family relationships, often as a means of rebutting claims that family ties are becoming attenuated, but the meaning and scope of this concept have not been explored. The book traces how the notion of commitment is understood and how far it has come to be used as a rationale for imposing the core legal obligations which underpin care and caring within families.

Obligation and Commitment in Family Law

Gillian Douglas

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Preface

The idea for this book had been in my mind for several years, but it was only when I was fortunate enough to be awarded a Leverhulme Trust Major Research Fellowship that I was able to devote the time to develop it properly. I am immensely grateful to the Trust for providing me with the opportunity to spend two years on a project exploring the notion of obligation and commitment in family law. This book is the major output from that project.

The motivation for my project was initially to look more closely at some of the earlier development of what might be called the 'modern' family law era, which began when family issues shifted from being primarily dealt with through ecclesiastical and property law to a body of secular law distinctly concerned with 'the family'. I was interested in the peculiar legal suit of 'restitution of conjugal rights', about which there seemed to be very little ever written. The idea of attempting to use law to coerce the performance of the non-financial obligations of marriage then led me to think further about how, and how far, the law has been used to determine the nature and content of family obligations more generally. The notion of family obligation assumed more significance when I was involved in an empirical study of people's attitudes to the law of inheritance. The study was intended to provide information for the Law Commission in its review of the law of intestacy, a law that has barely altered since 1925. In asking people for their views on who should receive (shares of) their estate, it was clear that what Janet Finch and Jennifer Mason, in their earlier qualitative study of attitudes to inheritance (*Negotiating Family Responsibilities*, 1993), had described as a 'sense of obligation' was highly important in determining their views of what would be 'right' and 'fair'. But it seemed that despite the enormous social changes in family formation and attitudes to intimacy and relationships that have taken place since the 1970s, never mind the 1920s or 1850s, people were still rather traditional when it came to matters of inheritance. We found that their 'inheritance family'—the family they regarded as legitimate claimants on their estate—was generally the narrow nuclear family of partner (including a cohabiting partner) and children, with 'own' (ie genetic) children taking priority over step-children.

It seemed to me that as 'identity' has become more important in terms of social, cultural and political personhood, so the notion of relational identity—who is connected to whom—has become the focus of much of the energy of family law scholars who have examined and advocated the case for the legal recognition of a broader range of family relationships than

this narrow nuclear family type. But somewhat less attention has sometimes been paid to considering what the legal consequences of such recognition would be, often because the drive for recognition has been motivated by a call, or an assumption, that this should deliver equality with the family relationships that are already recognised. Yet we all know from socio-legal and empirical insights into the working of family law that how the law is applied in practice may be far removed from how it appears on its face. And we also know that the law is communicated through a discourse imbued with underlying ideologies, attitudes and values that need to be unpacked and evaluated. So the aim of my project, and this book, has been to focus not on the recognition of relationships, but on the consequences of recognition as articulated through core 'obligations' imposed by the law on family members towards each other.

As well as examining the concept of obligation, the other dimension of my project has been to explore the meaning of 'commitment' in family law and family relationships. This is a concept that has become much more prevalent in both popular and legal discourse about the family and relationships in recent times, but as I explain in Chapter 1, its meaning has shifted from a term largely synonymous with burden—and obligation—to one that embodies dedication and allegiance to a person or a relationship. I seek to show how this change in meaning is a reflection of the liberal view of intimate relationships as existing to provide emotional self-fulfilment for the autonomous individual, who should be free to 'move on' from them if they fail to deliver such satisfaction. I note throughout how this conception of commitment is gendered, and how it also reflects the traditionally patriarchal stance of the law in the regulation and control of family relationships.

