

## Articles

### Ideas and norms: a conversation

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with Fatima Ahdash, Liam Davis, Claire Fenton-Glynn, Maebh Harding, Emily Jackson, Dafni Lima, Alice Margaria, Julie McCandless, Beth Tarleton, and Sarah Trotter

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Note from the editors: in the conversation that follows, which took place on Monday 14 October 2024, members of the project discuss the three reflection pieces that feature in the *ideas and norms* section of the special issue: Claire Fenton-Glynn's paper 'The past, present and future of legal parenthood', Dafni Lima's paper 'Regulating multiple parenthood under English law?', and Sarah Trotter's paper 'Reflections on the construction of the category of the "potential relationship" in European human rights law'.

FATIMA: There's quite a lot of talk in many of the papers about parenthood and parental responsibility, but parental responsibility as a term seems to mean different things in different contexts.

DAFNI: I think that's something that is a bit of a struggle, especially when doing comparative work. So this notion that you have a sense, you have an intuition of what the concepts mean in other jurisdictions, because they are part of the same family of thinking about parent-child relations. But then if you start digging deeper, you might say that certain of your preconceptions about how it would be regulated are very much premised on how other concepts are regulated, and I'm specifically thinking about the relationship between parenthood and parental responsibility in our jurisdiction. When you look at US jurisdictions or Canadian jurisdictions or even European jurisdictions, the connections there are very different – you would think about parental responsibility and parenthood quite differently if these were inextricably interlinked as they are in certain jurisdictions, and you would think of them very differently when they are not as is the case in England and Wales.

CLAIRE: Yeah, I think you're right, Dafni, and I think when we're talking about 'what is parenthood', it all comes back to the question of what are we trying to achieve here? What is the point of having these notions?

JULIE: Dafni, I had a question about your comparative work. When you have these cases that are not at birth and the courts are then saying there can be three parents or more, what is it that is actually being conferred? In the UK, it would be parental responsibility.

DAFNI: In the case that kickstarted regulation of multiple parenthood in California,<sup>1</sup> it was

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<sup>1</sup> *In Re MC* 123 Cal Rptr 3d 856, 861 (Cal Ct App 2011).

very much about who will have responsibility over the child, who will assume they're caring for the child, who will have legal rights and obligations over the child. I remember one case where the mother got pregnant, was in a brief relationship with the father, and then they broke up and she went back to her relationship with another woman. The father wanted to be involved, but he was cut off. He didn't have any means to communicate with them. And then the child was born and was being cared for by the two women. And then their relationship broke down. There was domestic abuse. And the mother was involved in attempted murder against her female partner and then ended up in jail. So you had the only person who was recognised as a legal parent from the moment of birth out of the picture, and the court needed to decide whether the person who had done most of the co-parenting since the child was born was more appropriate to step in or the father who had always wanted to have a relationship but couldn't but also never cared for the child. So I think in those cases it was very much connected to the question of who will care for this child. Who will be legally responsible for ensuring the welfare of the child? Issues like inheritance and issues that we would tend to connect to the legal status of being a parent were taking a back seat. It was very much about who needs to step in right now.

EMILY: I found reading these papers really fascinating, particularly all the links between them, because I think there's something really strange about this split between parental responsibility, which is obviously active and generally confined to childhood, and parenthood, which is this passive status that you have and is not to do with doing anything, and which also links to wider family and continues into adulthood. And I was really fascinated by Claire questioning whether we actually need this passive status. One other paradox is in relation to people who find out that they were conceived through sperm donation and who are entitled to find out the identity of their donor and any siblings. One thing that you often read about in this literature is how core the identity of your parents is to your identity – this idea that knowing who your parents actually are is really important, and can be expressed as a human right. And yet at the same time reading these papers, it seems clear that working out exactly who your parent is actually quite vague and messy, and not necessarily at all clear. So on the one hand, some people say that this passive status is core to who I am, and at the same time, the law is sometimes really struggling to work out who the parent should be in different contexts. And it seemed to me odd that something can be both core and vague at the same time.

