CHANGING CONTOURS OF DOMESTIC LIFE, FAMILY AND LAW

Drawing from a wide range of material and sociolegal methods, this collection brings together original essays, written by internationally renowned scholars, investigating emerging patterns in the shape and form of the legal regulation of domestic relations. Taking as a focus the theme of 'caring and sharing', the collection includes chapters which reflect on the changing contours of what we think of as 'domestic relations'; the impact which legal recognition carries in making visible some relationships rather than others; the potential for normative values carried within patterns of legal recognition and regulation; intersections between private law and public policy; the role of private law in the allocation of responsibility and privilege; the differential impact of seemingly progressive policies on economically vulnerable or socially marginal groupings; tensions between family law models and models carried within other fields of private law; and, unusually, architectures in law and the built environment designed to facilitate broader accounts of domestic relationships. This thoughtful, provocative and wide-ranging collection will be a must for anyone, whatever their discipline background, interested in the insights and potential offered by a fresh engagement with the complexity of domestic relations and the law.

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Changing Contours of Domestic Life, Family and Law

Caring and Sharing

Edited by
Anne Bottomley and Simone Wong

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Care to Share Your Home?' (2007) 58(3) *Northern Ireland Legal Quarterly* 268; and (co-authored with Anne Bottomley) 'Shared Households: A New Paradigm for Thinking about Reform of Domestic Property Relations', in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (London, Glasshouse Press, 2006).

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1

Introduction Changing Contours of Domestic Life, Family and Law: Caring and Sharing

ANNE BOTTOMLEY AND SIMONE WONG

CHANGING CONTOURS

WHY DOES, AND why should, the law recognise some domestic relationships and not others, and what is the effect of such recognition or lack of it?

When the contours of family law, in jurisdictions derived from European jurisprudence, were limited to the recognition of (opposite-sex) marriage and legitimate children, the policy issues involved in law were quite simple: the status of marriage, predicated on religious teaching, was the defining factor in carrying a cluster of familial rights and responsibilities. Not only were all other forms of partnership or living arrangements 'external' to the law, but 'why' the status of marriage should be the defining factor was unquestionable.

Three trends, however, have challenged this simplicity. The first was a concern to extend the contours of family law so as to 'recognise' all children, whether born of a marriage relationship or not. The extent to which this has been accomplished (the rights, for instance, all children have in relation to inheritance or nationality) has been uneven both within and between jurisdictions—but the general trend has been one of incorporation. This, of itself, challenges the presumption that it is the status of marriage which remains the core of family law, as legal regimes have moved towards a focus on the parent/child nexus rather than on the legal status of their parents. The second trend has underlined this movement: many jurisdictions, in the context of both a weakening of religious ties and the rise in unmarried cohabitation, have designed statutory forms which recognise what many now refer to as de facto marriage, ie a recognition of

'marriage-like relationships' between opposite-sex partners that simply lack the formal status of marriage. However, despite the general movement across jurisdictions in this direction, this extension of family law has remained controversial for many reasons, and indeed, England remains one of the jurisdictions that has not yet taken this step, despite a recent Law Commission report recommending that it should do so.[1] The third trend has been towards the recognition of same-sex partners in 'marriage-like relationships'. This has taken two forms: firstly, the development of forms of status registration, either (but rarely) marriage per se, or a similar, but crucially not the same, form such as (in the United Kingdom) 'civil partnerships'. Second, in jurisdictions which have developed statutes that recognise opposite-sex cohabitation, the extension of these statutes to include same-sex partners.[2] This trend has also been, unsurprisingly, controversial. One factor stands out at this point: if we think of these extensions of the contours of family law as 'stretching the marriage model',[3] how far can it be stretched? How inclusive can family law be(come)?

