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Towards an understanding of the basis of obligation and commitment in family law

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Much family law scholarship in recent years has been focused on the recognition of different types of family relationship. Often, the rationale for the grant of rights and duties to new forms of relationship is said to be because the parties have shown commitment, or the same degree of commitment, as those in formally recognised unions, such as marriage. But there has been relatively little consideration of why or how commitment can provide an adequate rationale for the imposition of legal consequences, in particular, legal obligations, especially when such commitment may be lacking on the part of one of the parties, or comes to an end. This paper explores the meanings of obligation and commitment within the family and questions whether commitment provides a necessary or sufficient justification for the imposition of legal obligations in family relationships.

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INTRODUCTION

> [N]ature is the first lawgiver, and when she has set tempers opposite, not all the golden links of wedlock nor iron manacles of law can keep 'em fast.[1]

Much family law scholarship in recent years has been focused on the recognition of different types of family relationship. In this paper, focusing on the duty to maintain a spouse or a child, I switch attention to the nature of and rationale for the obligations resulting from such recognition. I compare the concept of obligation with the growing emphasis on commitment as the basis for family ties and suggest that such emphasis is incompatible with enforcing obligations at the point at which they become important – when 'commitment' has been lost (eg on divorce) or has never been given (such as

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1. G Farquhar *The Beaux' Stratagem* (1707) Act III, Sc 3.

when a child is born after a brief sexual relationship). In so doing, I seek to distinguish between the two concepts of obligation and commitment.[2]

This paper is not concerned with *whether*[3] the law should impose obligations within the family, but *how* and *why* it does so. Its starting point is that the creation of enforceable rights and obligations provides the legal vehicle used by the state to promote and enforce the policies and values it seeks to advance. The common law famously imposed a duty on husbands to maintain their wives, and it was recognised that there was a moral[4] duty on fathers to maintain their legitimate children. Yet these duties were never directly enforceable by wives or children and reluctance to make monetary transfers remains a key problem in the state's attempts to place the primary burden of financial support on the family. It is argued here that we can understand why this is the case by considering first, understandings of 'obligation' in law, and then examining the nature and content of that obligation as it relates to the modern legal duty to provide financial support for one's close family members.

In particular, it will be argued that increasing store is set on the notion of commitment as the rationale for the recognition of ties and the basis for the imposition of obligations. Yet, quite what we mean by such 'commitment' is rarely examined in any depth. Does 'commitment' mean the same thing as 'obligation'? If I have a commitment, does that mean I am bound by it in the same way as a legal duty? Does being committed to something mean that I can be made subject to certain obligations in consequence?

Problems arise when one partner claims not to be 'committed' to the other, or to have ceased to feel committed. If the stronger party in a relationship refuses 'to commit' to the other, by marrying them or even by agreeing to put their home into joint names, it is difficult to argue that, nonetheless, their relationship is 'really' just as committed as a marriage and that, therefore, legal consequences akin to those on marriage (or even more limited consequences) should flow. Similarly, if a spouse decides that he or she no longer wishes to be married to the other, it is hard to argue that their commitment is binding when the law clearly allows them to terminate the marriage and start on the 'road to independent living'.[5]

This paper therefore seeks to explore in more depth the concept of obligation in family law and to question whether commitment provides a necessary or sufficient justification for the imposition of legal obligations in family relationships. The second section explores the meaning of 'obligation' and discusses the understanding of financial obligation in family law. To shed light on this, it draws on sociological literature on how families perceive and go about fulfilling their obligations to each other. The next section considers how the idea of commitment has been used and understood in the context of family ties, and seeks to show its limitations as a basis for the imposition of obligations within family relationships. The paper concludes by noting some alternative rationales to explain and justify these considerations.

2. But compare A Estin 'Love and obligation: family law and the romance of economics' (1995) 36 (3) Wm & Mary L Rev 989; and E Scott 'Social norms and the legal regulation of marriage' (2000) 86 Va L Rev 1901, 1923.