The core obligations imposed by the law on family members fall squarely, in my view, within the notion of 'caring', the various meanings of which I explore in Chapter 1. Care has rightly become central to the understanding of what a 'functional' approach to families and to family law might look like, but it is sometimes forgotten how (far) it might already be included within the content of family law. One can identify a specific 'duty of care' applying to the relationships that have traditionally been given legal recognition through a recognised legal status—marriage and parenthood—with family law imposing a variety of both positive and negative obligations on spouses and parents. The core *positive* obligations of care concern the duty of a spouse to cohabit with, and to maintain, the other spouse, and the duty of a parent to support, and to maintain a relationship with, his or her child. The *negative* obligations of marriage might be regarded as including a duty not to commit adultery and a duty not to act with cruelty (or now, loosely, 'unreasonably'). Negative obligations of parenthood might include the duty not to neglect or to ill-treat the child. The distinction between positive and negative obligations is discussed further in Chapter 1. The focus of the case studies discussed in this book is on the *positive* obligations only.

This is because, apart from adultery, which, by definition, can only apply to marriage (or, should it be so defined, although this has not been the case in the United Kingdom, to a civil partnership), such negative obligations are not confined to those in legally recognised 'family' relationships. Acting with cruelty towards an intimate partner, or towards a child, might be a criminal offence regardless, and a spouse behaving in such a way that the other cannot reasonably be expected to live with him or her *may* well involve criminal offences (eg acts of violence) or other acts controllable by civil law applicable to non-family members (eg harassment), or acts which would be regarded as anti-social regardless of the relationship (eg drunkenness, personal neglect). I have chosen not to deal with adultery and the duty of fidelity, in order to avoid becoming side-tracked into a different discussion of the grounds for divorce, which raise issues separate from the notions of obligation or commitment.

I have sought to trace the development of the law taking a retrospective approach, largely from the Victorian era, up to the current time, seeking to contextualise the primary legal sources and the ways in which relationships are viewed and evaluated within them, through reference to social, historical and demographic data and insights. These are discussed in detail in Chapter 2 and referred to throughout the book. I make extensive use of the primary legal sources. In my view, case law and statute are invaluable as sources of information regarding the attitudes that the state considers as important to promote and enforce through law, always bearing in mind, as I have noted, that one cannot assume that the 'messages' being sent are an accurate and complete reflection of how people actually behave, nor that the messages are received, understood and acted upon as intended.

The focus of Chapter 3 is on the action for 'restitution of conjugal rights'—a remedy for desertion in the form of a decree requiring one spouse to resume cohabitation with the other. This was not finally abolished until 1970. Chapter 4 considers the approach taken to financial support within and after marriage, and the establishment of the 'clean break' principle ending all financial ties between the spouses. This was put into statutory form in 1984. Chapter 5 examines the law governing child maintenance and the pendulum swings that have taken place in policy between a focus on the role of the state or the private sphere in providing financially for children. The high-water mark of state intervention in the parental duty to support one's child came with the establishment of the child support scheme in 1991. Chapter 6 focuses on how the law has been used to allocate rights and obligations relating to parenting and the upbringing of children both during and after the parental relationship has ended. A drive to encourage more equal roles for both parents received particular recognition in the Children and Families Act 2014. These chapters seek to build up a picture of how the law has reached its current state, and to reflect its interaction with the major social changes that have taken place in the modern and post-modern eras.

Chapter 7 changes the focus from the *obligation* to provide care in its various forms within the nuclear, form- or status-based family, to the recognition of care work as giving rise to a *right* to redress or compensation, as advocated by those who argue for a more functional approach to relationship recognition. Here, the discussion considers the recognition of care as a 'contribution' to the family, in divorce or property law and as extended to cohabiting and 'caring' relationships in Australia. Chapter 8 evaluates the development of the law as traced in the earlier chapters, and its fit with the changing nature of families and changing social attitudes.

