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## 'Book Review of Alan Brown: What is the Family of Law? The Influence of the Nuclear Family'

Item Type	Article
Authors	O'Sullivan, Kathryn
Citation	International Journal of Law, Policy and the Family, Volume 35, Issue 1, 2021, ebaa019
Publisher	Oxford University Press
Download date	2026-05-16 23:05:18
Item License	<a href="https://creativecommons.org/licenses/by-nc-sa/4.0/">https://creativecommons.org/licenses/by-nc-sa/4.0/</a>
Link to Item	<a href="https://doi.org/10.34961/researchrepository-ul.22778780">https://doi.org/10.34961/researchrepository-ul.22778780</a>

# Book Review: What is the Family of Law? The Influence of the Nuclear Family

By Dr Kathryn O'Sullivan, Senior Lecturer, School of Law, University of Limerick, Ireland

**Full citation: Kathryn O'Sullivan, 'Book Review of Alan Brown: What is the Family of Law? The Influence of the Nuclear Family' (2021) 35(1) *International Journal of Law, Policy & the Family* 1-5**

*What is the Family of Law? The Influence of the Nuclear Family* by Dr Alan Brown, University of Glasgow, was published by Hart Publishing in 2019. At its core, the book presents a theoretical analysis of the definition and construction of 'family'. In particular, it explores the continuing normative importance of the traditional nuclear family in the legal regulation of conjugal relationships and parent/child relationships in England and Scotland. The book also examines the possibilities offered by alternative models of 'family' before arguing for a radical re-imagining of the underlying approach to the legal understanding of the term.

The book comprises six chapters which are divided into four parts. Part 1, 'The Family', contains two chapters. Chapter 1, entitled 'What is the Law's "Family"', considers 'family' as both a social and legal concept. Notwithstanding that 'family' is not easy to define, Brown looks at different theoretical approaches (based on care, on identifying the social role of families and on expressing shared familial characteristics or experiences) to help gain a better understanding of the meaning of the term. Although each of the different approaches considered are united by their efforts to define 'family' without emphasising any particular family forms or valorising specific categories of relationship, he nonetheless concludes that each of the approaches resulted in 'an ambiguous understanding' of 'family'.<sup>1</sup> Having thus established that, as a social concept, it continues to lack a precise definition, Brown turns to consider the law's definition(s) of 'family'. In this regard, he studies three specific contexts. First, he analyses (at some length) the definition of 'family' as judicially developed under the Rent Acts, focusing on the evolution of the definition from its traditional incarnation under the 'ordinary man' test, through the emergence of the 'de facto familial nexus' test and its subsequent inclusion of unmarried and same-sex cohabitants. Despite the apparent liberalisation of the definition, he highlights how the existence of a conjugal relationship remains of paramount importance. Second, he considers the judicially developed definition of 'family life' under Article 8 of the European Convention on Human Rights, again highlighting the trend towards the gradual extension of

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<sup>1</sup> Alan Brown, *What is the Family of Law? The Influence of the Nuclear Family* (2019, Hart Publishing) 23.

recognition to new family forms. Third, he briefly details the ‘formalistic’ definition of ‘family member’ in EU law. Reflecting on all three definitions, he concludes that the traditional nuclear family, characterised by the central nexus of the conjugal relationship and the parent/child relationship, continues to exert a significant influence on the legal understanding of ‘family’.<sup>2</sup>

Chapter 2, ‘The Historical and Philosophical Underpinnings of the “Nuclear Family” Model’, builds on the foundation established in Chapter 1 and explores why it is that the nuclear family has come to be positioned as the ‘natural’ or ‘normal’ family of law. Having highlighted the dominance of the nuclear family throughout history, Brown considers how it aligns with the law’s image of the ‘legal subject’. To provide the wider context for this discussion, the development of the public/private divide is outlined before the orthodox understanding of the ‘legal subject’ is introduced. He then examines the critical scholarship which disputes this construction, in particular, assertions as to its self-evidence and objectivity. Drawing on feminist scholarship, he highlights, specifically, the idealised masculinity of the ‘legal subject’ and the inequality it may mask. Seeking to illustrate some of the difficulties associated with the traditional construction, he focuses on the so-called ‘persons’ cases, highlighting the historical exclusion of women from the legal definition of ‘person’. He argues that the conventional understanding of the ‘legal subject’, combined with the historical exclusion of women from the public sphere, have played an important role in establishing the values of the traditional nuclear family, particularly the separate and distinct gender roles. Moreover, as the nuclear family has become the law’s idealised image of ‘family’ this, in turn, has perpetuated its presentation as the ‘natural’ or ‘common-sense’ understanding of ‘family’. He concludes that the liberal notion of the public/private divide influenced the orthodox construction of the ‘legal subject’ and that this then ‘embedded the values of the nuclear family, particularly the delineation of gendered roles (the man as “breadwinner” and the woman as “homemaker”).’<sup>3</sup>