As with all 'big' questions, it will become obvious that we can only begin to address this issue by breaking it down into smaller questions. But consider this: in a recent application to the European Court of Human Rights two cohabiting sisters argued that their family rights had been prejudiced by the British government in that, when one of them dies, the inheritance tax which will be due on that estate will be such that the remaining sister will be forced to sell the home which they have shared together.[4] This could be simply seen as an argument about how the British government levies inheritance tax on shared homes, but it is much more than that. The sisters' argument was couched around a challenge to the extension of family law, or rather the marriage (like) element of family law, to same-sex couples under the Civil Partnership Act 2004. Registration of a civil partnership allows the privilege of exemption from inheritance tax, once limited to married couples, to be extended to civil partners.[5] The

[1] Law Commission, *Cohabitation: The Financial Consequences of Relationships Breakdown* (Law Com 307 Cm 7182, 2007).

[2] See eg Australia where subnational statutes have been extended from opposite-sex de facto partners to same-sex partners, and in some cases, even domestic partners in relationships of care and support; see Property (Relationships) Act 1984 (New South Wales); Domestic Relationships Act 1994 (Australian Capital Territory); Relationships Act 2003 (Tasmania). See further S Wong, 'Cohabitation and the Law Commission's Project' (2006) 14(2) *Feminist Legal Studies* 145.

[3] A Bottomley and S Wong, 'Shared Households: A New Paradigm for Reform of Domestic Property Relations', in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Abingdon, Routledge-Cavendish, 2006).

[4] *Burden and Burden v UK* (No 13378/05) (12 December 2006).

[5] All estates are subject to taxation (at 40%) above the exempted level, which for each estate currently stands at £360,000. Between spouses and registered partners, estates can pass free of tax, which often operates so as to protect the family home for the remaining partner. Thereafter, on the death of the remaining partner, the estate becomes subject to tax. In October 2007, the government announced a further privilege for spouses and registered partners: each spouse/partner will be allowed the exemption level of (at present) £360,000, thus on the death of the

sisters argued that to allow same-sex couples such a privilege, and not themselves, was contrary to their human rights.

This argument echoes one that was made during the passage of the Civil Partnership Bill. Why should a sexual relationship[6] be the nexus that allows for (some) privileges to be extended to domestic partnerships whilst other equally socially compelling domestic arrangements are ignored? This argument had been, in fact, mounted primarily by opponents to the Bill, who were looking for ways to jeopardise its passage and were, predominantly, anti-gay. But, despite its providence, as an argument it raises some very interesting issues which were also being voiced by feminists: why limit the privileges of family law to sexual partners, whether opposite or same sex? What is, or should be, the policy grounds for allowing a relationship to be recognised?

It is here that the title for our Oñati workshop, and the starting point for this collection, takes shape. If we leave aside, for the moment, the historical record of marriage as a sexual union, then there seem, to us, to be two reasons why many 'marriage-like' relationships require some recognition in law: recognition which carries a cluster of rights and responsibilities, as well as access to the adjudication of law, and remedies, when things go wrong (most obviously separation), or at particularly vulnerable periods (eg death or insolvency). They are: first, economic vulnerability which has arisen from 'caring' within a relationship and, second, unravelling the consequences of bringing to an end a lifestyle predicated on a commitment to 'sharing'. (Recognising that the latter may be the very reason for taking the risk of becoming vulnerable through the former, or that the former may give rise to the need to engage in the latter.)

As feminists, we recognise that it is 'caring and sharing' which have proven to be particularly problematic for women, both historically and contemporaneously, within marriage and 'marriage-like' relationships. Many women, because of social, cultural, biological and economic factors that remain, tenaciously, central in our society, are still made economically,

second partner the exempted level will be doubled to (at present) £720,000, to the benefit of those inheriting the estate. Obviously limiting such privileges is also contentious in relation to non-married or not registered cohabitants; but both groups can 'opt into' the privilege by marriage/registration. The sisters' point was that they had no means by which to access the privilege.