The case study approach that I have adopted to exploring family legal obligations means that I do not address three significant developments in family law in recent years. The first is the legal recognition of same-sex relationships and of families formed by these. One might legitimately argue that the adoption of non-discriminatory laws on sexual orientation is in many ways the *most* fundamental social shift in the sphere of intimacy and family relations that has been experienced in modern British (and western) society. However, as I have indicated, the focus of this work is not on the recognition of relationships and relational identities, but on the consequences of such recognition, in the form of legal obligations of care. As same-sex relationships have come to be included within the sphere of family law, this has been on the same basis as traditional 'family' relationships. The retrospective assessment in this book of the development of the law on family obligations is as relevant, I would therefore hope, to understanding its significance for same-sex relationships as it is for heterosexual couples and traditional families, although future legal development may identify ways in which same-sex partnerships should be treated differently by family law (eg in relation to assumptions regarding gendered dependency).

The second omission is detailed discussion of the challenge of providing care for the elderly. My rationale is twofold. First, apart from under the Poor Law, there has never been a legal obligation on adult family members to support their parents or other kin in England and Wales, which raises particular issues of cultural and social expectation. I touch upon the issue in Chapters 7 and 8. Secondly, until an assessment has been made of the utility and desirability of the imposition of binding obligations that *have* been recognised in the past, we cannot form a sensible view on whether these should be extended to additional family forms or ways of caring for each other. I hope that the discussion and conclusions in this book provide insights that are helpful to those shaping policy for all forms of caring, in respect of all forms of 'family' relationships, in the future.

Thirdly, it should be noted that I have not sought to provide a comprehensive 'statement of the law' as it currently stands. In particular, international human rights standards and internationally developed norms and processes play a part in regulating family relationships through law, particularly in relation to 'international' families formed, living and changing across

state borders. However, the development of the law in England and Wales (and, in Chapter 7, in Australia) discussed in this book has not entailed significant reference to or application of international and transnational law. So although relevant provisions and instances are referred to, primarily in Chapter 6, which deals with the promotion of 'contact' and 'involvement' in the life of the child post parental separation, I do not discuss them in detail.

I have been able to discuss ideas and issues arising in this book with many friends and colleagues, including (in alphabetical order), Rebecca Bailey-Harris, Anne Barlow, Caroline Bridge, Julie Doughty, Kathy Griffiths, John Haskey, Emma Hitchings, Nigel Lowe, Judith Masson, Mervyn Murch, Leanne Smith, Sharon Thompson and Liz Trinder. I would like to thank Belinda Felhberg and Helen Rhoades at the University of Melbourne, Patrick Parkinson at the University of Sydney and Bruce Smyth at the Australian National University, for hosting my visits and providing valuable information on family law in Australia. I am lastly and especially grateful to Stephen Gilmore, Kathy Griffiths, Jo Miles, Daniel Monk, Rebecca Probert and Frederik Swennen, for reading and commenting on various chapters in draft.

This book is dedicated to my husband, Hugh Rawlings, with the deepest sense of love, obligation and commitment.

Gillian Douglas
September 2017

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1

The Ties that Bind?

> They were so bound together that they constituted a family.[1]
>
> Rites of institution … aim to constitute the family … as a united, integrated entity … these inaugural acts of creation (imposition of the family name, marriage, etc) have their logical extension in the countless acts of reaffirmation and reinforcement that aim to produce, in a kind of continuous creation, the obliged affections and affective obligations of family feeling (conjugal love, paternal and maternal love, filial love, brotherly and sisterly love, etc).[2]

I. INTRODUCTION

THERE IS A fundamental tension at the heart of family law. Through the medium of law, the state attempts to use its power to regulate the formation, functioning and dissolution of personal relationships operating in an emotional and affective plane of human experience, frequently in a private space which is ostensibly intended to be kept separate and apart from the 'public sphere'.[3] Such relationships are supposed to be prompted and sustained by altruism, love and commitment, not legally enforceable rules and constraints. Indeed, Milton Regan has argued that, historically, 'Unwillingness to command performance of … duties … reflected a view that family members typically had a relational sense of identity that the law might undermine, rather than promote, if it intruded too far into the family.'[4] Whether families are viewed as social constructs

[1] *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304, 340C, CA, per Ward LJ.