Part 2 contains just one chapter entitled ‘The Legal Regulation of Conjugal Relationships’ (Chapter 3). The chapter examines the legal definition of marriage in the United Kingdom before the impact of the recognition of same-sex marriage on the understanding of the institution, if any, is considered. The chapter then proceeds to explore other non-marital relationships subject to regulation and highlights, from a legal perspective, the ‘centrality of conjugality’ in such relationships.<sup>4</sup> Leaving aside the divergence in approach between English law and Scots law vis-à-vis the legal regulation of cohabitation, Brown concludes that the continuing importance of marriage and ‘marriage-like’

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<sup>2</sup> *ibid*, 44.

<sup>3</sup> *ibid*, 74.

<sup>4</sup> *ibid*, 93.

conjugality for the purposes of legal recognition and regulation speaks again to the normative dominance of the nuclear family.

Part 3, 'Parenthood', contains two chapters both of which, as the title suggests, involve a consideration of various aspects of parenthood. Chapter 4, 'The Attribution of Legal Parenthood within UK Law' looks at how legal parenthood is determined and assigned across a range of different scenarios. Focusing on natural conception, assisted reproduction and surrogacy, it questions who the law deems to be the parents of a child and the varying factors which determine parenthood depending on the context. Brown explains that although legal motherhood (rightly or wrongly) is largely dictated by gestation, the determination of legal fatherhood involves a much more complex approach. Exploring legal parenthood in a variety of scenarios involving different modes of conception and gestation, the chapter considers the position of a range of possible interested parties: married couples, cohabitants, single parents, same-sex couples, the non-gestational female 'parent', et cetera. The chapter critiques some of the shortcomings of the Human Fertilisation and Embryology Act 2008 and again concludes that the binary two-parent model and traditional nuclear family underpin the framework for establishing legal parenthood.

Chapter 5 is entitled 'The Legal Understanding of the Parental Role'. It focuses on the legal understanding of the role of parent, highlighting the gendered nature of both legal and judicial interpretations. Notwithstanding the different approaches taken in England and Scotland to defining the content of parental responsibilities and parental rights, Brown argues that neither the English nor the Scottish approach 'offer significant substantive guidance regarding the legal understanding of the role of the "parent"'.<sup>5</sup> In this vacuum, judicial interpretations and understanding of the parental role have gained increased significance. Drawing on his examination of 'What is the Mother in Law' and 'What is the Father in Law', Brown posits that traditional gendered parenting roles continue to be of normative importance among the judiciary in understanding the (at least ostensibly gender-neutral) role of 'parent'. He develops this hypothesis with a consideration of the law's understanding of the welfare of the child principle. The chapter then turns to consider the role of lesbian parents with the initial hostility towards lesbian parenting underscoring once more the normative influence of the 'natural' gendered parenting roles of the idealised nuclear family. Brown highlights, in particular, the vulnerability of the non-gestational female 'parent' in disputes between lesbian couples and, most especially, in disputes with 'known donors'. Taking up this thread, he then investigates the perceived understanding of the role of the afore-mentioned non-gestational female 'parent', arguing that although there is no difference between the legal status of the 'mother' and the 'parent', the explicit

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<sup>5</sup> *ibid*, 137.

difference in terminology influences judicial understandings of the two roles and appears to be influencing judicial outcomes.<sup>6</sup> He concludes that ‘the legal understanding of the role of “parent”, regardless of the usage of gender-neutral terminology, is substantially underpinned by the distinct, gendered parenting roles of “mother” and “father” derived from the nuclear family’.<sup>7</sup>

