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Family Law as Social Policy: Taking Family Problems Upstream

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Abstract Family law legislation has often been a focal point for reforms which are aimed as much at changing the societal attitudes and behaviours of family members as affecting their statutory entitlements or how the courts approach family disputes. There has been a tension in the approach of politicians between, on the one hand, using family law to influence how family members think and behave in relation to one another, and on the other hand, failing to engage with policy solutions that might more effectively achieve those aims. This article situates family law as a tool of social policy, but one which is often not suited to the policy problems to which they are applied. Family law, which generally responds to some form of family crisis, comes too late to have the desired effect. The problem needs to be taken 'upstream', considering the policy factors that influence the way in which families operate before any crisis occurs. This article repositions these upstream policy issues as the central considerations for those interested in effecting societal change to family life.
Key words: family law; social policy; role of law; family behaviour

1. *Introduction*

The issues that arise within family law, as an academic discipline and an area of practice, link to wider discussions about the place of partners, parents, children and extended families within society and about the state's interactions with them through social policy decisions. This article concerns the tendency for policy-makers to use family *law*, understood in a relatively narrow sense, to help tackle wider *social policy* problems. Although family law can be seen 'as an instrument of social policy',[1] I argue that in many of these instances, family law is not the right tool for the job. Family law tends to bite in response to family crises, in other words, when family life is already unravelling. If policy-makers want to change societal attitudes

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[1] Mavis Maclean, 'Introduction' in Mavis Maclean (ed), *Making Law for Families* (Hart Publishing 2000) 1.

and practices within intact families, focusing on family law solutions, therefore, comes too late. Instead, policy-makers should adopt something more akin to a public health approach to family policy and consider policy solutions that are 'upstream' from the immediate problems. Coming at an earlier point in time, this approach would allow for the development of policy that addresses the source of problems in family life, rather than focusing only on the symptoms once they eventuate.[2]

Part 2 of this article sets out what I mean by family law and family policy, setting the boundaries of those terms before I move, in Part 3, to consider how they interact with one another. In Part 4, I step back and think about some of the potential functions that (family) law might be performing, setting the scene, then for addressing in Part 5 the extent to which family law can be used as an effective tool for implementing social change. Within Part 5, I take three examples of legislative reform where family law is used with the aim of creating social change, but where, as I argue, the aims would be better met using other tools within family policy, which would have effect 'upstream' from the problems and therefore be more likely to prevent those problems from arising in the first place. I conclude in Part 6 by linking these ideas together and suggesting that there would be value in considering family problems in a way that is more akin to a public health approach, looking holistically at creating a policy framework that reduces the need for family law interventions.

2. *Family Law and Family Policy*

The first thing to establish is: what is family law? The question of what family law is and what it is for has been the subject of sustained consideration over a long period.[3] The typical family law textbook deals with family formation and family crisis: formation in terms of marriage and civil partnership and the establishment of legal parenthood; and crisis in terms of separation and divorce, domestic abuse, disputes about children after separation, and child protection, with adoption law straddling the

[2] There is some similarity here with Leanne Smith's argument when she calls for 'a rethinking of the boundaries of family law to shift focus away from dispute resolution and towards more constructive and anticipatory approaches': Leanne Smith, 'Family Law for Family Life: Rethinking the Boundaries of Family Law' (2025) 78 CLP, online access [internal p 1].

[3] See, for example, Brenda Hale, 'Private Lives and Public Duties: What Is Family Law For?' (1998) 20 JSWFL 125; Alison Diduck, 'What Is Family Law For?' (2011) 64 CLP 287.

issues by turning one family's crisis into another family's formation.[4] But the family law syllabus, the family law textbook, and the practice area for family lawyers and family court judges have little interest in what happens between family formation and family crisis, which is to say, everyday family life. That is not to say that the law more broadly has no interest in everyday family life: taxation law, social welfare law, property law, employment law and others all have significant impacts on families away from the moments of formation and crisis, but they are not generally considered part of family law's cannon.[5] Exceptions to these generalizations stand out: Alison Diduck and Felicity Kaganas's textbook *Family Law, Gender and the State* has chapters on 'The Family-State Relationship: Social Policy' and 'Household Economics'[6]; Rebecca Probert edited an excellent collection of essays in 2007 that looked explicitly at ways that the law interacts with intact families.[7] Here the exception proves the rule: the unusual nature of these texts illustrates the standard limitations of what is considered to be family law.

These wider links between family law, narrowly defined, and the wider ways in which families interact with the law are important for my argument, though it is worth noting that the family court—the epicentre of the practice of family law, though certainly by no means the only place that it plays out in practice—denies itself the ability to engage with these wider issues. For example, many families find that, after parental separation, the cost of providing two homes that are suitable for children is much greater than can be afforded. A local authority's housing department might be in a position to help with that—at least, in a parallel universe where resources were not as limited as they currently are—but the family court may not make an order that even appears to influence the housing department in its allocation of resources.[8] So it is that

[4] See, for example, Rob George, Sharon Thompson, and Joanna Miles, *Family Law: Text, Cases, and Materials* (5th edn, OUP 2023). With one or two exceptions, most family law textbooks do not deal with family crises flowing from the death of a family member either, such as inheritance or property rights after the death of a spouse/partner or parent.

[5] Again, see also Smith (n 2) on the possibility of a wider approach to what 'family law' is.

[6] Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (3rd edn, Hart Publishing 2012). See also Brenda Hale, David Peral, Elizabeth Cooke and Daniel Monk, *The Family, Law and Society: Cases and Materials* (6th edn, OUP 2008) ch 3.

[7] Rebecca Probert (ed), *Family Life and the Law: Under One Roof* (Hart Publishing 2007).

[8] *Holmes-Moorhouse v London Borough of Richmond upon Thames* [2009] UKHL 7, [2009] 1 WLR 413 esp [39], reflecting perhaps the more general principle set out in *A v Liverpool CC* [1982] AC 363 (HL), though the case was not cited.

the family court is told that its orders 'are not meant to be aspirational statements of what would be for the best in some ideal world which has little prospect of realisation',[9] even though 'the law', more broadly conceived, might be seen as offering a way for that more 'ideal world' to be realized. That may or may not be right, either as a matter of law or as a policy choice, but the significance for my argument is that it reflects a particular view of the role of family law—one that would be logical enough were it not for the fact that family law is also, at the same time, specifically used as a driver of what can only be described as aspirational policy about how families are supposed to operate.

Turning to what is meant by 'social policy', the academic discipline of social policy, broadly speaking, is about understanding the relationship between the individual, the family, the state, and the third sector (charities, religious organization, community groups and so on). For instance, how are the responsibilities for the different things that a society does (or might do) divided up between these players? How are society's resources and burdens shared? Martin Rein suggests that any definition of social policy 'should, at least, be broad enough to encompass services such as education, medical care, cash transfers, housing and social work',[10] linking also to Richard Titmuss's idea that social policy is concerned with social activities that serve a common purpose.[11] Because social policy responds to social problems and priorities, there are few if any single right outcomes; policy-makers must 'choose among social aims, all of which are desirable and most of which conflict'.[12]

Seen from the perspective of the policymaker, social policy is any decision which affects the allocation of resources or responsibilities as between the various players. For example, it is a social policy decision whether healthcare is provided by the state from general taxation, on a state-run insurance model, though private insurance or individual funding, through charities and non-profits, or some combination of these approaches. Importantly, a significant part of the process is to identify what is thought to be the problem to which policy is meant to respond: '[p]roblem-setting is as important as problem-solving because the frames which organize thoughts shape the conclusions we reach'.[13]

[9] Ibid [38].
[10] Martin Rein, *Social Policy: Issues of Choice and Change* (Random House 1970) 3-4.
[11] Richard Titmuss, *Commitment to Welfare* (Pantheon 1968).
[12] Rein (n 10) 250.
[13] Martin Rein, *Social Science and Public Policy* (Penguin 1976) 14.