MAEBH: I think it's really interesting when we talk about it because we generally look through a family law lens. And if you kind of go broader, it can sometimes be an unofficial thing. So for example, in Irish tax law, there's a loophole in that if someone has lived with you as a child, you would be treated with preferential tax status. And in Poland, there's something similar. So I think the question is, are we looking at a particular family law status or how family law regulates a link? Or are we looking at how legal systems in general understand the parent-child nexus? And I'm not suggesting that everyone has to take the wider definition, but it's just interesting that not everything about law's recognition of the parent-child link will go through family law.

DAFNI: I'm glad that Maebh talked about tax, because I've always found it quite interesting that we don't really teach succession law as part of family law. And to me it seems that a lot of what parenthood does is essentially a remnant of needing to regulate kinship in the context of property succession and property regulation. So in relation to the idea of abolishing parenthood – and I still struggle with that idea, I must admit – I'm wondering whether we need to more overtly recognise its roots and what it was meant to do. I wonder whether we need to think about the context in which it was doing it and how we have progressed from that to what parenthood can do right here, right now. At the same time, I think that as with

other things, like marriage, parenthood has assumed an important symbolic emotional function for a lot of people. So I'm wondering how easy it would be to abolish parenthood, or whether we need to reconsider and mitigate the extent to which parenthood is functioning in family law and spilling over into other areas of law.

CLAIRE: I had a few points here. One comes back to Maebh's point about what this idea of parenthood is and the different definitions according to different factors. And this is something that Alice and I have been working on in relation to the question of what is a family;<sup>2</sup> and there I think you do really see that the lens through which you are asking this question can come up with very different answers. Secondly, in terms of the thought about abolishing parenthood, the idea of it as a functional status rather than a formal one might be useful here, and it's something Dafni mentioned – that it does still have a function, and it may still be important for various things like succession. Abolishing legal parenthood wouldn't mean that we no longer pay attention to the relationship, it's just that it wouldn't be some kind of legal monolith. Instead, you would look at what we are using this for. The third point I'd like to make goes back to what Dafni is saying about history and property being so important to parenthood. If we go back to the rules concerning marriage, the rules concerning children and parenthood, it also goes back to that alienation of property. When property was first alienated from the state, that's when rules concerning marriage became very strict, because if you were going to pass down your own personal property, you needed to know who you were passing it down to, therefore you needed to have the legitimacy of children, you needed to have this concept of parenthood and a clear line of succession. So I think that's a really interesting perspective to keep in mind: that this history of parenthood did come in through and with the idea of patriarchy, it did come through the idea of personal property.

SARAH: Thank you for making the succession point, Maebh and Dafni, because it is one of the areas of law where we do see so clearly an idea of family being articulated. But this relates also to something that I wanted to raise in relation to Emily's point about legal parenthood being passive. Is it completely passive? So much of what seems to come through in the papers is also about the symbolic function of legal parenthood as a status.

EMILY: I suppose I meant that parental responsibility is what you do. Parenthood is who you are. So they're different. You're identifying who the parent is. You're not saying that you necessarily are actively caring for the child or taking responsibility for the child or really doing anything. So I agree with you, Sarah, it's not totally passive, but I mean the difference between status as identity rather than status as doing something. Parental responsibility is clearly about taking care of the child, whereas parenthood isn't necessarily about taking care of the child. You could be a legal parent who doesn't do anything at all for the child.

FATIMA: In other areas, such as in immigration law, the law is quite interesting in that the idea of a parent includes both parenthood as a status (which you have to prove through birth certificates and things like that) but you also have to show your ability to financially provide for a child, which is in some ways also parental responsibility. And those kind of interact to allow you to bring your child with you and have a family life and so forth. So I think in some instances outside of family law, the clearcut distinction between parenthood and parental responsibility is muddied and being a parent is both that status but also the action as well.

MAEBH: It's the same with marriage, right? We have immigrants who have to have the status of marriage and show that they are actively performing marriage. That's the privilege of it: if you're certain people, you can just be passive with this, but in other situations you

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<sup>2</sup> A Margaria and C Fenton-Glynn (eds), *What is a Family? Law and Regulation in a Transdisciplinary Context* (Bristol University Press, forthcoming in 2026).

have to do both, and be both. It's to do with how the law over-scrutinises or increasingly scrutinises the family relationships of some groups of society in some contexts and not others. And so I think that there are other ways of looking at how this active-passive thing works out and why it works out differently in different contexts.