Part 4, ‘The Future’, consists of Chapter 6 entitled ‘The Possibilities Offered by Alternative “Models” of the “Family”’. Brown analyses a number of different ‘theoretical, philosophical and ethical concepts’ which could potentially assist in shifting the legal understanding of ‘family’ away from (or replacing entirely) the idealised nuclear family model.<sup>8</sup> He considers the developing literature on care and relationality; vulnerability; and autonomy and choice. Although the different conceptual factors could provide a normative basis on which the legal understanding of ‘family’ might rest, Brown argues that given their inherent ambiguity, none are appropriate. He contends that ‘the legal understanding of the “family” should not be based upon attempts to construct an abstract model of family, but instead should be much more explicitly grounded in the lived reality of the families themselves’<sup>9</sup> Acknowledging that this proposition is radical, and that there are ‘significant potential difficulties associated with the idea’, he nevertheless argues that ‘the legal understanding of the “family” should seek to embrace the elasticity and uncertainty inherent to the concept of “family”’.<sup>10</sup> He concludes that ‘this re-imagined approach would more clearly situate the legal understanding of the “family” within the context of individual, contemporary familial relationships’.<sup>11</sup> How Brown’s proposal might actually operate from a practical perspective is not explored.<sup>12</sup>

The book closes with a ‘Conclusion’ consolidating its core findings (that a particular, idealised image dominates cultural and legal understandings of ‘family’), reiterating the inappropriateness of adopting any abstract model of ‘family’ and restating the need to fundamentally reimagine the legal understanding of ‘family’. Despite these aspirations, however, Brown concludes that realistically neither the normative nor rhetorical importance of the nuclear family appears to be diminishing but instead ‘may well continue to underpin the legal understanding of “family” for a long time to come’.<sup>13</sup>

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<sup>6</sup> *ibid*, 165.

<sup>7</sup> *ibid*, 167.

<sup>8</sup> *ibid*, 174.

<sup>9</sup> *ibid*, 193.

<sup>10</sup> *ibid*, 195.

<sup>11</sup> *ibid*, 197.

<sup>12</sup> He notes at 197 footnote 181 that it is questionable as to whether the concept of ‘family’ would even be the most appropriate organising concept for the legal regulation of personal relationships going forward under his thesis.

<sup>13</sup> *ibid*, 202.

*What is the Family of Law?* is based on the author's PhD thesis and certainly makes for interesting reading. Social, demographic and scientific developments have seen many areas of law – none more so, arguably, than family law – come under increasing and sustained pressure in many jurisdictions. Governments, legislatures and law reform commissions across the world are struggling to deal with the range of issues emerging for determination, hindered in at least some instances by the dominance of the idealised image of the nuclear family repeatedly critiqued by Brown.

In terms of its main strengths, *What is the Family of Law?* provides a concise introduction to the philosophical, theoretical and ethical debates and contestations in the field. No prior knowledge is required or assumed (detailed footnotes throughout support readers in this regard), however, for those familiar with the existing literature, it presents a thorough critique of the normative influence of the nuclear family in both English and Scots law. In addition to considering the implications of this influence on the construction of the legal framework regulating a range of different relationships, the book is also notable for the attention it devotes to the implications for one stakeholder who has received relatively scant academic attention to date: the non-gestational female 'parent'. At various junctures in the book, Brown vividly highlights her vulnerability and makes a strong case for reform to strengthen the protection she is afforded.

Ultimately, whether the broad proposal presented, namely the abandonment of all theoretical models of 'family', would actually work in practice to remedy this and other issues, remains highly questionable. The viability of the proposal is not teased out in any meaningful way nor are there any references to other cultures/jurisdictions where the legal understanding of 'family' is closer to that advocated for by Brown or, at least, not as narrow as that currently applied in the United Kingdom. While the majority of the book focuses on demonstrating the continued dominance and influence of the idealised image of the nuclear family (Chapters 1-5), comparatively little space is dedicated to the analysis of the potential avenues for reform (Chapter 6). However, to regard this apparent shortcoming as a weakness of the book would be unfair. As Brown notes in the 'Introduction', the aim of the book was not to develop an alternative normative approach to understanding the 'family' but 'rather first to elucidate and demonstrate the continuity of the law's preference for the "nuclear family" form, and secondly to explore the possibilities raised by ... a shift in normative approach'.<sup>14</sup>

The book therefore primarily sets out to demonstrate the continuing normative influence of the nuclear family – particularly under English and Scots law – and it certainly achieves this aim. It has a clear, logical structure and is very well signposted, if at times a little repetitively so. In terms of length,

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<sup>14</sup> *ibid*, 12 footnote 57.

at just over 200 pages (202), it is a very manageable read and adopts a brisk pace with the arguments advanced succinctly throughout.

*What is the Family of Law?* is a timely contribution to the literature. Whether you agree with the conclusions reached in this thesis as to the influence of the nuclear family or the desirability of reform, it is certainly food for thought. Furthermore, given the fundamental nature of the core questions raised in the book as to what the legal understanding of 'family' is or ought to be, it would likely be of interest to academics, researchers and scholars involved in family law, not just within the UK but also well beyond its shores.