Moreover, '[s]ocial policy choices are made through political processes',[14] so both the framing of the problem and the identification of the solution are inextricably linked with politics and the nature of governmental decision-making. This insight is important in all areas of social policy, but for family policy it can have particular resonance: as I will set out below, the framing of a family policy problem as being primarily legal in nature, and the ready ability of governments to legislate in the family law field with little (visible) financial cost, is part of the reason why family law is chosen as the vehicle by which government responds.

Family policy, as an explicitly acknowledged sub-field within social policy, is comparatively new. Jane Lewis notes that although many areas of policy had direct and indirect impacts on families, '[n]ot until the 1990s did [the British] government … attempt to formulate a family policy' which was identified as such.[15] Before this (and still to a considerable extent since), the approach has been 'to make implicit assumptions about family form and functions, which have had a profound effect on policy, but not address family questions explicitly'.[16] Consequently, as Linda Hantrais observes, 'definitions of family policy are often extended to encompass policies implemented in other areas that may have an impact on families'.[17]

Unlike family law, family policy is largely focused on intact families and is not particularly concerned with either family formation or family crisis. There was, for many years, an assumption that family policy was concerned only with 'traditional' families: the married, two-parent family where the man's role was primarily as financial earner and the

[14] Phoebe Hall, Hilary Land, RA Parker and Adrian Webb, *Change, Choice and Conflict in Social Policy* (Heinmann 1975) 3.

[15] Jane Lewis, 'Family Policy in the Post-War Period' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (OUP 2000) 81. Janet Finch suggests that government thinking about 'the family' became more explicit in the 1980s: see 'Social Policy, Social Engineering and the Family in the 1990s' in Martin Bulmer, Jane Lewis and David Piachaud (eds), *The Goals of Social Policy* (Urwin Hyman 1989) 160.

[16] Ibid 99.

[17] Linda Hantrais, *Family Policy Matters: Responding to Family Change in Europe* (Polity Press 2004) 166. As with family law, though, there are many areas of social policy that have major effects on families but are never thought of as family policy. Diduck quotes a 1999 study from the National Family and Parenting Institute where participants highlighted that 'issues about traffic, street lights, public transportation, low wages, accessibility of shopping and business centres, and racism were crucial to their everyday familial lives', but are not analysed from the perspective of family policy-making: Alison Diduck, *Law's Families* (LexisNexis 2003) 28–29.

woman's as carer.[18] More recently, family policy scholars have moved to focus on issues like parental leave policy, flexible working time, maternity and neo-natal care, early years education (though primarily as a form of state-funded childcare and the link therefore to the labour market), and family benefits (like child benefit and working family tax credits).[19] For family policy, key questions include what role (if any) the state has in supporting existing families to live their lives better, and what role (if any) the state has in encouraging particular family forms, in particular[20] in encouraging families (women) to have more children,[21] and how childcare should then be divided between parents and with what support from the state. While these issues can be taken in isolation, there has been an increasing trend to recognize their interconnection.[22]

Where connections are rarely made, however, is between the broad ideas of family policy and the world of family law and the family courts. Family policy as an academic discipline is relatively uninterested in family law or the family courts, with 'family law and child protection policies … usually left outside the scope' of family policy's field of interest.[23] Indeed, a search of the Journal of Social Policy for the term 'family court' revealed no results at all. Searching for the term 'family law' revealed just four articles; only one of them engages with family law in any detail. In that one article, leading family sociologist Carol Smart observes that 'family law [is] a key instance of family policy',[24] and engages with how family law and policy might interact in various ways. That connection, however, is not reflected more widely in the literature, even though the relationship between law and policy is crucial.

[18] Lewis (n 15) 81–82.

[19] See, for example, the chapters in Guðný Eydal and Tine Rostgaard, *Handbook of Family Policy* (Edward Elgar 2020).

[20] There are other versions, though, in particular in incentivising couples to marry by using tax incentives for married couples as opposed to those who cohabit without marrying: on the use of this kind of policy previously in England, see John Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld and Nicolson 1984) 201.

[21] See, for example, Malgorzata Fuszara and Beata Laciak, '"Pro-Family Policy" in Poland in the Nineties', in Mavis Maclean (ed), *Making Law for Families* (Hart Publishing 2000).

[22] Barry Freidman and Martin Rein, 'The Evolution of Family Policy in the United States after World War II', in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (OUP 2000) 101.

[23] Guðný Eydal and Tine Rostgaard, 'Introduction' in Eydal and Rostgaard (n 19) 3.

[24] Carol Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy' (1997) 27 JSP 301, 305.

3. *The Interconnection Between Family Law and Family Policy*

Moving from Smart's intuition, in this section, I explore some of the ways in which family law and policy can be seen to be inherently interconnected.

Starting at a practical level, it can be noted that family law problems rarely occur in isolation from wider social policy questions. There is often what Stephen Cobb terms 'a domino effect' in cases of family crisis, where people 'tend to experience clusters of problems'.[25] For example, Cobb illustrates the difficulty using the example of divorce and separation,[26] where many families struggle to arrange adequate housing for two families;[27] there may be a need for one or both to move to a new area, which may disrupt social support for everyone involved, which GP or local authority is engaged, etc; it may be that only one parent is employed or that in any case the income available is inadequate to running two separated households. These problems then reverberate further, creating employment problems, disrupting children's engagement with education, causing or exacerbating debt issues, creating or worsening mental health difficulties, and so on. Consequently, what may be identified in one sense as family law problems can engage far wider areas of the social welfare system and therefore, by implication, wider areas of social policy.

Conversely, many aspects of social policy are underpinned by, guided by, or indeed exist only because they are set out in some way by law. For example, thinking about education policy, various pieces of legislation form the central planks of how education is delivered,[28] but education policy goes far beyond that: there is government guidance[29]; the national curriculum; input from local education authorities and, in the case of free schools at least, a policy of increasingly decentralised decision-making about the delivery of education.[30] Similarly, family

[25] Stephen Cobb, 'Legal Aid Reform: Its Impact on Family Law' (2011) 35 JSWFL 3, 4.

[26] Ibid. See also Zoe Williams, 'So We Can't Afford Legal Aid? Look at the Costs Without It', The Guardian (23 June 2011).

[27] See, for example, Emma Hitchings *et al.*, *Fair Shares? Sorting Out Money and Property on Divorce* (Nuffield Foundation 2023).

[28] See, for example,the Education Act 1996.

[29] For examples of statutory guidance, see, for example, 'Keeping Children Safe in Education' (3 September 2024); 'School Suspensions and Permanent Exclusions' (19 August 2024); 'Supporting Children with Medical Conditions at School' (16 August 2017); 'Behaviour and Discipline in Schools: Guide for Governing Bodies' (24 September 2015).