EMILY: One other thing that's really interesting in relation to parenthood is the way in which the case law often talks about it in terms of the truth – that there's some truth here, that we can know the truth of parenthood. So it's not like a choice is being made about who's going to be doing the looking after, it's that some sort of eternal truth exists outside of the law and the law is there to discover the truth.

CLAIRE: And I think that links to what was being said previously about the idea of parenthood being this essential part of your identity. And I think to a certain extent, this is socially constructed – that because DNA tests are possible, because we've got this language around truth, it becomes an essential part of an identity. It's a kind of self-perpetuating cycle.

SARAH: And it's for both, isn't it? There's the construction of the truth of the child, but also of the truth of the person who's in the category of parent, which comes out a bit in the way in which an account of being a parent emerges in the case law of the European Court of Human Rights. There is also the contrast that's constructed between that idea of truth, Emily, and the idea of the stability of the family unit. So in the paternity challenge cases in European human rights law, for example, that's the dichotomy that's constructed: between the right to know about origins and potentially the right of the genetic father to know, on the one hand, and then the stability of the family unit without the information, without the knowledge, on the other.

JULIE: I really like the idea of looking at what lens you are using to look at this and the idea that you get different answers depending on the lens. I think that shows the different layers of things we're trying to do with legal parenthood. And that relates to the question of regulation – are we regulating this for the relationships that we see as socially valuable in society? Is it for financial reasons, and all the connections to property? Is it both? And how do you hold that all together in this one status that's contested, but that people see in terms of just being? It's only a kind of being thing if you fit the models. If we think about it in terms of inclusion or exclusion there's something about the kind of relationships that we make legible and not legible through state regulation. This relates to Liam's paper [in the next section] – these notions of the good parents, the bad parents, those who are in and those who are out of that model. Law has this impulse and need to categorise. But there's a question of how people's subjectivity then comes in.

LIAM: I was just going to come in on that and link back to the whole idea of the truth when we're looking at DNA. And I feel like it's already been said. But my biggest gripe with searching for the truth is that it's always constructed along biological lines. And I feel like – and going back to the paper that you wrote in the Eekelaar collection, Sarah, about truth and identity<sup>3</sup> – it's only ever a certain type of truth that's prioritised. There's never a recognition in law, in my view, that the social reality is just as important or can be just as truthful. Law prioritises biology and genetics as the foundation. You see that in some circumstances it's not prioritised through legal presumptions, as where people just go on the birth certificate and biology is ignored. But the second it becomes contested, that unmarried father can just be displaced. Or going back to Emily's point in her paper, about the *P v Q* case,<sup>4</sup> where the

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<sup>3</sup> S Trotter, 'Truth and Reality in Family Law', in S Gilmore and J Scherpe (eds), *Family Matters – Essays in Honour of John Eekelaar* (Intersentia, 2022).

<sup>4</sup> *P v Q* [2024] EWFC 85, [2024] 2 FLR 1178.

mother can just get taken off the birth certificate because it came down to a contested idea of whether they actually had sex or not ... I just think that law is prioritising certain ideas of truth and it's always revolving around biology and genetics, but then why is the social reality not just as important? And why is that not truthful? I just don't understand why truth always has to be synonymous with a biological version of truth.