[2] P Bourdieu, 'On the Family as a Realized Category' (1996) 13 *Theory, Culture and Society* 19, 22. For a rejection of the idea that love can be so categorised as 'distinct types of affection to be found pre-packaged on a supermarket shelf' rather than as a complex relational emotion shaped by its context, see C Smart, *Personal Life: New directions in sociological thinking* (Cambridge, Polity Press, 2007) 59.

[3] For a critique of the public/private distinction, see F Olsen, 'The Family and the Market: A Study of Ideology and Law Reform' (1983) 96 *Harvard Law Review* 1497; M Fineman, *The Autonomy Myth: A Theory of Dependency* (New York, The New Press, 2004).

[4] M Regan Jnr, *Family Law and the Pursuit of Intimacy* (New York, New York University Press, 1993) 11. As Olsen and others have pointed out, however, the family members who might share this view have generally been husbands and fathers, rather than wives, mothers and children: see Olsen (n 3).

formed of intimate units, romantic partnerships, parent/child dyads, people connected through kinship, caring relationships or other collectivities; or whether 'family' is better understood as an ideological concept—the 'family we live by' rather than 'with', as Alison Diduck argues;[5] or not as a noun at all, but as an adjective describing the 'practices' that people engage in, or as a verb whereby people are best understood as 'doing' family;[6] the assumption is that family members care for each other because of sentiment, and not because they are compelled by law to do so.[7]

Lawyers and legal commentators generally steer clear of bringing love or affection into discussions of family matters and how to regulate them.[8] Nor are they alone. As Carol Smart explains, sociologists have also been wary of studying love, regarding emotions as belonging to the province of psychology.[9] The messiness and uncontrollability of love, and even more, the negative emotions and behaviour that usually follow its disappearance and which frequently lead to the need for regulation and resolution *within* the sphere of law, help explain why those trained in the 'cool' rationalism of law might wish to limit its impact.[10] In discussion of law (and the politics and philosophy which influence its development), therefore, as with sociology, love tends to have been translated into the related concept of 'care'. For example, in his discussion of caring and the law, Jonathan Herring brings love and care together in arguing that 'Law is about enforcement; while

[5] A Diduck, *Law's Families* (London, LexisNexis, 2003), drawing on J Gillis' categorisation, in *A World of Their Own Making: Myth, Ritual, and the Quest for Family Values* (Cambridge, MA, Harvard University Press, 1997). See also Diduck's discussion of the expanding inclusivity of the concept of 'the family', and the consequential expanding responsibilisation of those now included within it, in A Diduck, 'Shifting Familiarity' (2005) 58 *Current Legal Problems* 235.

[6] D Morgan, *Rethinking Family Practices* (Basingstoke, Palgrave Macmillan, 2011) 4–5.

[7] But for the view that family relationships are governed by obligation rather than preference, see R Abbey and D Den Uyl, 'The Chief Inducement? The Idea of Marriage as Friendship' (2001) 18 *Journal of Applied Philosophy* 37; and for examination of early political philosophy concerning how far duty and volition go together in domestic relationships, see V Kahn, '"The Duty to Love": Passion and Obligation in Early Modern Political Theory' (1999) 68 *Representations* 84.

[8] Two exceptions are, first, Katherine O'Donovan, who refers to love in 'Love's Law: Moral Reasoning in Family Law' in D Morgan and G Douglas (eds), *Constituting Families: A Study in Governance* (Stuttgart, Steiner, 1994). Secondly, John Eekelaar discusses 'brotherly love' in *Family Law and Personal Life* (Oxford, Oxford University Press, 2006) in the context of friendship, and love more generally in 'Family law and love' [2016] *Child and Family Law Quarterly* 289.