[30] HM Government, 'Types of School: Free Schools', online at https://www.gov.uk/types-of-school/free-schools.

policy has elements of law,[31] but the law is merely part of the story, interacting in complex ways with social norms and societal customs.[32] As Ira Ellman says, the family is 'a sphere rich with nonlegal obligations that people take seriously',[33] and John Eekelaar is right that, in everyday life, people will often not know or draw a distinction between what are strictly legal rules and what are 'merely' social norms or customs.[34]

The relationship between these norms (or 'nonlegal obligations') and family law and policy is complex and to an extent symbiotic: the decisions about what the law should say are influenced by existing social norms, both when devising legislation and in the development of case law,[35] but social norms also develop in part in response to what the law says. It is this attempt to shape social norms that Janet Finch terms 'social engineering' in the context of family policy formation.[36]

The role of law and of policy in shaping social norms is complex, particularly in an area like the family where there are such strong societal influences independent of either law or policy. Law and policy might aim to prop up, alter or even undermine an existing social norm,[37] and the family sphere offers an array of examples, but their chances of success and likely effects are hard to predict. Ellman thus cautions those who turn to family law in this way that '[t]hings may not work out as you expect',[38] while Glendon similarly comments that '[i]t has become commonplace that policies in these areas occasionally produce unintended side effects on family life which are hard to control because they are for the most part unforeseeable'.[39]

For example, as I will address in more detail below, divorce law has historically been used, largely unsuccessfully, as a tool to attempt to 'support marriage' and reinforce the norms of stable, long-term

[31] Part III of the Children Act 1989 is a good example, setting out obligations on local authorities to provide support services for children and families in need.

[32] John Eekelaar, 'Uncovering Social Obligations; Family Law and the Responsible Citizen' in Mavis Maclean (ed), *Making Law for Families* (Hart Publishing 2000) 16.

[33] Ira Ellman, 'Why Making Family Law Is Hard' (2003) 35 ASLJ 699, 700.

[34] Eekelaar (n 32) 16.

[35] Eekelaar (n 32) gives the example of Lord Hoffmann's speech in *Piglowska v Piglowski* [1999] 1 WLR 1360 as showing that the court considers itself entitled, in the family law field at least, to give guidelines about future cases based on 'values about family life which it considers would be widely accepted in the community'.

[36] Finch (n 15) 160.

[37] On Smart's thesis, attempts to do so may amount to 'harmful tinkering': Smart (n 24) 318.

[38] Ellman (n 33) 700.

[39] Mary Ann Glendon, *The New Family and the New Property* (Butterworths 1981) 137.

monogamous relationships. The related legislative policy changes of introducing civil partnerships in 2004,[40] and then of same-sex marriages in 2013,[41] also reflected policy-makers' wish to promote committed relationships,[42] but such changes are also linked to shifting social norms about homosexuality.[43] So whereas these policy aims in relation to stable relationships may have had limited effects,[44] the legislation concerning same-sex relationships was a significant driver in changing social norms about the social acceptability of those relationships (both within and outside marriage).

Part of the complication is that family law has various functions which in a given instance may be variously and inevitably interconnected, as I will now explain.

4. *Family Law's Functions*

Family law is used by policy-makers and others for a number of purposes. Sometimes a legal change is used to alter the categories of people eligible for a particular legal status, such as the Marriage (Same-Sex Couples) Act 2013's extension of marriage to gay and lesbian couples, or the Human Fertilisation and Embryology Act 2008's extension of the eligibility rules for surrogacy to same-sex and unmarried couples, and later to single people.[45]

Other times, the law is focused on changing the consequences of certain behaviours or situations. Much of criminal law illustrates this approach, but in family law we see it also, for example, in relation to the law governing the financial consequences of divorce, when the family court was given power to redistribute the financial assets of a formerly-married couple.[46] Whereas prior to the late 1960s, the court was reliant on property and trusts law to determine the allocation of assets after divorce, statutory provisions since then allow for the court

[40] Civil Partnership Act 2004.
[41] Marriage (Same-Sex Couples) Act 2013.
[42] See, for example,Government Equalities Office, *Equal Civil Marriage: A Consultation* (TSO 2012) 1.
[43] Giulia Dotti Sani and Mario Quaranta, 'Mapping Changes in Attitude Towards Gays and Lesbians in Europe: An Application of Diffusion Theory' (2022) 38 ESR 124.
[44] Diduck (n 17) ch 3.
[45] Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (SI 2018/1413).
[46] Matrimonial Causes Act 1973.

to redistribute property rights, and the question of which spouse is the legal owner of property is rarely relevant.[47] Policy debates continue as to whether the law should introduce some kind of redistributive power in relation to unmarried cohabiting couples.[48]

An increasing trend in family law over recent years has also been a policy aim of 'de-legalizing' family disputes,[49] pushing people to make private decisions and to avoid bringing family problems to legal dispute-resolution mechanisms, in effect shrinking the boundaries of the law itself in this area.[50] The government tried to discourage court use by cutting legal aid as part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, reducing the eligibility criteria and taking most private family law issues 'out of scope'.[51] Nonetheless, after a short-lived drop in court applications when the new legal aid rules entered force, application numbers remain broadly steady.[52]

The law can also be focused on 'message-setting'[53]—an expressive or normative role[54]—where the function of the law is more symbolic than practical, 'tell[ing] the public what is good and what is bad',[55] and 'sign-post[ing] what is thought to be a legitimate public point of view'.[56] John Dewar has suggested that this message-setting function is indeed at the

[47] '[T]o base an award on title would run counter to the discrimination and sharing principles' that are central to the law's approach to post-divorce financial orders: *Standish v Standish* [2025] UKSC 26, [47].

[48] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (London: TSO, 2007); House of Commons Women and Equalities Committee, *The Rights of Cohabiting Partners*, Second Report of Session 2022-23, HC 92 (London: TSO, 2022).

[49] See, for example,Emma Hitchings, 'Official, Operative and Outsider Justice: The Ties That (May Not) Bind in Family Financial Disputes' (2017) CFLQ 359

[50] John Eekelaar, 'Not of the Highest Importance: Family Justice Under Threat' (2011) 33 JSWFL 311.

[51] Ibid.

[52] The *characteristics* of those cases are not steady though. There has been a drop-off in applications by young mothers (those under 25) after LASPO, suggesting that a lack of resourcing is keeping a potentially vulnerable population from seeking court help. At the same time, in England the proportion of applications that relates to a child arrangements order (residence and contact) has dropped from 69 per cent in 2010–2011 to 52 per cent in 2019–2020, whereas applications for specific issue orders have gone up from 21.6 per cent to 26.2 per cent, for specific issue orders from 7.0 to 13.8 per cent, and for enforcement orders from 2.7 to 8.0 percent over the same period. See Cusworth and others (n 95) 37.

[53] Cass Sunstein, *How Change Happens* (MIT Press 2019).

[54] Alison Diduck, 'What Is Family Law For?' [2011] CLP 287.

[55] Mavis Maclean with Jacek Kurczewski, *Making Family Law* (Hart Publishing 2011) 104.

[56] Diduck (n 54) 289.

heart of how family law works, 'set[ting] the tone' for family disputes as much as changing the substantive rules.[57] However, as successive governments, or even successive ministers, change their approach to family law and policy, what often emerges is that the law, as stated, contains conflicting ideas and values about key aspects of what family law is supposed to be doing. Mary Ann Glendon argues that policy-makers may 'enshrine in the law several competing values, hoping perhaps that out of the dynamics of this uneasy coexistence some new, more satisfactory synthesis will eventually emerge'.[58] Diduck identifies this in relation to marriage and divorce, with the law, at least when she was writing about it in the early 2000s,[59] containing 'many contradictory assumptions about the nature of the marriage relationship and about the individuals within the relationship'.[60]

The picture becomes more complicated when, as is often the case, a particular law combines several of these functions. Take the Marriage (Same-Sex Couples) Act, for instance. The Act allowed same-sex couples to marry, as a matter of legal eligibility; it promoted stable unions between couples, as noted earlier; and also asserted as a matter of policy that same-sex unions were of equal value and deserving of equal respect as heterosexual unions. Given that civil partnership was already available to same-sex couples,[61] which provided virtually identical legal rights to marriage,[62] the balance of practical and symbolic importance may have been weighted more to the symbolic.