[6] Interestingly the Civil Partnership Act does not, as marriage law does, require a sexual act in order to consummate the status of the relationship in law: thus allowing the possibility of two same-sex platonic friends becoming registered partners. This detail was picked up by some progressive commentators to argue for an extension of civil partnership to opposite-sex partners (platonic or not), who might wish to register a relationship, but did not want to enter into marriage. The government was robust in both pointing out that civil partnership is *not* the same as marriage (which remains in the UK a heterosexual union), and that opposite-sex partners do not require another form of registration other than marriage per se (in contrast to, for instance, the regime in France which allows both same-sex and opposite-sex partners to use the Pacte Civile de Solidarité (PACS), whilst continuing to limit marriage to heterosexuals).

emotionally and socially vulnerable through their relationships with male partners, especially when they have children. This is not to ignore the many advances that have been made by and for women, especially in relation to paid employment, or to ignore the fact that many women are empowered through, and enriched by, their domestic relationships, their marriages and their children. But it is to recognise that women too often remain, within marriage and marriage-like relationships, the economically vulnerable partners whose economic vulnerability is the consequence of those relationships, both in terms of what they have given up to secure them, and in terms of what they have invested through 'caring and sharing'. Although some of us may think that the figure of the 'vulnerable' woman is sometimes too overdrawn (especially when that figure is called upon as a rationale for extending the protection of the law[7]), we cannot ignore the reality of economic vulnerability which so many divorced, separated and widowed women face.

If we recognise that it is not simply the history of marriage status which justifies 'recognition', but such factors as the reality of the consequences of 'caring and sharing': why should the protection of marriage law be limited to only those who have the status of marriage? But if protection is extended, how should the law recognise those who have need of its remit? To date, protection has been extended through two trajectories: first, an extension of a marriage model to those who seem to conform to being 'marriage-like' (opposite-sex couples living together in a sexual relationship), on the basis of potential 'vulnerability'. The second trajectory operates very differently: the extension of 'marriage-like models' to opposite-sex partners through an 'equal treatment' argument.[8] Both carry problematic issues for feminists. For instance, by extending aspects of 'marriage law' to opposite-sex partners through de facto recognition, it becomes very difficult for women to 'opt out' of marriage law should they wish to. Equally, some feminists have argued that extending 'marriage law' to same-sex partners is to replicate a pattern of patriarchal providence that is neither welcome nor relevant to same-sex partners.[9] Both arguments tap into an ambivalence which feminists have historically held towards the status and practice of marriage, and a concern that law not only 'protects' but also 'regulates'. But recognising that many women remain vulnerable in opposite-sex relationships, whether married or not, and that many same-sex partners demand the privileges of recognition which have been limited to heterosexual relationships (even to the extent of wanting

[7] See eg A Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-Habiting Women (Still) Need Marriage Law' (2006) 14(2) *Feminist Legal Studies* 181.

[8] See further Bottomley and Wong, above n 3.

[9] See eg R Auchmuty, 'Same-sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14(1) *Feminism & Psychology* 101.

'marriage' per se[10]), requires us to think, cogently, about shifts in the contours of marriage, family and domestic relationships. In this context, one way to try and begin to re-engage with the politics of family law is to focus on 'caring and sharing' as the key features of intimate domestic relationships which may justify or require some form of legal recognition. Such an approach allows us to move through a wide gamut of domestic scenarios: from those which, through cultural practices, might involve little active 'choice' in 'caring', through to those in which individuals have proactively chosen to 'share'. It does not need to be limited to sexual partners, or indeed dyadic relations.[11] And it allows us to begin to think about not only 'why' and 'when' some people 'care and share', and with what consequences, but also what the potential role is for law, in its many aspects. We can begin to disaggregate aspects which have been associated with the privileges of marriage law and consider relocating them—for instance, considering the sisters who challenged the limitation of privileges given in relation to inheritance tax might make us think of schemes associated with protecting continued occupation of shared homes, rather than of extending privileges associated with the status of partners. And, meanwhile, we need to be cognisant of the many ways in which, by extending the contours of family law through 'recognition', there has been both an increase in regulation of domestic relationships (a pattern which exerts 'responsibilities' as much as conferring 'privileges'), and trace those aspects of the law which continue to privilege marriage as a heterosexual union, especially when dealing with such crucial issues as inheritance, nationality and immigration.[12] In this sense, changing the contours of family law raises crucial questions not only about who is brought into its remit and with what effect, but the extent to which 'marriage' remains the core. There is, therefore, a tension which runs throughout this collection: on the one hand, we have taken the opportunity to think positively about the potential in rethinking contours through 'caring and sharing', and, on the other hand, we remain, necessarily, very aware of the ways in which present changes in those contours carry elements we have to be very cautious of.