[9] Smart (n 2) 54.

[10] There is a large literature on lawyers' attempts to limit their clients' appeal to 'feelings' when resolving family disputes: see, in particular, A Sarat and B Felstiner, *Divorce lawyers and their clients: power and meaning in the legal process* (New York, Oxford University Press, 1995), J Eekelaar et al, *Family lawyers: the divorce work of solicitors* (Oxford, Hart Publishing, 2000). On the difficulty that the refusal to acknowledge clients' emotions creates in seeking to achieve such 'resolution', see H Reece, *Divorcing Responsibly* (Oxford, Hart Publishing, 2003) and S Day Sclater and C Piper (eds), *Undercurrents of Divorce* (Aldershot, Ashgate, 1999).

caring is about the voluntary performance of acts motivated by love.'[11] Smart notes, however, that there is a tendency to regard such 'care' as having value 'only if it entails work, self-sacrifice and some degree of compromise and endurance, otherwise known as commitment'.[12] Within the sphere of law, as distinct from other disciplines, this tendency may be less open to criticism. For how would law recognise and define love, and how could it promote or enforce it?[13]

Yet law is frequently used to regulate the *expression* of emotions: think of much of the criminal law of offences against the person, or the grant of a divorce on the basis of adultery.[14] Law can be seen as a mechanism used to regulate caring (in the various forms discussed in section II) within the family, through the core obligations imposed by family law, which are elucidated in Chapters 3 to 6. As explained later in this chapter, I use the concept of obligation in two senses, legal and sociological.[15] In the first sense, an obligation is of course the correlative of a *right*, and it is also the basis for the grant of a *remedy* to family members suffering harm or detriment as a result of their family ties. In the second sense, it is a social norm governing behaviour and attitudes towards others. The first question explored in this book is how far the notion of obligation has been effectively utilised through the medium of law to promote and sustain caring within the family.

Smart's use of the notion of 'commitment' understands it as entailing 'work, self-sacrifice and … endurance'. But as is explained in section V.C, the term has substantially shifted in its popular meaning from being understood as a synonym for a binding obligation (and, in the meaning used by Smart, effectively a burden) which cannot be avoided, to expanding to cover a promise made, or dedication to a particular plan or belief, which can later be dropped or discarded. Indeed, she goes on to discuss it in exactly this sense, in a critique of arguments attributing the reduction in marriage rates and the rise in cohabitation to a 'decline' in commitment.[16] In the sphere of family policy, this more recent understanding of 'commitment' is often taken as the signifier that an emotional bond has been forged between individuals in an intimate or domestic relationship. It is then regarded as a basis and justification for attaching particular legal consequences to that relationship, from a duty to maintain a child[17] to a liability to share one's property.[18]

[11] J Herring, *Caring and the Law* (Oxford, Hart Publishing, 2013) 2.
[12] Smart (n 2) 64.
[13] For the view that the law should promote kindness, rather than love, see Eekelaar 'Family law and love' (n 8).
[14] See, eg, S Bandes (ed), *The Passions of Law* (New York, New York University Press, 1999).
[15] For a moral/metaphysical analysis, see S Fitzgibbon, 'Marriage and the Good of Obligation' (2002) 47 *American Journal of Jurisprudence* 41.
[16] Smart (n 2) 66–68. See ch 2 for the demographic picture.
[17] See ch 5.
[18] See ch 7, section II.B.i.

So the second question explored in this book is how far our changing understanding of 'commitment' is reflected in a change in our attitude to the nature and scope of the legal obligations to care which may be owed to family members, and to the legitimate role of law in regulating family life.