Maclean gives other examples of family law where, although there may have been some practical consequences, the primary purpose of the law was in sending a message. The Children and Adoption Act 2006 is a key case study. The government, Maclean says, was anxious to be seen to be taking action in response to extended and effective campaigning about the claimed unfairness of the family court in relation to post-separation child arrangements, the claim being in particular that fathers

[57] John Dewar, 'The Normal Chaos of Family Law' [1998] MLR 467, 474. On how law does this (well or otherwise), and the potential implications for family life away from family crisis, see Smith (n 2).

[58] Glendon (n 39) 110. See also Rein (n 13) 22, noting that when ambiguous or conflicting legislation is passed, the problem moves from policy-makers to those on the ground who are implementing the policy and who have to make choices in practice about what should be done.

[59] The Divorce, Dissolution and Separation Act 2020 may be more coherent?

[60] Diduck (n 17) 44.

[61] Civil Partnership Act 2004.

[62] Andy Hayward, 'Civil Partnerships and the Repurposing of Relationship Formalisation: From Creating a Space to Developing a Script' (2025) 47 JSWFL 28.

were being discriminated against. Although there was no widespread or broadly-based concern about this issue, with research consistently rejecting the idea that there was in fact any systemic bias in the family court,[63] the government 'was forced to react tactically' to a campaign group that grabbed the media and to some extent the public attention.[64] Maclean describes a situation where 'the legislative process was basically a holding operation' to buy time and appear to be taking the concerns seriously, even though 'the resulting legislation carefully upheld existing policy on child law and promised little change'.[65] This approach has some effects in wider society from the message-setting, but 'the main value of symbolic legislation is to those who propose this kind of legislative action';[66] in other words, to the politicians, who get to appear to be taking action and responding to a problem without actually doing anything.

My main interest in family law for this article though is not so much with law reform that is intended to do little, but rather with law that is aimed at achieving social change,[67] to which I will now turn.

5. *Law Reform and Family Behaviour*

Glendon identifies four 'serious limits' on the power of the law to shape social norms, those being 'aims, behaviour, funds and methods'.[68] The aims can be unclear or contradictory; the behaviours of those involved are often unpredictable;[69]and many policies would work well if they were properly implemented and funded, but they are not.[70] But for my purposes, the main obstacle is methods. Even if the aims are clear, the

[63] The research evidence at the time was summarized in Joan Hunt with Ceridwen Roberts, *Child Contact with Non-resident Parents*, Family Policy Briefing 3 (University of Oxford 2004), with a key study being Joan Hunt, *Researching Contact* (National Council for One-Parent Families 2003).

[64] Maclean with Kurczewski (n 55) 56.

[65] Ibid 74.

[66] Ibid 105.

[67] In other words, law as a form of biopolitics: Michel Foucault, 'Society Must Be Defended', *Lectures at the Collège de France, 1975-76* (David Maccy, tr., 2003) 241.

[68] Ibid 126.

[69] As Jacob LJ once put it, 'human emotional relationships simply do not operate as if they were commercial contracts and it is idle to wish that they did': *Jones v Kernott* [2010] EWCA Civ 578, [2010] 1 WLR 2401 [90].

[70] Regarding the policy aims of the Children and Families Act 2014, for example, see the House of Lords Select Committee's scathing assessment of it as reflecting good ideas that were badly implemented: House of Lords Select Committee, *Children and Families Act 2014: A Failure of Implementation*, Report of Session 2022–23, HL Paper 100 (London: HMSO, 2022).

behaviours could be changed in the ways hoped for, and the funds were put in place, the method of trying to achieve those things may still be wrong—and when considering the policy aims identified in many cases, family law is often the wrong tool to choose.

As Maclean notes, '[t]he extent to which legislation can deal with social problems remains limited',[71] and indeed she goes further in identifying 'policy goals that can never be attained through legislation'[72]—but that does not stop politicians from trying. This is the nub of my argument. Family law is important, and it does lots of substantively important things. But it is also a very visible target for politicians looking for an easy win in an area where policy achievement is hard to come by. I will illustrate this argument with three examples.

A. *Divorce*

The oldest story in the book is the use of divorce law to try and change how couples behave in their marital relationships. As Alison Diduck sets out in *Law's Families*,[73] a frequent refrain of divorce law, both in terms of background policy statements and the law itself, has been focused on the idea of 'saving marriages'. As she pointedly remarks, '[w]hether divorce law is the best place to advance a marriage-saving agenda is a matter of debate'.[74]

I start by noting that this example is now historical in the UK context. The current divorce law, enacted in 2020,[75] does not appear to advance any kind of marriage-saving agenda. Within the current law, the aim is to reduce conflict and allow the marriage to be ended with as little adversity as possible—an entirely laudable aim, and one that might at least contribute to various related policy aims such as reducing parental conflict about children after separation.[76] That said, if the aim is in fact to reduce parental conflict during and after divorce, there are

[71] Maclean with Kurczewski (n 55) 105. See similarly Craig Lind's comment, drawing on Felicity Kaganas's work, that 'co-opting legal power is rarely as simple as just "having a law" that (simply) manipulates conduct': Craig Lind, 'Parenthood and parental responsibility: legal messaging and the power of law' (2025) 47 JSWFL, in press [internal p 7].

[72] Lind, ibid 5.

[73] Diduck (n 17) ch 3.

[74] Ibid 45. Maclean identifies 'promoting marriage' as an example of the kind of 'policy goals that can never be attained through legislation': Maclean with Kurczewski (n 55) 5.

[75] Divorce, Dissolution and Separation Act 2020.

[76] Smart describes this as 'a joint parenting contract [that] is becoming indelible': Smart (n 37) 316. But, as she goes on to say, few people are asking 'how can we achieve joint parenting on divorce when there are no structural supports for it even during marriage?': Smart (n 37) 319.

probably better ways of doing that, such as by providing or promoting family therapy or mental health services—but these things cost money, whereas family law looks cheap.

The position in the current law completes a shift that Diduck identified when writing about earlier reforms that formed part of the Family Law Act 1996, but which were never brought into force.[77] As Diduck notes, by 1996, the law had abandoned its previous policy of being generally opposed to divorce, but the policy of the 1996 reforms was an uneasy compromise of two broadly conflicting aims.[78] The first was still to 'save marriages', but there was an acceptance that this would not always happen, in which case the secondary aim was to divorce responsibly, 'so that even if the marriage could not be saved, the family could'.[79]

These abandoned reforms offer a good example of how family law is being used inappropriately to pursue a policy aim to which family law is poorly suited. If policy-makers want to pursue a policy of 'saving marriages' or, put more euphemistically (but usually meaning the same thing), 'strengthening families',[80] the moment when one or both parties want to divorce is really too late.[81] Instead, policy-makers need to look upstream. Policy-makers would want to take advice from those with experience outside family law, but amongst the ideas one might consider include relationship guidance before and in the early days of marriage, a secular version of an idea that most organized religions have had for a long time. A similar family policy exists around newborn children, where maternal and child health services perform two key functions: 'health checks for and supervision of mother and baby, and informing and educating parents (usually mothers) about infant and child health and well-being'.[82] We might also look to wider policy ideas like work-life balance, minimum holiday entitlements, and housing. The policy and social issues affecting families are diverse and strongly (if sometimes indirectly) connected, and suggest that a law focused on the moment of divorce is unlikely to have much effect on making marriages work.