[10] Eg the recent case of the two women, Sue Wilkinson and Celia Kitzinger, who married in Canada, taking their case before the English court for their marriage to be legally recognised in the UK. See *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam). See also C Kitzinger and S Wilkinson, 'The Re-branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership' (2004) 14 *Feminism and Psychology* 127.

[11] Thus the Australian statutes, above n 2, that have extended legal protection to 'carers', have remained limited to a dyadic model. See further Bottomley and Wong, above n 3.

[12] See further, eg, R Graycar and J Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 *Washington University Journal of Law & Policy* 121. And for an interesting account of the continued privileging of (and support for) heterosexual parenting in France, see V Duverger, 'Who's afraid of Gay Parents?' [Nov/Dec 2007] *Radical Philosophy* 2.

CARING AND SHARING

This collection begins with a chapter by Carol Smart who, drawing from empirical evidence, reminds us that 'families' are formed through the everyday practices of people coming together to share their domestic lives, to share with each other and care for each other, rather than derived from definitions deployed by law. From this perspective 'who' or 'what' a family is, is constituted from social practices rather than a legal formula; such an approach recognises a wide range of 'family practices' which are not easily fixed through a simple definition predicated on status. But Smart also draws from her interviews evidence of concerns that 'family members' have when their relationships are not given some recognition in law: recognition which can facilitate and strengthen their 'family ties', as well as allowing them to access certain benefits. In a sense, approaching the issue of recognition from this perspective suggests that law becomes an issue when it seems to block or impede the development of a sense of family and the full potential of familial practices.

Following on from Smart's chapter, the subsequent chapters are divided into four sections, with each section containing two chapters and prefaced by a short introduction written by the editors. The first, 'Property Division in Couple Relationships', examines alternative possibilities for approaching property distribution between partners at the end of a relationship. The second, 'What Is Fair and To Whom?', contextualises the issue of relationship recognition within broader social policy issues. The third, 'Heteronormativity and Marriage Fundamentalism', examines the ways in which neoliberal politics of governance engender the heteronormalisation of intimate couple relationships, both opposite and same sex. The final section pushes at the contours of domestic relationships through examining forms, or settings, for households which move beyond the conventions of a (private) familial model.

2

Making Kin: Relationality and Law

CAROL SMART

INTRODUCTION

THE MAIN THEME of this chapter will be the way(s) in which English family law seeks to create recognised links between individuals and across generations in order to constitute a family that can be recognised as a legal entity. While the general or popular assumption tends to be that law simply maps itself onto pre-given biological relationships, I argue that the relationship between biological connectedness (now usually referred to as genetic ties) and legal recognition of kin has always been more ambiguous and less straightforward than this. What is more the already complex task of recognising and creating legal relationships has become more difficult as the actual and potential shape of modern kinship continues to change. So it is my argument that we should now resist a continued emphasis on how family law seeks to pin down and normalise kinship (in particular to mould new forms of kinship into pre-ordained patriarchal and heterosexual shapes), and instead focus on how contemporary practices of kinship require law to keep up with rapid changes, thus requiring law itself to be more flexible and fluid. I shall argue in a way that is reminiscent of the early work of Michel Foucault[1] that contemporary law does not (any longer) say 'no' to diversity; rather law is becoming more and more willing to embrace difference. But, unlike Foucault, I do not argue that this is a device for the better regulation of families and populations; instead I suggest law is hurrying along in the wake of changes brought about by people themselves because family law has become a popular site for the cultural recognition of social and affective relationships between adults and children. Put more simply, I shall argue that changes in the ways in which people organise their personal lives and relationships, combined with their desire to achieve legal recognition, is driving the liberalisation of

[1] M Foucault, *The History of Sexuality*, vol 1 (London, Allen Lane, 1979).

family law. It is not, contra Foucault, that family law is casting its net wider and wider to normalise potential diversities.