II. CARE AND CARING

A. An 'Ethic of Care'

Acceptance of the centrality of such caring within family life or as underpinning family 'practices' has produced a growing literature expounding the importance of placing an 'ethic of care' at the centre of (family) law, politics and moral philosophy.[19] Carol Gilligan's original argument was that no account of morality can be complete without considering a 'moral voice' focused on responsibility and relationships, as well as rights and justice.[20] As Sarah Clark Miller explains,[21] this central insight has been elaborated by subsequent care ethicists into an assertion of the moral importance of needs. She identifies four key themes in care ethics: *particularity*—a focus on the specific person in his or her individual circumstances rather than on a generalised 'other'; *dependency*—the recognition that we all have phases of reliance upon others rather than an assumption of autonomous independence—a view propounded, in particular, by Martha Fineman;[22] *interdependence*—the further recognition that we are mutually dependent upon and shaped by our relationships with each other—as Jennifer Nedelsky puts it, we are 'both constituted by, and contribute to, changing or reinforcing the intersecting relationships of which [we] are a part';[23] and *need*—while individual instances of need may vary widely from one person to another, we all experience needs. Miller goes on to justify the imposition of an *obligation* on others to meet such needs,[24] using Kant's duty of beneficence. Kant argued that there are duties of love (in the sense of practical action for the love of humankind, rather than the emotion of loving), of which beneficence is one, and Miller suggests that where a need is

[19] See, for a full review of this literature, Herring (n 11).

[20] C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA, Harvard University Press, 1982).

[21] S Clark Miller, 'Need, Care and Obligation' (2005) 57 *Royal Institute of Philosophy Supplement* 137.

[22] Fineman (n 3).

[23] J Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York, Oxford University Press, 2011) 22.

[24] While noting that some feminist scholarship argues that 'care' is incompatible with duty since it ignores or negates the emotions necessary to act in a 'caring' way: see Miller (n 21) at 143–44.

'constitutive' of the person, that is, where the person cannot exercise agency unless it is met, there is a moral duty on those with the means to do so, to respond with beneficence.[25]

Gilligan's argument, developing from experimental psychology regarding the differential responses to moral dilemmas given by men and women, has often been taken to mean that these different voices are gendered. Later feminist empirical work has both confirmed and refuted a gender difference.[26] Regardless of its empirical basis, the distinction between 'care' and 'justice', 'responsibility' and 'rights' has been helpful—and influential—in framing and articulating the different viewpoints and experiences of men and women in family relationships, which will be noted throughout this book. The question why a general duty of beneficence should be devolved particularly to family members is considered in section VI.

B. Meanings of 'Care'

The meaning of 'care' and 'caring' needs to be articulated, not least because just as the 'ethic' of care might be gendered, so too might the meaning of care itself. Interestingly, in the context of the focus here on obligation and commitment, Joan Tronto has noted that 'Semantically, care derives from an association with the notion of burden: to care implies more than simply a passing interest or fancy but instead the acceptance of some form of burden.'[27]

In her earlier work, Tronto divided 'care' into two categories: 'caring about', which she saw as having been the traditional focus of moral philosophy, and which is concerned with attitude and sentiment (for example, how and why one should care about the environment, or about others); in contrast to 'caring for', or the physical work and activity of caring.[28] Although she subsequently viewed this dichotomy as rather crude,[29] it has been used in the context of family law,[30] particularly in considering how mothers and fathers, or parents with care and non-resident parents, approach

[25] To similar effect, see J Eekelaar, 'Are Parents Morally Obliged to Care for Their Children?' (1991) 11 *OJLS* 340.

[26] See eg C Smart and B Neale, *Family Fragments?* (Cambridge, Polity Press, 1999) ch 6; J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (London, Routledge, 1993) 82–85.

[27] Tronto (n 26) 103.

[28] J Tronto, 'Women and Caring: Or, What Can Feminists Learn About Morality From Caring?' in S Bordo and A Jaggar (eds), *Gender/Body/Knowledge* (New Brunswick, NJ, Rutgers University Press, 1989).

[29] Tronto (n 26) 106, fn 25.

[30] See eg C Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 *Journal of Law and Society* 485.