

[Review] Elizabeth Brake and Lucinda Ferguson (2018) Philosophical Foundations of Children's and Family Law

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Elizabeth Brake and Lucinda Ferguson, eds.

Philosophical Foundations of Children's and Family Law (Oxford: Oxford University Press, 2018) ISBN 978-0-19-878642-9, pp. 339, £ 75.00

Review by Maria Federica Moscati

Philosophical Foundations of Children's and Family Law offers a collection of fourteen elegantly written essays contributed by both philosophers and legal scholars. The essays speak to key themes in family and children's law discourses including polyamory, child support, dissolution of same-sex relationships, and children's rights.

Lucinda Ferguson and Elizabeth Brake introduce the collection by presenting the themes of the collection and by providing insightful comparative reflections on the aims, arguments and methodology of the two disciplines, law and philosophy. The tension and combination of both disciplines shape the aims of the collection. On the one hand differences between law and philosophy aim to augment reflections on both disciplines. On the other hand, 'combining insights from law and philosophy, we intend to add another layer to the current trend to focus on the empirical in family law research, and highlight how critical debates in children's and family law are at once theoretical and empirical' (1).

Although, the overall reflections on the collection are drawn later in the review, the reader should be aware that the collection fulfils the pursued aims!

Following the Introduction, Part I is dedicated to the nature of family and family law. John Eekelaar's essay reflects on family law and legal theory. Theories about family law, he rightly argues, should develop through an understanding of the interaction of legal and social norms. Central to such understanding are concerns about power relations that characterise several dimensions of family and children's law. Thus, power imbalances might characterise the resolution of family disputes. Eekelaar suggests that legal norms

should therefore be adapted to ‘minimize damage to the well-being of everyone affected’ (55).

David Archard delves into the nature of ‘family’ and ‘family law’, offering three definitions of family: functional, formal, and ‘family resemblances’. He champions the functional family as important for providing the basis for family law. But this approach tends to neglect what family is for those who are members of the family. It is to those voices that family law should revert and listen to.

The papers in Part II are mainly concerned with ‘Relationships’. Elizabeth Brake’s essay opens Part II, arguing convincingly for legal protection of adult caring relationships, including paid material caregivers. The essay explores the theoretical and practical implications of considering paid caregivers as family members. Indeed, the role that care/caring has within human relationships cannot be overlooked by family law (Herring, 2013). In emphasising the importance of intimacy, caring and relationships Brake suggests that challenging the dichotomy between work and care would extend the deserved family law protection to domestic workers (who receive legal protection under labour law).

Ronald C. Den Otter’s fine essay, like Brake’s chapter, breaks away from a narrow understanding of family based on the norm of the heterosexual, two-person adult relationship. Otter advocates for the protection of polyamorous marriage. Starting with an analysis of American constitutional law through the lens of liberal principles, Otter links to Stuart Mill’s idea of experiments in living to then evince the individual and social benefits that polyamorous marriages might bring. At this point a reader might ask, what does refrain a society from recognising a variety of marital relationships and plural marriages? It is well-known, legal recognition of adult relationships are considered as instrumental in accomplishing the interests of a given community. But often the very true interests of a given community are neglected by prejudices and stigma which are not rooted in reality. Otter walks the reader into a convincing discussion

showing that prejudices can be overcome and that a variety of marital arrangements would indeed add value to society.

Robert Leckey's chapter employs analysis of property disputes between cohabitants to answer 'big questions – such as what people who live together should owe one another, and the balance between choice and protection' (115). Leckey offers a stimulating perusal of English and Canadian judgments and highlights the institutional limits posed on judicial reform concerning cohabitation. The chapter suggests that default rules might be a more functional solution than individual choice approaches when considering legal regulation of cohabitation. Interestingly, the chapter concludes by pointing out that cuts to legal aid have reduced dramatically access to family justice. And contrary to Leckey's concerns about choice, it must be emphasised that advocating for personal choices in resolving family disputes was at the core of the Access to Justice and ADR movements (Fuller, 1978).

Charlotte Bendall and Rosie Harding then offer a fascinating analysis based on empirical data collected through semi-structured interviews with solicitors and clients on the dissolution of civil partnerships in England and Wales. The chapter analyses whether and how legal dissolution of civil partnerships encourages same-sex couples to conform to 'heteronormative patterns of relating'. The authors focus on financial disputes and identify two main themes. First the clients interviewed reported discontent regarding the adversarial approach pursued by the lawyers and become keen to find private solution rather than recourse to formal legal processes. Secondly, the legal framework concerning dissolution of civil partnership promotes a rather heteronormative and assimilating approach that solicitors adopt when dealing with a dissolution between same-sex partners. According to the data analysed in the chapter, no differences were found in the way in which solicitors advise same-sex couples or construct the issues to be analysed and

discussed during the dissolution.

These findings can be compared to other research concerning dispute resolution involving same-sex partners and parents. First, same-sex couples are being assimilated into opposite-sex couples in the resolution of parenting disputes. The debate (and related practice) concerning the involvement of children during family mediation has proceeded overshadowing the variety of family structures that same-sex partners and parents create. Secondly comparative analysis has shown that the lack of harmonised legal recognition of same-sex unions has a direct impact on the nature of disputes, on the availability and choice of the method and on the resolution per se (Moscati, 2015).