[77] They were formally repealed by the Children and Families Act 2014, s 18.

[78] Cf Glendon (n 39).

[79] Diduck (n 17) 53; see also Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003).

[80] Glendon (n 39) 126.

[81] This is not a new observation: see Law Commission, *Reforming the Grounds of Divorce: The Field of Choice*, Law Com No 6, Cmnd 3123 (HMSO 1966) 54.

[82] Mary Daly, 'Policies on Family and Parenting Support in a Global Perspective' in Eydal and Rostgaard (eds) (n 19) 355.

B. *The Involvement of Parents in Their Children's Lives After Separation*

A more recent example relates to the use of family law by policy-makers to influence how couples parent their children, both during their relationship and after separation. The so-called 'parental involvement presumption' was introduced into the Children Act 1989 as s 1(2A) as part of the Children and Families Act 2014. This provision sets out that the court is required to presume that, unless the contrary is shown, the involvement of both parents in a child's life after parental separation is in the best interests of the child, where involvement is defined as being 'any involvement, whether direct or indirect, and not any particular division of a child's time'.[83]

The history of this small section of legislation is complex, the issue never having really died down after the Children and Adoption Act 2006.[84] A Private Members' Bill reignited the debate early in the Coalition Government of 2010–2015.[85] A Westminster Hall debate on 13 December 2012 included the then-Children Minister Tim Laughton MP referring to a survey by insurance giant Aviva:

> which pointed to the increasing existence of stay-at-home dads and dads' wish to be much more involved in their child's upbringing. The Government are doing much to encourage that societal change, promoting fathers as equal parents and encouraging them to be fully involved with their children from the earliest stages of their lives.[86]

By the time the government took over the legislative process, the consultation described its plans as 'legislation to promote shared parenting'.[87] While acknowledging that '[t]he benefit of ongoing involvement with both parents is already factored into these [court] decisions', the consultation was concerned about the large majority of cases that are resolved outside the court process, and 'a perception that the law does not fully recognize the important role that both parents can play in a child's life'.[88] The government was explicit in saying that its approach applied only 'where this is safe and in [the child's] best interests',[89] though only

[83] Children Act 1989, s 1(2B).
[84] Cf discussion of this Act above, after n 61.
[85] Children (Access to Parents) Bill 2011.
[86] Hansard, HC Deb, Vol 537, Col 262WH (13 December 2011).
[87] Department for Education and Ministry of Justice, *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* (HMSO 2012) [3].
[88] ibid [3.1].
[89] ibid [4.1].

one of the four draft clauses put out for consultation made explicit reference to safety.[90]

By the time the consultation response was published, the government's position had shifted, setting out their intention:

> to place an explicit requirement on courts to consider the benefits of a child having a continuing relationship with both parents, alongside the other factors affecting their welfare. Such legislation will send a clear signal to separated parents that courts will take account of the principle that both should continue to be actively involved in their children's lives where appropriate. In doing so, it will help to dispel the perception that there is an in-built legal bias towards one parent.[91]

The final point here brings us firmly back to the territory of the Children and Adoption Act 2006, using legislation to respond to perceived pressure from a particular group.

All this led to the parental involvement presumption as enacted. The provision is controversial and problematic for a number of reasons. Most concerningly, there is strong reason to think that, as well as possible effects within judicial reasoning,[92] the provision is understood amongst the general separated parent population as a strong presumption for contact in all cases, such that safety concerns about children and their mothers arising in particular from domestic abuse are overlooked.[93]

My concern with this provision, in the context of this article, is that, as a piece of policy, it uses family law to try to influence family behaviour in a way that is unlikely to have the desired effects. The policy aim, as stated, is to 'encourage societal change, promoting fathers as equal parents and encouraging them to be fully involved with their children from the earliest stages of their lives'.[94] Family law, with its focus on family crisis and, in the context of parent–child relationships, applying primarily in the period after parental separation, is not the place to do that, assuming that there is a place for law in that endeavour at all.

[90] ibid [9.1].

[91] Department for Education, *Cooperative Parenting Following Family Separation: Proposed Legislation on the Involvement of Parents in a Child's Life: Summary of Consultation Responses and the Government's Response* (HMSO 2012) 4.

[92] Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (HMSO 2020) 174. See also Adrienne Barnett, 'When Is "The End of the Road" Reached? Observing the Presumption of Parental Involvement through Systems Theory' (2025) 47 Journal of Social Welfare and Family Law, in press.

[93] Ibid 87. See also Felicity Kaganas 'Parental Involvement: A Discretionary Presumption' (2018) 38 LS 549.

[94] Hansard, HC Deb, Vol 537, Col 262WH (13 December 2011).

We know that those who use the family court for private law disputes are not representative of the wider population of separating parents. These family court users disproportionately come from the most deprived areas.[95] Adults involved in private law children cases are disproportionately likely to have unresolved mental health problems, to engage in drug or alcohol misuse, and to experience self-harm and domestic abuse.[96] Rates of domestic abuse recorded in medical records in the year before court proceedings for the court-going population are twenty times higher than in the non-court comparison population,[97] with between 49 and 62 per cent of all private law cases including allegations of domestic abuse.[98] We also know that the rates of conflict amongst those parents using the family court are high, and that parents do not have recourse to the family court unless they feel there is no alternative. For those who are able to access legal advice, family lawyers are skilled at negotiating and seek to avoid litigation where possible,[99] and the government has introduced and gradually strengthened the requirement on would-be applicants to consider mediation or other non-court dispute resolution before applying to the court.[100] Exact figures are hard to come by, but something like 10 or 12 per cent of separating parents end up getting a final order determined by a judge, with a further low percentage attending court for preliminary hearings before resolving matters by consent along the way.[101]

The court-going population is therefore not an auspicious place to start when thinking about promoting shared parenting as being in children's best interests. The population of people who attend court in private law cases is, on numerous measures, atypical, particularly in terms of domestic abuse, drug and alcohol misuse, and levels of conflict that

[95] Linda Cusworth et al, *Uncovering Private Family Law: Who's Coming to Court in England* (NFJO 2021) 33.

[96] Linda Cusworth et al, *Uncovering Private Law: Adult Characteristics and Vulnerabilities (Wales)* (NFJO 2021) 3-4.

[97] ibid 35.

[98] Adrienne Barnett, *Domestic Abuse and Private Law Children Cases: A Literature Review* (Ministry of Justice 2020), online at assets.publishing.service.gov.uk/media/5ef3dd32d3bf7f7142efc034/domestic-abuse-private-law-children-cases-literature-review.pdf

[99] See, for example, Mavis Maclean, John Eekelaar and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing 2000).

[100] Family Procedure Rules 2010, Part 3; Practice Direction 3A.