DAFNI: When we think about parenthood, one of the main questions that we need to ask – and I think this ties in a lot with what Sarah is exploring in her paper – is who is a parent? But also in the background, who decides who is a parent? Who decides what the answer to the question looks like? And I think there are three functions that the law is performing here. One of them is self-validating. So this idea that the parent is the one that the law says the parent is. And this also relates to, secondly, the channelling function that Claire also refers to in her paper – the idea of putting any and extremely diverse experience of who your parent is into these straightjacketing categories. And I don't know, as a lawyer, if it can ever be different. One of law's functions is to self-validate and also to make sure that we have categories we can deal with. That doesn't mean that it can't be criticised, but I think that is quite inherent in what the law does in most instances. But this does mean that, for example, children will have different experiences of who they call their parent. For some, there's this idea of 'I want to meet my biological parent; it is important to me for my self-identity; I think of them as some sort of parent to me', while others will say 'actually I was raised by my grandmother, my grandfather, and these are the people who I consider parents'. So I think one of the functions conflates different experiences, and I struggle to think a bit how else it could be done, but I think it does relate to the ideas that Sarah explores. And the third function I think is self-perpetuating, and that relates to the point that Claire made, and this broader idea that we tend to think of the nuclear family as the golden standard, but that is a very specific snapshot in time. It is very much in the later period that we have children that are primarily raised within the nuclear family. It is not the experience of many different cultures both within Europe and at different times and places. But because we have – or maybe this is a question: is it because we have ascribed so much value to this ideal nuclear family and this idea of knowing who your nuclear family is, that it has become so important for our self-identity to know, to be able to very specifically point out these people that belong to our nuclear family? If we were at a different snapshot in time, would it still be so important and would we ascribe so much value to it in terms of their right to know your own origins?

EMILY: I wanted to say something about a really good example of where the law is just a real mess here, and that's the cases in which the legal parenthood of a child was wrong because the clinic had filled in the forms wrongly, so people – often same-sex female couples – were told by the clinics 'you think you're the parent of your child, but you're not because we didn't fill in the form properly and you have to therefore go to court where a judge will declare that you're the parent'. And making a declaration was almost automatic, because it was so clearly just an administrative error. It seems such a good example of how strange this is that you can have this status which matters so much which turns on whether or not a form is filled in correctly. So it's not about some sort of biological truth here. It's about form-filling and it just seems so strange that we would think that this is a core part of your identity which turns on something quite bureaucratic and trivial.

JULIE: I like to call that the paper-working parenthood regulation. How did we get there? It was through these provisions that were really contractual in nature, really bureaucratic rather than about what people's experience had been, what their expectations were, what they thought they were doing. When you take a step back and look at it, it almost seems farcical. It's like the law says you're not a parent, but if you go to court and apply for it, the judge can then say that you are through a different piece of paperwork.

MAEBH: But it is important, and at least you have that space in the legislation for that. Irish legislation has now tried to make it so operationalised by rule of law that there is no space to go to court. I think that's an important thing: how much do we acknowledge that legal parenthood can be contested? And how much do we think that if we just had the right regulation, we could have signed the correct person each time as a matter of law? And I think that that seems to be a huge tension amongst legislators ... Because law is inherently normative, right? This is the point that Dafni's making: that we can have queer criticisms of how law is so normative, but ultimately it has to be normative. It has to create categories, it has to create rules, and we can rage against them ... But does it go so far as to say well, we can pre-emptively decide everybody's parents for them? Or does your system acknowledge that there must be a space to consider complicated circumstances such as not filling out forms?

CLAIRE: Does that come back to the whole notion of there being some truth of parenthood? Whether or not that truth is biology, do we need to contest not just the idea of the parenthood truth being biological but also whether or not there is some kind of truth of parenthood that we can determine? And if so, who is in charge of determining this? Is it the law's role?

SARAH: I'm also wondering something on the basis of the cases that you were just talking about, Emily, because there's something really interesting going on in those cases, at least in the sense that it seems to also be about maintaining an idea that certainty is possible here. There isn't an allowing of it to be otherwise ... So the forms have been filled in incorrectly, and there's the need to go to court ... Is there something going on in that to do with a kind of faith in law, an idea that it's possible to actually come up with an answer to this question and have a degree of certainty about it? I think that goes a little bit to what Claire is saying about whether there is a truth in this. But I think my question would be: is it something to do with needing certainty?