Lister's essay closes Part II arguing that drawing upon family ties, immigration policies should provide family-reunion programmes. The chapter considers family unification and formation; the relation between justice and state discretion concerning family unification, and engaging with the debate on whether and how family unification might represent a violation of liberal neutrality. The attention that Lister pays on the rights of children and the issues they raise for immigration law and policy deserve special mention. Correctly, the author argues for full access to citizenship and social services.

Part III is dedicated to "Rights and Obligations". Diane Jeske suggests that a broader notion of intimate relationships should inform analysis concerning family and marriage. After depicting the nature of intimacy and its moral significance, Jeske guides the reader through a discussion on the role that political and legal institutions play and the approaches they take to engaging with moral and legal obligations to support intimate relationships.

The other three chapters in Part III propose a balanced interdisciplinary overview regarding the nature and justification of children's moral and legal rights. Colin M. Macleod, in his essay,

suggests that ‘a satisfactory moral theory that purports to be comprehensive must take children seriously’ (190). He develops his convincing argument by showing that the diffidence towards children’s rights and which draws upon foundation scepticism and discourse anxiety is not compelling.

To some extent Macleod’s aim sits close to Lucinda Ferguson’s. In her essay Ferguson argues that legal decisions concerning children should prioritise children as ‘special case’. Academic debate and legal decisions do not seem to prioritise children’s interests as the governing law – in particular section 1 of the English Children Act (1989) – requires. Ferguson unfolds and frames her discussion engaging with a critical and convincing analysis of four main objections moved to the prioritization argument. Scott Altman’s essay completes Part III, offering the reader a somewhat different approach from that of Macleod and Ferguson. The focus of Altman’s essay is parent’s moral claims to control their children. His lucid account of the nature and basis of such claims speculating on the importance of authenticity to justify parent control rights is nevertheless limited by an absence of attention to the children’s position and voice.

In the Introduction Ferguson and Brake in presenting the essays concerning legal regulation on children, ask “Does it matter how we frame children’s legal relationships with others?”. Part III shows the reader that it is indeed very important to establish how to frame children’s relationships. However, what Part III misses is the need to consider the children’s perspective. The arguments developed seem to proceed from a rather adult-centric perspective, whereas the recourse to child protagonism (Liebel, 2007) could offer more contextualised and child focused solutions.

Finally Part IV provides insights into ‘Regulation and Intervention’ of family and family life. Important questions concerning whether and how the state should regulate relationships are

addressed by looking at private ordering in family law, surrogacy, and children rearing.

Brian H. Bix starts with an overview of the variety of private ordering developed in the United States. The chapter proceeds with philosophical arguments underpinning the discussion on whether and how to regulate the variety of private ordering, reflecting on issues of autonomy, social utility, public policy, and personal dignity.

James G. Dwyer delves into the debate concerning whether and how legal interventions inspired by liberal values should take into account minority-cultural practices. The chapter concludes by claiming that parents should retain the freedom to transfer cultural values to children unless such values will negatively affect the child. Perhaps here greater attention could have been given to the approach of 'law as culture' (Rosen, 2006). In the final contribution Mary Lyndon Shanley drawing upon ethics of care and theories of relational rights argues that these approaches might better endorse the rights and interests of all those involved in the web of relationships that surrogacy creates. Her approach is positive and robust, and could well be used to advance legal reforms.

Two main reflections prompt the reader at the end of the book. Does this collection fully engage with philosophical foundations of children's and family law? The answer depends on what part of the world and what philosophy a reader is concerned with. There is something of a dissonance between what the editors suggest in their Introduction about the aims of the collection and the manner in which the contributors engage with philosophy and law. It is puzzling that non-Western legal cultures have been overlooked notwithstanding the very well-known examples of family law systems developed upon non-Western and non-liberal philosophical thinking on matters of family and kinship. Moreover, the philosophical reading of children's and

family law seems to be understated in the ‘conversation’ between law and philosophy.

The second reflection is inspired by the editors’ suggestion that ‘by contrast to philosophy’s focus on discerning true norms, the nature of legal practice encourages (academic) lawyers to be purposive in their focus on normative issues’ (3). Conversely, it could be argued, however, that disciplinary divides have been settled when philosophical discourses have formed the basis for family and children’s law. For instance, the inclusion of legal clinic projects within undergraduate and postgraduate law degrees and the development of cause lawyering (Sarat and Scheingold, 1998) encourage legal scholars and lawyers to go beyond normative issues and to consider, and bring into practice philosophical discourses on equality and social justice.

Also, there is the experience of various legal cultures in Asia and Africa to be considered. For instance, traditional Chinese family law (both statutory and customary) was largely based on Confucian ‘Five Human Relationships’ (Rosenlee, 2006), laying out a map for good conduct within the family in the interests of promoting harmony and stability. This traditional philosophical value teaching is still influential on child’s law (Palmer, 2010; 2017). Finally, philosophical arguments underpin judicial interpretation and decisions concerning family and children’s law. For instance, the landmark case *Obergefell v. Hodges*¹ that legalised equal marriage in the US represents a good example where ‘A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy’ (at 12).

Nevertheless, this is a family and children law collection of essays that offer fascinating insights and encourage critical

¹ 135 S. Ct. 2584 (2015).

interdisciplinary thinking. It will prove to be an enjoyable read and a valuable resource for a wide range of readers.

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