[101] See, for example, Krishna Dabhi, Tarini Anand and Trinh Tu, *Survey of Separated Parents*, DWP Ad Hoc Research Report No 105 (DWP 2022) figs 32 and 34; ONS, *Non-Resident Parental Contact: 2007-08*, Omnibus Survey Report No 38 (HMSO 2008) table 2.9.

prevent negotiated outcomes being reached. So, if the policy is primarily directed at cases where there are no safety concerns and where the aim is to encourage greater sharing of parental care, the family court is the wrong place to focus. These policy aims have to be taken upstream. These are difficult societal patterns for the government to influence, but insofar as it can do so, the answer is not in family law, as conceived. The answer has to be in wider areas of family policy, for example, looking at parental leave and flexible working time.

Looking at the example of parental leave, English law currently provides that, if they meet various eligibility criteria,[102] men can take up to two weeks of paternity leave when a child is born (paid at statutory rate of £187.18 per week or 90 per cent of earnings, whichever is lower), and up to 50 weeks of the maternity leave can be shared between the parents, depending on their respective employment rights. Take-up rates are hard to assess: one study in 2015 found that the amount of time fathers take off work after the child's birth can be counted in days, with only 50 per cent even taking the full two weeks of statutory paternity leave.[103] Nearly 10 years later, industry research suggests that the average duration of men's parental leave is three weeks.[104]

By contrast, Sweden has long had a policy of extensive parental leave and incentives to encourage it to be used by men. There, 82 per cent of fathers take at least some parental leave, with 30 per cent of all parental leave being taken by fathers. Parents are entitled to 480 days of parental leave, with 90 days being reserved to each parent and the remaining 300 days available to be allocated as the parents wish (including that 45 days of leave can be transferred to someone else entirely, like a grandparent). Denmark allows up to twenty-four weeks at full pay (though eleven of those weeks can be 'transferred' to the mother if the couple chooses).[105]

[102] The self-employed and those earning less than £123 per week are excluded from the scheme.

[103] Margaret O'Brien, Sara Connolly, Svetlana Speight, Matthew Aldrich and Eloise Poole, 'Father involvement with young children in the contemporary United Kingdom' in Marina Adler and Karl Lenz (eds) *Father Involvement in the Early Years: An International Comparison of Policy and Practice* (The Policy Press 2015). In the tax year 2021–22, 204,200 individuals claimed statutory paternity pay, whereas over 600,000 children are born in England and Wales every year.

[104] QBE, 'British Men and Women Want Paternity Leave to Double: Workers' Attitudes and Expectations Shift', 13 February 2024, online at https://qbeeurope.com/news-and-events/press-releases/british-men-and-women-want-paternity-leave-to-double-workers-attitudes-and-expectations-shift/.

[105] Kristian Johnson, 'Paternity Leave: How Much Time Off Work Do New Dads Get Across Europe?', BBC News Website, 15 June 2025, online at www.bbc.co.uk/news/articles/cy8d3l7858zo.

In Spain, fathers have sixteen weeks of parental leave at full pay, with no cap on salary and also covering the self-employed.[106]

Providing fathers to have greater parental leave, funded in the same way as maternity leave, does a number of things. There is the practical involvement that fathers get in their children's lives in the early months of their lives; but there is also the message-setting about the importance of fathers being hands-on parents, sharing childcare with mothers on a (more) equal basis. Parental leave is just one measure, but if the overall policy is to make parenting a more equal endeavour, focusing on how parents are able to manage their parenting lives before they come to the moment of separation is likely to be more effective than trying to affect behaviours at the point of separation.

Similarly, flexible working time gives greater potential for parents to share their parenting responsibilities (more) equally between them. As with parental leave in the early months of a child's life, the ability of parents to adjust their workplace commitments to be able more readily to be actively involved in their children's upbringing is more likely to promote active fathering and shared parenting than legislation aimed at changing the way that parents who have now separated manage their child arrangements.

C. *The Completion of Care Proceedings in Twenty-Six Weeks*

My third example, also coming from the Children and Families Act 2014, relates to care proceedings. These are applications under s 31 of the Children Act 1989, brought by a local authority when it considers that a child in its area is suffering or is at risk of suffering significant harm as a result of the care being provided by the parents. The 2014 Act introduced a statutory requirement for care proceedings to be concluded within twenty-six weeks.[107]

The overall picture concerning care proceedings is well known. The number of applications being made to the family court by local authorities shot up in the aftermath of the high-profile death of baby Peter Connelly in 2008, with a result that there was a 50 per cent increase in the court's workload that came about in a period of around two years and which has never abated. While precise numbers fluctuate from year to year, prior to 2008, there were typically around 20,000

[106] Women and Equalities Committee, *Equality at Work: Paternity and Shared Parental Leave*, HC 502, Sixth Report of Session 2024-25 (TSO 2025) [43].
[107] Children and Families Act 2014, s 14.

children involved in care proceedings every year; in 2009 and 2010, it was 26,000;[108] and it has hovered around 30,000 every year since.[109]

Partly as a result of this increase in the sheer number of cases, though also for other reasons,[110] the duration of care proceedings also increased dramatically. By 2010, the mean average time for care proceedings to be concluded was fifty-three weeks;[111] by 2011, it was fifty-five weeks.[112] There is no doubt that this amount of time to conclude care proceedings is concerning, though how much of it is properly called 'delay' and how much of it is time that is (or could be) justifiably and fruitfully spent doing necessary work is a matter of debate. For example, longer care proceedings in theory give parents greater opportunities to engage with social work, alcohol- or drug-related interventions or mental health services and thereby demonstrate their capability to change and to parent their child(ren) sufficiently well.

The family policy problem that was identified here focused on the negative consequences for children of delay in decisions about their future. The Norgrove Review, for example, suggested that delay caused by protracted care proceedings 'really matters' because it can affect a child's chances of finding a permanent home, damage the child's development, leave children at risk while proceedings are on-going, and leave children in situations of distress and anxiety.[113] The Review identified a significant number of causes of the problem, which included: local authorities 'often wait[ing] too long before making an application to court'; inconsistent quality of social work evidence, leading to lack of trust in the local authority's assessments; difficulty getting social work input from Cafcass; 'multiple reports from expert witnesses are a time-consuming and routine requirement'; non-compliance with court rules and guidance and insufficiently robust case management by judges; and capacity issues within the family justice system.[114] But the solution to this

[108] Court Statistics Quarterly 2009, Table 2.4.

[109] Family Court Statistics Quarterly 2024, Table 5.

[110] The increasing importance of human rights arguments in this period is a likely further reason: see cases like *Re B (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 and *Re B-S (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563.

[111] David Norgrove (chair), *Family Justice Review: Interim Report* (Ministry of Justice 2011) [2.31].

[112] David Norgrove (chair), *Family Justice Review: Final Report* (Ministry of Justice 2012) [3.2]; and see Family Statistics Quarterly 2014, Table 5.

[113] Ibid [3.5].

[114] Ibid [3.3].

problem was rather one-dimensional, focused on treating the symptom (delay) rather than engaging with those causes.

By way of court rules and then shortly afterwards by way of legislation, it was mandated that care cases must be quicker. Whereas the Children Act 1989 had originally provided that care proceedings must be disposed of 'without delay', the Act was amended to say that local authority applications must be disposed of within twenty-six weeks.[115] The Act aimed to assist with the achievement of this target by doing two further things.