DAFNI: I was going to make a similar point. I would construe what Claire is talking about when talking about whether there is some sort of truth in terms of whether there is some constancy and whether there is some need for something to be constant, especially when you need a parent to have responsibility for a child. So in that sense I'm coming at it again from this adult-focused perspective, but from the sense of binding someone. And I've been thinking while we're talking about how conflict really is the thing that ultimately maybe saves our laws of parenthood. That is when the law needs to step in – in contexts of conflict between parents who want to be recognised or who want to walk away from being responsible for the child, in contexts of conflict over the decisions that they're trying to make for the child, conflict over who will care for the child, or who can decide where the child lives, and so on and so forth. So is it about truth and identity from this personal identity, personality perspective of what it means for someone to be your parent and what it means for you to be the child of someone? Or from the perspective of law is it more about how to put structures in place that will help decide when conflict arises, if it does? And this is also why I think that in many realities of how children are parented, they are not really taken care of by their legal parents necessarily, but that doesn't really matter because if no conflict arises, people figure it out in practice and they don't really need the law to tell them actually you can't decide XYZ except when they need to get in contact – you know, for example, medical concerns or relocating the child and so on and so forth where they actually need to have that legal capacity. Also in certain realities children can be actively parented by someone like their grandparents, and as long as everyone understands that this is for the benefit of the child and everyone agrees that this is the best way forward, there's really no need for the law to step in and declare no, you're not a legal parent of the child ...

EMILY: I totally agree that on those form-filling cases, it's about certainty and identifying the parent. There's a really interesting recent surrogacy case where a parental order is made in respect of an adult, so that's not about caring for the child, but about there being some kind of certainty that this is your parent and that that continues into adulthood.<sup>5</sup> And there's also a recent case where an adoption order is made for an adult following a surrogacy case as well.<sup>6</sup> But those contrast with the completely baffling Icelandic surrogacy case where the European Court of Human Rights says that because there's a foster care arrangement in place for the people who are caring for the child, that's ok, and that you don't need to make a parental order in that case.<sup>7</sup> And I think that contrasts really interestingly with these recent cases in the UK, where it's not about caring but about certainty of parenthood into adulthood for children born through surrogacy. So I totally agree that in the sense here – and certainly in the UK cases – this truth seems to be about certainty rather than necessarily about genetics.

LIAM: I think it's absolutely about certainty, but just to think about the ideas and norms that are underpinning that ... I think it's certainty, but because of the overarching need of assimilation. The forms are filled in wrongly, but had they not been the family would have conformed to our accepted notions of an expanded idea of the nuclear family. So for me it all comes back to the nuclear family. That's what all these ideas are based on. That's what all these laws have been premised upon, and that's what these queer or otherwise non-conforming families come within, because they're all conforming to an idea of what a parent is. And I just wonder, because if these forms hadn't been misplaced or filled in incorrectly, there's still that prior thing of they've still conformed to this assimilatory idea of a family, and the law would not be able to recognise it had they not done that. So yeah, just bringing it back to the nuclear family.

SARAH: I think it's also to do with ideas and norms about law, and an incapacity to be with the reality that the forms were filled in wrongly, and so it's not completely reflected at the level of 'legal reality', if you want to put it like that, and there's just an incapacity to be with that. So I think this is also to do with a need to be able to locate certainty in law, and the ideas and norms constructed in relation to law itself. But I think it's a really interesting point, Liam, because there are different dimensions to it, different layers to the certainty going on here.

JULIE: I think it's great to keep coming back to Claire's idea of what would happen if we abolish this status, because then you can start thinking through what it actually achieves or what it's there for. One thing I'd like to throw in the mix is if we abolish it and move to more of a notion of responsibility, do we just shift all these questions of contestation that we have about legal parenthood to this more social concept of responsibility? So would we be having the same conversations? Or is a more helpful abolition conversation about what we want to achieve with the concept? Can we take some of the pressure off it? So if this really is something about just inheritance, you take the pressure of all the identity issues off it, or maybe we don't really want something about the protection of private property and inheritance and succession rights and you have status for these kind of validatory notions across society, and you start to think about it in a way that's a bit more detached from the restrictions of the nuclear family norm. We probably can't come up with any answers ... I was reading something by Kathy Weeks on family abolition, and her preferred strategy was that you take away the idea that all the needs have to be satisfied within the family and then you have other infrastructure in society that meets some of the needs that are increasingly

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<sup>5</sup> *X v Z and others* [2022] EWFC 26, [2023] 1 WLR 1493.