In this chapter I shall explore these themes in a number of ways. First I shall look at ways of thinking about families through the concept of relationality which has become the cornerstone of important new perspectives on contemporary kinship. Then I shall briefly discuss aspects of the history of family law in relation to parenthood and paternity, and it is here that I shall lay the foundations of my argument that law is a kinning practice rather than a regulatory device. Then I shall ground these issues through a discussion of a recent study on same-sex partnerships and will conclude with a discussion of a significant case concerning the recognition of lesbian motherhood.

RELATIONALITY AS A WAY OF THINKING

In the field of anthropology Janet Carsten[2] has mapped the shift in thinking away from traditional approaches to kinship towards what has become known as the 'new' kinship studies. This shift has entailed the adoption of different terminology: Carsten argues that anthropology is now concerned with 'relatedness' rather than formal structures of kinship.[3] Relatedness, as a term, is a different way of expressing two main themes. The first theme argues that individuals are constituted through their close kin ties. That is to say, without both formative and ongoing relationships we do not develop our own sense of personhood or individuality. This is, as Carsten acknowledges, not a new insight but it is one which keeps being submerged in the Western intellectual tradition with its emphasis on the unattached individual who can exist independently of others. The second and particularly important theme is that the kin to whom we relate in this process no longer need to be understood as literal blood relatives. Although the 'new' kinship in anthropology preserves the cultural and personal significance of blood ties, the new approach gives equal significance to people who may not be strictly 'kin' at all, but who occupy the same place in emotional, cultural, locational and personal senses. This conceptual shift has expanded the range of significant others that both anthropology and sociology can grasp as important and formative in the lives of ordinary people. The concept of relatedness takes what matters to people, and how their lives unfold in specific contexts and places, as its starting point. It demotes the importance of traditional ways of understanding either 'family' or key relationships by always enquiring into who matters, rather than assuming that this is known a priori.

[2] J Carsten, *After Kinship* (Cambridge University Press, 2004).
[3] Ibid, 109.

In sociology Janet Finch[4] and Jennifer Mason[5] have also developed different ways of thinking about families and kin—creating a conceptual shift akin to that accomplished by Carsten in anthropology. Their emphasis on 'kin' was unusual in sociology in the late 20th century and this terminology appears to have been used deliberately to stretch sociological thinking beyond its (then) fixation on the nuclear married couple. The term kin was, at first, used more or less as another word for relatives, and thus it occupied a largely descriptive function. But over time it became the conceptual tool through which Finch and Mason fashioned new ways of understanding complex relationships between people who defined themselves as related. Finch's initial concerns were to challenge the rigid and unrealistic model of family life held in the minds of policymakers, as well as to problematise the notion of duty between kin. On the one hand she argued that kinship (in England) was more fluid and dynamic than the usual static model of fixed relationships allowed. On the other hand (and putting it rather simply) she argued that family obligations and exchanges were based on 'persons' not 'positions', by which she meant that people did not behave in supportive ways towards each other because of a biological link, but because they felt an affection or obligation towards others that had developed as a consequence of a history of interaction and mutuality. More recently these ideas have coalesced into a kind of sociological version of anthropology's 'new kinship'. Finch and Mason argue:

> First, we think that kinship operates at, or is to found at, the level of negotiated relationships more than structures or systems. . . . Essentially, this is why we wish to jettison both the idea of kinship as a structure and the concept of individualism in favour of one of *relationism*. Second, we want to suggest that kinship is constituted in *relational practices*, with the privilege that this concept gives to actors' reasoning, actions and experiences.[6]

Relationality is therefore an important concept because it transcends the conceptual limitations of the older concept of kinship. Significantly the term acknowledges that people relate to others who are not necessarily kin by blood or marriage and so it allows for a much more fluid way of thinking and, of course, can include such ideas as families of choice.[7] But perhaps even more importantly, it captures a way of thinking and also expresses motivations that ordinary people may have. The term conjures up the image of people existing within intentional, thoughtful networks that they actively sustain, maintain or allow to atrophy. Indeed, the combination

[4] J Finch, *Family Obligations and Social Change* (Cambridge, Polity, 1989).