First, it reduced the court's scope to order expert reports to assist it in determining whether the threshold for local authority intervention was met or what orders might then be best for the children concerned. The Act limited the availability of such reports to cases where the expert's input was 'necessary to assist the court to resolve the proceedings justly'.[116] The court has been a remarkably willing collaborator in having its autonomy and the rights of the parents and children who appear before it limited in this way, and has taken a restrictive view of this provision.[117] The controversial 'suspected inflicted head injury service' pilot raises further concerns about the use of experts and the curtailment of the ability of lawyers (and therefore courts) to challenge them.[118] The High Court's recent suggestion that legal teams will not be permitted to cross-examine expert witnesses unless the court rules, on a specific and formally-made application, that 'it is necessary in the interests of justice' to do so,[119] likewise shows the court's complicity in focusing on speed of proceedings over substantive and procedural justice to the parties and children concerned.

Second, the court was instructed that it was no longer 'required' to consider the local authority's care plan, other than the permanency provisions, defined as meaning long-term care with a parent, family or friends, or adoption, or a long-term care placement of some other kind.[120] In other words, the court was to reduce its scrutiny of all aspects

[115] Children Act 1989, s 32(1)(a)(ii), as amended by Children and Families Act 2014, s 14.

[116] Children and Families Act 2014, s 13(6).

[117] *Re H-L (A Child)* [2013] EWCA Civ 655, [2014] 1 WLR 1160.

[118] John Vater, 'Suspected Inflicted Head Injury Service and the Law of Unintended Consequences', *The Law Society Gazette*, 26 June 2024, online at www.lawgazette.co.uk/commentary-and-opinion/suspected-inflicted-head-injury-service-and-the-law-of-unintended-consequences/5120131.article

[119] *A Local Authority v X (Attendance of Experts)* [2025] EWFC 137 (MacDonald J).

[120] Children and Families Act 2014, s 15(1), substituting new provisions within Children Act 1989, s 31A.

of the local authority's actual plan for what was to happen to a child in the medium and long term, other than the legal status of the placement they would be in (adoption, fostering, family placement, etc). This provision entirely reversed a key policy objective of the earlier 2002 Adoption and Children Act, which had aimed to increase court oversight over local authority care of children.[121] Now, by contrast, the court was effectively told not to worry too much about what was to happen once the care order was made. The fact that the courts,[122] and then Parliament,[123] had earlier thought that such a policy was dangerous for children and families, and indeed that judicial scrutiny was necessary in order to give proper regard to the right to respect for their family life of the children and parents concerned,[124] no longer seemed to matter, because judges taking the time to read and possibly challenge the care plan was causing cases to take longer.

Amidst this focus on making care cases quicker, little attention has been given by policy-makers to why there are so many care cases in the first place or what the primary causes of 'delay' might be. Rather than requiring each individual case to move through the system more quickly by tinkering with due process and, in effect, making the decision-making process less robust, the policymaker's eye could look upstream.

The first port of call might be to ask who the people are in care proceedings. Research shows, for example, that there is a huge unmet need for mental health support amongst mothers involved in care proceedings, while factors like having a child before the age of 20, living in a particularly deprived neighbourhood, or having had a hospital admission in the previous three years for a chronic physical or mental health condition, disability or an adversity-related cause, all dramatically increase the risk of being involved in care proceedings.[125] The biggest

[121] The court was previously required to give 'rigorous scrutiny' to the details of the care plan: see *Re K* [2007] EWHC 393 (Fam), [15]. That included, for example, support services that would be provided to the child or their family (for example, counselling, disability support, respite care), any financial support being offered, what involvement, if any, the local authority social work team would have after court proceedings end, and so on. None of that is now required to be considered by the court.

[122] *Re W and B; Re W (Care Plan)* [2000] EWCA Civ 757, [2001] 1 FLR 582, rev'd *Re S; Re W (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291.

[123] By passing the relevant provisions of the Adoption and Children Act 2002 that introduced s 31A into the Children Act 1989, in response to the concerns expressed by the judiciary.

[124] ECHR, Article 8; see particularly the judgment of Hale LJ in *Re W and B; Re W (Care Plan)* [2000] EWCA Civ 757, [2001] 1 FLR 582.

[125] Georgina Ireland and others, *Social and Health Characteristics of Mothers Involved in Family Court Care Proceedings in England* (Nuffield Foundation 2024) 7.

single risk factor is having previously had a child who was the subject of care proceedings: a third of mothers in care proceedings had a second set of care proceedings within 8 years.[126] The lack of upstream support services for parents, particularly in terms of mental health support, is a notable cause of the problems that turn into care proceedings.

This links to the general problem of resourcing. A huge amount of money is spent on child protection, but much of it is focused on the point of crisis. Local authority budgets are stretched to breaking point, their overall funding cut on average by 18 per cent per capita in real terms between 2010 and 2024, with larger cuts in real terms for local authorities serving more deprived areas (26 per cent) compared to less deprived ones (11 per cent).[127] Spending on children's social care actually rose during this period,[128] but what that money was being spent on changed: the number of children in secure accommodation (a vastly expensive resource) increased by over 30 per cent,[129] while the general cost of each placement in a children's home rose by 20 per cent.[130] Conversely, spending that might have met the local authority's statutory duty to take steps to avoid the need for care proceedings,[131] such as on youth services and Sure Start Centres, was cut dramatically: Sure Start funding has dropped 67 per cent and youth services by over 70 per cent since 2010.[132] Taking a broader view of what counts as 'children's social care', therefore, budgets fell by 9 per cent;[133] but almost more importantly, the way the money was being used shifted, so that the focus is on responding to crisis, rather than preventing the crisis arising in the first place.[134]

[126] Ibid, 8. See also Bachar Alrouh and others, *Mothers in Recurrent Care Proceedings: New Evidence for England and Wales* (NFJO 2022).

[127] Kate Ogden and David Phillips, *How Have English Councils' Funding and Spending Changed? 2010 to 2024* (IFS 2024) 3.

[128] Ibid 11.

[129] Secure accommodation is a description of a placement where the child's liberty is restricted. There is usually 24/7 monitoring and a building designed to prevent the child escaping, though there are far too few such placements available meaning that so-called 'bespoke' placements are used which, not being designed for the purpose, usually require four or more adults to be present at all times to prevent the child from leaving. These facilities, which are nothing short of a scandal (see, for example, Children's Commissioner, *Unregulated: Children in Care Living in Semi-Independent Accommodation* [CCE 2020]), are also hugely expensive, often costing £1m per child per year.

[130] Ogden and Phillips (n 127) 4. Secure units and children's homes have accounted for the placement of the vast majority of the increase in the number of children in care over the same period.

[131] Children Act 1989, Sched 2, para 7.

[132] Ogden and Phillips (n 127) 11–12 and 32.

[133] Ibid 12.

[134] Lottie Winson, 'Failure to Support Children with Complex Needs and Lack of Appropriate Placements Driving "Astronomical" Care Costs, Warns LGA', *Local*

So the tragic self-fulfilling process is that local authorities have a reduced budget, and so spend less on support services, while at the same time (because of the highly negative media attention after the Peter Connolly case) taking a risk-averse approach to child protection decisions such that more cases are brought to court than happened previously. Add to that the cuts to legal aid which, while not actually removing legal aid from care cases, have kept fees frozen for over twenty years (save for a 10 per cent *cut* in 2013) and led to stricter limits on the work that lawyers can do to help their clients outside the specific remit of a court hearing. And then add the court's own budget cuts,[135] which lead to fewer and more dissatisfied judges,[136] and fewer and less experienced support and administrative staff to assist them.[137] Court buildings are also in serious disrepair and are not fit for purpose,[138] particularly when taking into account that a large part of the function of the family court is to create a space where negotiation and settlement take place.[139]

Against this background, it is unsurprising that there are more care cases and that they take longer. But responding by simply demanding, by statute, that cases get done faster is at best simplistic and likely actually making things worse. The families in these cases, having been denied meaningful state support prior to the commencement of care proceedings, are now further denied it within those proceedings, as there is simply insufficient time to do any work that might be needed within the demands of a twenty-six-week determination of the case.