<sup>6</sup> *J v P* [2024] EWFC 41.

<sup>7</sup> *Valdis Fjölnisdóttir and others v Iceland* (Application No 71552/17) (2021) 18 May, ECtHR.

familialised.<sup>8</sup> And I wonder if we thought about legal parenthood in that way, how do you take the pressure off it to help clarify what you'd actually want to do with it?

CLAIRE: And I think this goes to the deeper question that goes across all family law: to what extent is it the role of law to fill these – in some circumstances – quite social needs? When you're talking about the establishment of identity, for example, is it necessary for the law to declare something? Or is this something that could be achieved socially in other ways?

MAEBH: Yeah, I'm always interested in how a lot of this always centres around this idea of really responsible and caring parents and constructs the status as nearly a reward for that behaviour when quite a lot of family law is going after really terrible parents. Like the whole of maintenance ... Lots of people talk about the intentional parents, but what about the non-intentional parents – do we just have such a seismic shift that we're only looking at people who are invested in being parents? Or are we also looking at people who we consider to have some kind of financial responsibility or liability towards their children even though they have chosen not to take it up? I always think that because of the way the politics are constructed in the newer models, focusing on people who really want parenthood. And then if you go really radical, like you're talking about, Claire, well, maybe that's not family law but really just a better state system that would support families. You can shift it to other places, but with the people we give parenthood to or parental responsibility to, do they always have to be signed up and dedicated? Or are we also trying to catch the people who are not doing a great job? Social welfare systems would maybe recognise those kinds of things as well.

FATIMA: Isn't that what public family law's doing? People have the parenthood status, but we think they're really bad parents because they do drugs or they are a criminal or they're extremist or whatever. And then we do the opposite ... So what you're saying is maybe the legal kind of politics of parenthood is constructed around the people who really want to become parents, and then the close regulation of parental responsibility happens on the other side, of people who are biologically definitely parents but who we think are practising it in a non-ideal way.

DAFNI: I was also going to make a point about child protection. There is this monitoring that happens in cases where the state has this ultimate duty to protect children, and there's a degree of being able to identify the individuals that are responsible and whether they are engaging with children in the way that the law expects them to, and not just in terms of child protection but also in terms of other state-mandated obligations with regard to children, like the fact that they need to go to school, have vaccinations, and be taken to a hospital if something happens and so on. So, thinking about what would it look like if we didn't have parenthood, I guess parenthood functions as this default state in terms of who has responsibility over these things. Who do we look to in the first instance for answers when things go wrong? It might not be the parent, but it is the parent that is responsible for having avoided the harm to the child. But also it is a default in terms of succession – if you haven't made a will, there is a default plan for how your property will be inherited upon death. And I'm thinking that maybe one of the things that we struggle with here is that parenthood is meant to do so many different things. It's meant to act as a default in very different areas, which on some level reflects what the reality is also like – the relationship between a parent and a child spills over different responsibilities and different kinds of duties. But I wonder whether it acts as a default in so many different ways that it sort of obfuscates the broader picture.

CLAIRE: And I think this is part of my problem: that we're trying to apply this concept in so

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<sup>8</sup> K Weeks, 'Abolition of the family: The most infamous feminist proposal' (2023) 24 *Feminist Theory* 433.

many different ways and for so many different functions and for so many different reasons. I mean, if you look at succession, the reason why we have succession rights between parents and children might be completely different from the reasons why we assign the responsibility for getting vaccinations and making health decisions to parents. So if we go back to the question of what we are actually achieving here, maybe – and I think you're right Dafni – that might give us some answers.

DAFNI: I think to a certain extent some of the functions of parenthood as a status have to do with acknowledging the reality. For example, I assume that succeeding to someone's property has to do with the fact that you actually had a relationship during their lifetime – which might not be the case, right? But right now the underlying assumption is that you're sort of in an interdependent committed unit where there are financial responsibilities, which might not be the case at all.