3. On this issue, see J Eekelaar 'Self-restraint: social norms, individualism and the family' (2012) Theoret Inq L 75.

4. There was no duty *at common law* to support even a legitimate child: Sir W Blackstone *Commentaries on the Laws of England* (1765–1769) bk I, ch 16, 'Of parent and child'; Royal Commission on Marriage and Divorce *Report 1951–1955* Cmd 9678, 1956, para 560.

5. Baroness Hale in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [2006] 2 AC 618 at [144].

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OBLIGATION IN FAMILY LAW

Obligation as a legal concept

What does it mean to say that there are certain obligations that attach to legally recognised family relationships? The dictionary definition of obligation is of 'a moral or legal requirement; duty; the act of obligating or the state of being obligated; a legally enforceable agreement to perform some act … a person or thing to which one is bound morally or legally; something owed in return for a service or favour; a service or favour for which one is indebted'. The concept of obligation suggests something that is *imposed* upon the person, possibly against his or her will or preference.[6]

According to Hart, an obligation, at least in relation to obeying the law (rather than obligation to another person), derives not from 'feeling obliged' (ie coerced) to obey through the threat of a sanction for non-compliance, but from an acceptance that there is a rule governing the behaviour: '[I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.' However, Hart went on to state that '[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great'.[7] He explained that 'it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty[8] may wish to do'[9] and in a developed legal system, 'the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone'.[10] Although there are highly sophisticated challenges and critiques of Hart's position, which cast doubt on his views as to the irrelevance of threats and coercion and the nature of the internal aspect of rules,[11] it does provide an explanation for what can be empirically observed in the sphere of family law. A divorcing spouse may 'accept' that he or she has to share the property that has been acquired during the marriage without being willing to do so; a non-resident parent may agree that child support should be paid

6. By contrast, the dictionary definition of 'responsibility' is 'having the ability or authority to act or decide' or 'accountability'. The focus is on *who* takes decisions rather than the binding nature of the onus placed on the decision maker. For consideration of *parental* responsibility, see J Eekelaar 'Parental responsibility: state of nature or nature of the state?' [1991] J Soc Welfare & Fam L 37.
7. H Hart *The Concept of Law* (Oxford: Oxford University Press, 1961) pp 55 and 84. But for the view that people 'exert social pressure on others to comply because of the existence of the obligation' rather than the other way round, see JC Smith *Legal Obligation* (London: The Athlone Press, 1976) pp 32–33.
8. Hart regarded 'obligation' and 'duty' as synonymous (ibid, p 238), although their usage may vary according to context, with 'obligation' commonly used in relation to contract, 'duty' in relation to tort. In his commentary on Hart, *H.L.A. Hart* (Stanford, CA: Stanford University Press, 1981) pp 59–60, Neil MacCormick argued that they are distinct, with obligation flowing from a relationship (eg parent and child) while duty relates to a position or role. This is a subtle distinction – does a parent have a relationship, or a role? MacCormick recognized that 'in their vague and general use' they are more or less interchangeable, and they are used thus in this paper.
9. Hart above n 7, p 85.
10. Ibid, p 114.
11. There is, of course, an enormous literature: see in particular, MacCormick, above n 8, and M Bayles *Hart's Legal Philosophy: An Evaluation* (Dordrecht: Kluwer Academic, 1992). For recent discussion of sanctions and coercion, see F Schauer 'Was Austin right after all? On the role of sanctions in a theory of law' (2010) 23(1) Ratio Juris 1; and E Yankah 'The force of law: the role of coercion in legal norms' (2007–2008) 42 U Rich L Rev 1197. On the internal aspect of rules, see J Gardner 'Nearly natural law' (2007) 52 Am J Jurisp 1; and S Delacroix 'You'd better be committed: legal norms and normativity' (2009) 54 Am J Jurisp 117.

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but seek justifications for not doing so in his or her own circumstances. In both cases, the obligation is imposed upon the payer without his or her willing consent.

MacCormick has suggested that the term 'obligation' is particularly used in the context of identifying relationships between people that carry some normative import. For example, to have obligations such as those of a parent 'implies (a) that one stands in a certain relationship with another, as parent … and (b) that because of that relationship one is *required* to act in certain ways towards the other'.[12] Clearly, recognised family relationships such as those of spouses or of parents and children carry with them these normative requirements, but social norms and understandings of family relationships are becoming more contested as family forms and modes of behaviour become more diverse. It becomes more difficult to agree on the content of the obligation, on whom it is to be imposed and to whom it is owed.