[5] J Finch and J Mason, *Negotiating Family Responsibilities* (London, Tavistock/Routledge, 1993).

[6] J Finch and J Mason, *Passing On: Kinship and inheritance in England* (London, Routledge, 2000) 164.

[7] K Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York, Columbia University Press, 2nd edn, 1997).

of the term relationality with the concept of family practices[8] emphasises the active and to some extent voluntaristic nature of relating.[9] In this way it is possible to challenge the idea that relationships are given simply as a consequence of one's position in a family genealogy or through marriage. Relationality is then a mode of thinking which influences decisions, actions and choices, and which also forms a context for the unfolding of everyday life. Relationality requires action and is not just a state of mind and this means that in order to understand how relations are sustained we need to be attentive to everyday practices and the meanings that people give to them.[10]

More recently these shifts in thinking about families and kinship have been complemented by studies on friendship. As Pahl and Spencer[11] have suggested, it may now be more appropriate to think in terms of a complex continuum of relationships rather than discrete categories such as family or friends. They have therefore developed the concept of suffusion in order to conceptualise types of relationships, and nuances of closeness, can take different forms and shapes.[12] This concept introduces the idea of relationships as more or less 'friend-like' and more or less 'family-like' and allows them to slide between the two depending on various interacting qualities such as affection or responsibility or choice. This suffusion between the content of chosen and given relationships means that it is problematic to focus 'solely on one side or other of the equation'.[13] In order to avoid the predetermining (even overdetermining) categories of friends and family Pahl and Spencer have developed the concept of 'personal communities' which are not pinned down or conceptually restricted by place (physical locality), type (eg work colleague) or affinity (mother, acquaintance, etc). They go on to produce a complex and detailed typology of relationships which still uses the concepts of friends and family as descriptors but which succeeds in revealing the complex mix of different relationships (with their different meanings, purposes and degrees of closeness) that constitute personal communities. Pahl and Spencer are thus seeking to achieve a different form of sociological conceptualisation of relationships while recognising that terms such as family and friends continue to have cultural significance and meaning in everyday life. So it is not that they aspire to expunge terms such as family or friends from the sociological lexicon, rather they argue that these should not be conceptually determining. Moreover, they recognise that for some people interactions with family

[8] D Morgan, *Family Connections* (Cambridge, Polity, 1996).

[9] C Smart, *Personal Life: New Directions in Sociological Thinking* (Cambridge, Polity, 2007).

[10] J Mason, 'Tangible Affinities and the Real Life Fascination of Kinship' (2008) 42(1) *Sociology* 29.

[11] R Pahl and L Spencer, 'Personal Communities: Not Simply Families of "Fate" or "Choice"' (2004) 52(2) *Current Sociology* 199.

[12] L Spencer and R Pahl, *Rethinking Friendship: Hidden Solidarities Today* (Oxford, Princeton University Press, 2006).

remain more important than with friends, and vice versa, so they do not seek to 'flatten out' all relationship types and make general statements about the respective fortunes of either families or friends in modern times.