SARAH: I think it's also to do with the construction of a normative vision of how reality should or could be, and that was something I wanted to ask Claire about also. Say legal parenthood is abolished as a category, what then happens? How do we then identify and locate the normative assumptions that are made about being a parent, if we don't have the legal term for it to find those assumptions? It's the same question I would ask in relation to arguments in favour of a move towards gender-neutral legal parenthood. If we lose the terminology of mother and father, how do we then identify in law the kinds of assumptions that have been made about those categories? I don't know, Claire, if you want to come in on that – on this post-legal parenthood world, where I would imagine that law would still be constructing some vision of being a parent, except we wouldn't have the language to identify it.

CLAIREE: Yeah, I think that would be really important – there would still be this idea of there being a relationship, but we would be defining it on a functional basis. So for succession, for example, we would be basing the succession rights on the fact that we are recognising a certain pre-existing relationship that involves responsibility for maintaining. And so it would be much more specific rather than just operating on the assumption that everyone has this relationship. So rather than using this catch-all legal term of 'you are a parent and therefore this is everything that flows from it', my idea would be to say well let's look at what we use this for, and let's really go back and think about what we are trying to achieve with this. What's the point? So that we're not making so many assumptions, so that we are able to fit to differing families, so that we are able to break up the gendered heteronormative nuclear family idea of this is what the relationships should look like within a family, so that we are able to think a bit more constructively about what is happening and why it is important.

SARAH: So we lose the channelling function, basically? We lose the symbolic channelling aspect of it and take it back to recognition?

CLAIREE: Absolutely. So recognition versus regulation.

EMILY: Two other contexts where I think this idea of identifying who people are within a family happens outside of the context we've described so far. One is the rules for criminal injuries compensation in the event of a death of a family member. So, for example, if you lose a spouse, you can make claims for what you've lost from that spouse, which can have a lot to do with all of the work that they would have done for you going forward into the future. And then with children, it's also very much about what they did for you. It's really quite transactional, and money is calculated on the basis of what somebody does. So it's sort of like succession, because somebody's died and you're distributing criminal injuries compensation amongst a very limited group, but on the basis of a very transactional view of what the dead

person would have done, 'but for' the crime that led to the end of their life. The other example is the part of the Human Tissue Act 2004 where there's a hierarchy of people who can have a say over organ donation. This has been somewhat superseded by the coming into force of deemed consent, but it's quite interesting because it's very clear that you have at the top of the list partner, spouse, then children and then various other relatives, and it goes down in this rather interesting hierarchy of who is the person who is allowed to have a say here. And I think if you were to lose legal parenthood, it would disrupt things like that in a really interesting way. I'm not saying you shouldn't do that, but I think there would be so many interesting ripple effects of getting rid of it. But I'm really excited and challenged by Claire's suggestion. I think it would be really interesting to think through how you do that differently without that concept.

LIAM: I'm surprised, but also not surprised, at how much we've been discussing succession and inheritance and property. Obviously that's foundational in terms of where family law's coming from, and I understand that. But whenever we talk about the family and then it goes into a discussion of property, I've always felt really uncomfortable. I know it has so much relevance, but there's always something really weird to me about discussing the family and rights and children and then going into succession and inheritance. And then another comment is that we've spent a lot of time talking about how best to recognise and the norms that are underpinning the law. But my question in a different way would be: why do we care? Why do we care what the law thinks? And that's what I'm interested in. I don't care what the state has to say about me and how I live my life, but at the same time I need to play the game and fit within the categories for legal protection, because I need to be acknowledgeable and intelligible by the state.

FATIMA: I wanted to just interject a little bit with Liam's point there because I always feel really icky about this too. And I think part of it is to do with age. Our generation mostly doesn't have property, and never will. And so the intertwining of family and property is to me at least unrecognisable. I can't relate to it. What I do relate to though – and this is where positionality becomes important – is the concept of family within citizenship and immigration law. I find that is so relatable to me, way more than property law. And so that's where categories of parent and dependent – what they use instead of child – are just so interesting and important. And they're quite strict, actually; if they're fluid elsewhere, they're really strict when it comes to immigration and citizenship. And the binaries here act as borders as well – of who's part of the nation, who's not. So when we talk about inclusion and exclusion, it's not just about property, but about who gets to be, who belongs and who doesn't belong in terms of the nation, citizenship, and so forth. So I just wanted to echo your point, Liam. I think at the workshop in March, the issue of class was so pronounced, and class, intergenerational divides, and also positionality in terms of race and immigration are all really important.