In this regard, Maclean and Eekelaar have suggested that it is necessary to distinguish between direct and indirect legal obligations.[13] They contrast a law 'which says that a husband must support his wife and provides the wife with a remedy to enforce the obligation' – a 'direct obligation' – and one that 'gives no remedy to the wife, but merely allows the state to recover a contribution from the husband towards any benefits it sees fit to provide as a result of his failure to support her' – an 'indirect obligation'. As discussed below, the law of child support provides a more complex example of such an indirect obligation, where it is not clear to whom the duty is owed (the parent with care? the child?), but it is clear that only the state can enforce it.[14]

The central point that the obligation to obey the law derives from its normative character in society is important for an examination of the nature of obligations in family law. This is because while one must distinguish between legal and social (or moral) norms, the content of law cannot be understood without recognising its *context*.

The obligation to maintain the spouse[15]

THE SPOUSAL DUTY TO MAINTAIN

At common law, the husband had a duty of maintain his wife (as long as she did not commit a matrimonial offence). However, the wife could not take direct legal proceedings to enforce this duty: she had either to incur debts (for which her husband could be held liable under the doctrine of unity)[16] or seek some form of order from the ecclesiastical courts regarding her marriage, as part of which the court could order the husband to pay her 'alimony'.[17] Under the Matrimonial Causes Act 1857, a wife granted a

12. MacCormick, above n 8, p 59.

13. M Maclean and J Eekelaar *The Parental Obligation: A Study of Parenthood Across the Households* (Oxford: Hart Publishing, 1997) p 6. See also L Ferguson 'Family, social inequalities, and the persuasive force of interpersonal obligation' (2008) 22(1) int J Law, Pol & Fam 61.

14. *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48 [2006] 1 AC 42.

15. Including civil partners, unless the context requires otherwise.

16. Husband and wife were one person in law, and the wife could not own property in her own name. There was a presumption that she was acting as his agent if she obtained articles of a domestic nature, and she had an 'agency of necessity' under which she could pledge the husband's credit to meet the cost of necessaries supplied to her while living apart from the husband with just cause: C Morrison 'Contract' in R Graveson and F Crane (eds) *A Century of Family Law* (London : Sweet & Maxwell, 1957) pp 127–133.

17. See L Stone *Broken Lives: Separation and Divorce in England 1660–1857* (Oxford: Oxford University Press, 1993); J Bailey *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660–1800* (Cambridge: Cambridge University Press, 2003); J Barton 'The enforcement of financial provisions' in Graveson and Crane (eds), above n 16, pp 352–355.

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divorce could be awarded maintenance, and the Matrimonial Causes Act 1878 made it possible for her to seek maintenance during the marriage when the husband had been convicted of aggravated assault and the court had granted her a separation order. The traditional view that the law should not 'intervene' in a 'functioning' household (and definitely not challenge the husband's authority as head of that household) explains the unenforceability of the common law duty and the requirement that cohabitation have ceased before an order could be enforced.[18]

The common law duty was prospectively abolished by s 198 of the Equality Act 2010. It was clearly gender-discriminatory and had either to be abolished or reformulated by statute as a mutual obligation. The Matrimonial Causes Act 1973 s 27 and the Domestic Proceedings and Magistrates' Courts Act 1978 s 1 already provided a gender-neutral right for a spouse to seek reasonable maintenance from the other so that no new statutory provision was required. However, these statutory rights are qualified and in practice, a dead letter. Many wives seek welfare benefits and 'maintenance' becomes relevant, if at all, only at the point of seeking a divorce. Even then, with the preference for capital division over periodical payments, maintenance is increasingly rarely part of the basis for any divorce settlement.[19]