The question that now needs to be raised is where law might fit into these different ways of thinking about relationality. This is especially important given that law has frequently been depicted as seeking to shore up or give priority to particular kinds of family structures and to prioritise some relationships over others. Typically law has been seen to bolster patriarchal families, nuclear families, heteronormative families and so on.[14] More recently there has been debate about whether law supports and bolsters the genetic family and blood ties or whether it gives succour to social parenting. While not dismissing these arguments, since there is evidence to support the cases on both sides of these debates, I prefer to add a different perspective rather than trying to resolve the dispute. I seek to insert additional layers into the picture because it is my view that law operates in rather complex and sometimes quite contradictory fashions, in other words it does not have one 'mind' or policy goal. Moreover, as will be well known, shifts in law (legislation, case-law or simply practice) can produce unplanned and unintended consequences. So even where law reforms are initially introduced with clear political agendas, their consequences cannot be guaranteed in advance. Borrowing from John Law's[15] ideas on methodology, I suggest that law—at least English family law—is a mess but this condition is not necessarily a problem because the real life it seeks to address is a mess too.[16]

This complex body of law therefore seeks to engage with families that are not clearly demarcated as married, heterosexual and nuclear, but are made up of the kinds of diverse relationships outlined above. Where once it might have been clear that the intent of family law (combined with related jurisdictions such as the Poor Law) did seek to impose order and clear moral boundaries between respectable families and others, this is now far less clear. Indeed gradually law has become more and more engaged in a game of 'catch up' with social reality as it seeks to reformulate itself in line with contemporary fluidity. I suggest that law (case-law and legislation) often seeks to make elective affinities (or chosen kin) into legally recognised relationships, and in so doing law *may* regulate and normalise, but its primary intent is to protect and recognise those affinities that ordinary people themselves wish to recognise, safeguard and respect. I would go

[13] Pahl and Spencer, above n 11, 203.

[14] C Smart, *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London, Routledge and Kegan Paul, 1984); R Auchmuty, 'Same-sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14(1) *Feminism & Psychology* 101; C Stychin, *Governing Sexuality* (Oxford, Hart Publishing, 2003); S Jeffreys, 'The Need to Abolish Marriage' (2004) 14(2) *Feminism and Psychology* 327.

[15] J Law, *After Method: Mess in Social Science Research* (London, Routledge, 2004).

[16] J Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *Modern Law Review* 467.

even further to suggest that there are outcomes to this kind of intervention which cannot be predicted because the field in which law operates is never static. Every step in the direction of acknowledging new forms of associations takes place within an already complex web of legal relationships and social/personal affinities which means that new measures or decisions are never straightforward or uncomplicated in their outcomes.

LAW AS A PRACTICE OF 'KIN MAKING'

So we arrive at my proposition that it is useful to see law as a practice of kin making or 'kinning', by which I mean that in various ways law operates to create recognised and recognisable forms of kinship. While once these practices of kinning may have been largely imposed, in late modern times they are more likely to be attempts to keep abreast of changing social and cultural practices. Historical examples of this past practice would be the way in which state-formalised marriages (made compulsory in England in 1753[17]) became the means of properly recording marital relationships and ensuring that spouses enjoined a public contract rather than engaging in more private, or clandestine nuptials. In this way the state ensured it knew who was married to whom; from which knowledge the duties and obligations of kinship could ensue. Marriage was also the mechanism for creating recognised and enforceable legal kinship between men and children. Thus marriage performed a number of functions, and a primary one concerned establishing paternity. It is significant that English law also tended to insist—against credibility in some cases—that any child born to a married woman was the legitimate child of her husband. Thus it was marriage rather than biology that determined paternity. In this way we can see that English law has long been about making fictive kinship into legal kinship, or at least it has actively patrolled the boundaries between the two, allowing some incursions but not others. We also know that law sustained marital relationships through the control of economic factors (eg giving ownership and control of women's property to husbands) and through requirements over domicile and desertion.[18] These mechanisms of acknowledging who was and who was not kin (and in turn the duties and obligations of kinship) relied heavily on negative sanctions against those who transgressed the legally constituted boundaries. Following Foucault again, we can see that these mechanisms are the complete antithesis of more modern, permissive measures which developed in the 20th century.

One notable turning point in this strictly regulatory approach to the practice of kinning occurs with the introduction of legal adoption in 1926

[17] CS Gibson, *Dissolving Wedlock* (London, Routledge, 1994) 45.
[18] Smart, above n 14.