Government Lawyer, 2 June 2025, online at https://www.localgovernmentlawyer.co.uk/governance/396-governance-news/61095-failure-to-support-children-with-complex-needs-and-lack-of-appropriate-placements-driving-astronomical-care-costs-warns-lga?trk=feed_main-feed-card_feed-article-content. The same pattern is seen in other areas of council expenditure: budgets for housing services were cut, while spending on homelessness increased: Tom Harris, Louis Hodge and David Phillips, *English Local Government Funding: Trends and Challenges in 2019 and Beyond* (IFS 2019) 42.

[135] Ministry of Justice spending per capita is down 24 per cent in real terms since 2010, one of the largest cuts of any government department: Magdalena Dominquez and Ben Zaranko, *Justice Spending in England and Wales* (IFS 2025).

[136] Cheryl Thomas, *2024 UK Judicial Attitude Survey: England and Wales Courts, Coroners and UK Tribunals* (UCL 2025).

[137] House of Lords Select Committee, *Children and Families Act 2014: A Failure of Implementation*, Report of Session 2022-23, HL Paper 100 (London: HMSO, 2022) [111].

[138] Monidipa Fouzder, '"Leaky Ceilings, Disgusting Toilets, No Heating": State of Court Buildings Exposed', The Law Society Gazette, 19 December 2022, online at https://www.lawgazette.co.uk/news/leaky-ceilings-disgusting-toilets-no-heating-state-of-court-buildings-exposed/5114615.article.

[139] Rob George and Rob Marsh, 'Do We Need Physical Family Courts?' (2024) 46 JSWFL 59.

6. *Conclusions*

To pull some of these strands together, I have identified some examples of family law, in its relatively narrow conception focused on family formation but primarily on family crisis, being used as a policy tool to try to affect wider societal change. From the perspective of government which has a particular focus on reducing financial expenditure in the short term, seemingly irrespective of the long-term consequences, family law looks like a good bet. Passing legislation allows government to appear to be doing something, giving 'a legislative victory' to the government or the individual minister,[140] while also sending a message about the government's values and priorities, but without costing significant amounts of money. The family court, after all, is already up and running—there is no new agency to set up, no new employees to hire and, undoubtedly, no new money for the court service. The fact that changing the law makes it more complicated to administer and often has knock-on effects for other agencies, whether part of the state or otherwise, is not factored into the equation.[141] But considered from the perspective of policy-making, these family law reforms are also a lost opportunity, because they appear to take action in relation to an identified social problem, but are unlikely to make much real difference.

Seeing family law as a tool of family and social policy allows it to be seen in the context of a wider array of policy levers that might be pulled when seeking to change underlying social norms or behaviours, or to respond to a social problem. The Children Act 1989 was written with an awareness of the interaction between these things, and this is visible in its structure and provisions. For example, the local authority has a duty under the Act to take steps to avoid the need to bring care proceedings,[142] coupled with wide-ranging powers and duties on local authorities to support children and families set out in Part III of the Act, amongst other places. But while the Act itself is widely heralded as a great success, the Act's framework is currently undermined by the lack of resources available to make those parts of its structure that aim to support families and avoid crises actually work.

My argument has some resonance with colleagues who call for a more 'public health' approach to family law. The Robert Wood Johnson

[140] Maclean with Kurczewski (n 55) 105.

[141] See the arguments to this effect about legal aid in Rob George, *Ideas and Debates in Family Law* (Hart Publishing 2012) 13–16, Eekelaar (n 50) and Williams (n 26).

[142] Children Act 1989, Sched 2, para 7.

Foundation sees public health as requiring a consideration of the social determinants of health problems, challenging an approach of 'thinking about health and illness in medical terms, as something that starts at the doctor's office, the hospital or the pharmacy'.[143] Instead, there is a focus on the ways in which good health can be encouraged and facilitated from an early stage, reducing or avoiding illnesses and health crises, or catching them early when treatment is cheaper and more likely to be successful. Examples can be wide-ranging. Public health has numerous possible definitions, but is broadly understood as systematic approach that aims to fulfil society's interest in creating conditions in which people can live healthy lives, preventing disease and promoting health through organized community effort.[144] Taxing added sugar in food can be used to try to reduce the development of obesity and diabetes; making exercise equipment available in public parks can similarly help with general fitness; providing health screenings for certain illnesses helps to enable early detection. The aim is to improve people's lives, while also lowering public expenditure by reducing people's need for both primary health services (GPs and hospitals) and wider social welfare services (disability or unemployment benefits, social care services, etc).

For lawyers, Matt Jay describes this approach as requiring 'transdisciplinary integration of law, social science, epidemiology and administrative data' so as to allow us to understand 'how family justice operates, who uses it, and the short- and long-term outcomes of it'.[145] As he goes on to say, '[d]iscovering upstream health and social determinants of family proceedings could inform early interventions to support parenting, improve child and family health, reduce conflict and adversity and prevent the need for court involvement in the first place'.[146] As with public health, the aim is to help people live better lives, and in the process to reduce the need for family court proceedings that deal with family crises, by focusing policy interventions upstream to help avoid those crises arising in the first place.

A 'public health' approach to care proceedings, for example, is not primarily concerned with the duration of each set of proceedings

[143] Robert Wood Johnson Foundation, *A New Way to Talk About the Social Determinants of Health* (2010) 35, online at https://www.rwjf.org/content/dam/farm/reports/reports/2010/rwjf63023.

[144] Bernard Turnock, *Public Health: What It Is and How It Works* (5th edn, Jones and Bartlett Learning 2012) 9–10.

[145] Matthew Jay, 'A Public Health Approach to Family Justice: The Possibilities of Legal Epidemiology and Administrative Data' (2024) 46 JSWFL 289, 290.

[146] Ibid.

(though that can be important),[147] but with providing support and intervention before such proceedings begin in the hope of avoiding the kinds of crisis that lead to court action being needed at all. Some care proceedings will be unavoidable, such as those arising following an unpredicted inflicted injury to a child. But other cases are easily predicted: parents who are not providing good quality care that turns to neglect are usually known to professional services, as are parents with drug or alcohol addictions, or those with chronic, untreated mental health conditions. These are problems that, with the right interventions and support services, might be at least managed if not entirely fixed in a significant proportion of cases—but only if they are addressed early and resources provided to do so.

Some family policy problems are rightly identified as 'family law' problems, where amendments to the substantive law or the procedures for family law can be expected to address the problem as identified. But many of the issues currently addressed by amendments to family law are really wider problems of family policy, where making legal changes in the targeted field of family law is likely to come too late and therefore to be ineffectual in influencing family behaviour and social norms. Policy-makers who want to create stable families, promote the active involvement of both parents in their children's lives, and avoid the need for family court proceedings and compulsory state intervention in family life would be well advised to leave family law to one side, and think instead about the upstream policy areas that influence these issues in the first place.

[147] The Children Act 1989, s 1(2), recognizes that in general any delay in determining a question relating to a child's upbringing, such as where they should live and with whom, is likely to prejudice the welfare of the child.