BETH: I just wanted to say that it's so important for adults with learning difficulties who have had their children removed to hold on to the fact that they are still the parent, even if they haven't got the responsibility for their kids. And you can do what you like legally, but those parents who've had their children removed from their care are still going to feel that they are their parent.

JULIE: That's the affective side of legal recognition, and I sometimes think the law's got it the wrong way round. There's quite a lot vested in status in terms of responsibility for responsibility, and this gets bundled in with – if we're talking about inheritance, it was always about that ongoing financial responsibility in a way, so that the state wouldn't have to effectively pick it up. But things like child maintenance. You have that obligation as a legal

parent irrespective of whether or not you also have parental responsibility. Yet when it comes to something like adoption, you have to have parental responsibility to be able to consent or not. And I just wonder whether it would be worthwhile unpicking what rights and entitlements go with which legal concept and investing more in parental responsibility and thinking more about that affective or recognition/social validation aspect of status as a legal concept. It makes sense to me, unbundling these, but maybe it doesn't make sense to people in difficult situations where it's more helpful to have them bundled up. But I think it's what we keep coming back to when we come back to inheritance, and it really is about using family law to indicate social responsibilities, very many of which are financial.

SARAH: The affective point is really interesting because – and I was also going to come in on the point about people seeking recognition through law and needing recognition – I think it is a really important function of the legal status of parenthood. But I suppose the broader question is about the use of law for that purpose. I think it came up earlier as well. Is this something that we want to be seeking through law? I think that's something that we might come back to in the next panel on recognition too. But just to go back to Liam's point about succession, I suppose one of the reasons it comes up is because it's such a clear-cut case of law articulating a list – a little bit like Emily's example of the Human Tissue Act – of who gets priority and law's vision of the family. The way I teach it here when we talk about inheritance law is in those terms – that this is an area of law that articulates some concept of the family and sets out a ranking of family members. But I think the question of why law continues to adhere to that is a really good one.

EMILY: On the recognition point, there are some really interesting questions that arise in relation to the recognition that you were a parent where you have very late pregnancy loss. You'll be aware of the recent change to enable people to get a certificate of loss,<sup>9</sup> which doesn't matter to everybody, but it matters a great deal to some people. And the law draws some really strange boundaries here in relation to at what point in relation to pregnancy loss are you still entitled to maternity leave, because there's a point at which you are and a point at which you're not. So the law is drawing some really interesting lines there about people who, in a sense, are not parents, because their children haven't survived – and while they might be parents of other children, they're not the parent of the child here because the child has not been born alive. But that matters to people a lot, and it has really important concrete impacts. If you're on the wrong side of that boundary, you can't get access to maternity leave after late pregnancy loss. So in terms of recognition, it is a status, and that matters to people, but it also has really important practical implications for people's lives.

SARAH: Emily, just on that example – and I know we have to stop now – it's also interesting because the law is drawing a line in a way that doesn't necessarily align with people's feelings. What would need to be recognised here, therapeutically at least, would be someone's feeling and experience of loss. But then law imposes this boundary on it and says, well, if you're not here, you can't be seen in that way ...

EMILY: I couldn't agree more. The law is in a sense helping and not helping at exactly the same time. There's some recognition there, which for some people is a bit helpful, but the way in which it does it is unhelpful because it does it in the way that law always does by saying there's a bright line here, and if you fall one side or the other, it will affect you. And that doesn't really cohere with how people experience the loss of a pregnancy.

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<sup>9</sup> See further: [www.gov.uk/government/news/baby-loss-certificate-launched-to-recognise-parents-grief](http://www.gov.uk/government/news/baby-loss-certificate-launched-to-recognise-parents-grief), last accessed 6 January 2025.