Recourse to the state engages its interest in the hitherto private and autonomous family unit. At least since the enactment of the Poor Law of 1601,[20] the state has regarded itself as entitled to recover its spending on a destitute person from a close family member upon whom a liability of support could be imposed, through the concept of the 'liable relative'.[21] When the welfare state was founded, the range of relatives was limited to spouses and parents of dependent children.[22] The state could take civil proceedings against the liable relative to secure payment of maintenance, which would be paid to the Secretary of State to offset the amount paid in benefit.[23] Wikeley comments that actions taken under this section were unheard of,[24] and the power was prospectively repealed by the Welfare Reform Act 2009.[25] But even if it had been exercised, it would only indicate the existence of an 'indirect obligation', as Maclean and Eekelaar would term it,[26] on the liable relative to reimburse the state, not the spouse, who would still therefore have to take private-law proceedings to vindicate her own 'right' to

18. See also M Fineman *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004) pp 98, 297.

19. For the view that divorced wives should expect to work once their children are aged around seven and have no expectation of long-term maintenance, see *Wright v Wright* [2015] EWCA Civ 201.

20. Act for the Relief of the Poor 1601, s 7. For discussion of this and earlier Elizabethan legislation, see N Wikeley *Child Support: Law and Policy* (Oxford: Hart Publishing, 2006) pp 40–42.

21. See N Wikeley 'The strange death of the liable relative rule' [2008] J Soc Welfare & Fam L 339. For discussion of the Poor Law and the household means test of the 1930s, see J Finch *Family Obligations and Social Change* (Oxford: Polity Press, 1989) chs 2, 4.

22. Now see Social Security Administration Act 1992 s 78(6), prospectively repealed by the Welfare Reform Act 2012, Sch 14 Pt 8.

23. Social Security Administration Act 1992 s 106.

24. Wikeley above n 21, p 346.

25. Schedule 7, Pt 1. Oddly, it remains a criminal offence persistently to refuse or neglect to maintain *oneself* or a person whom one is liable to support (which is now limited to one's spouse or civil partner and not one's children): Social Security Administration Act 1992 s 105.

26. M Garrison 'Is consent necessary? An evaluation of the emerging law of cohabitant obligation' (2004–2005) 52 UCLA L Rev 815 at 832ff argues that the obligation on a liable relative to reimburse the state is a public obligation based on participation in civil society, but this seems to ignore the crucial fact that only certain relatives are placed under the duty, presumably precisely because of their relationship with the benefit recipient.

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maintenance. As we have seen, this is not a realistic option: the 'obligation to maintain' therefore can be seen as an empty duty, applying only at the point of divorce when meaningful transfers of money and property do take place – but then immediately raising the question of the basis on which such an 'obligation' can exist when the marriage itself no longer does.

POST-MARRIAGE OBLIGATION

As is well known, the reformed financial provision law introduced in 1970, subsequently consolidated in the Matrimonial Causes Act 1973, required the court to exercise its very wide powers to achieve an equitable distribution of the parties' assets and to meet their future needs from their joint resources. In so doing, it was directed 'to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other'. This was abolished in 1984 when clean-break settlements, with no continuing financial ties between the ex-spouses, were given statutory endorsement.[27]

It has frequently been argued since that there is no logic in asserting that someone who is no longer married can be under an obligation to meet the ongoing needs of the other ex-spouse qua spouse.[28] However, there is no lack of logic here. Apart from the situation where the parties make a valid pre-nuptial agreement that excludes sharing marital assets after divorce,[29] when they marry they accept *all* of the terms laid down by the law as affecting their relationship. If the state asserts the right to place prior and primary liability on spouses to meet each other's financial needs into the future, then that is part of the marital contract by which they are bound. The current legislation certainly envisages that there are continuing financial obligations between the spouses that do not end simply by virtue of the divorce, albeit that a 'clean break' between the spouses is to be achieved if possible.[30]

From a communitarian perspective, Milton Regan offers an additional justification. He argues that marriage is more than an economic partnership; rather, it is

> a distinctive open-ended relationship of mutuality, interdependence, and care, in which responsibilities may arise without express consent and impacts may linger after divorce … Financial obligation at divorce … rests not on the duty of charity to a dependent, but on the responsibility for economic justice toward a spouse.[31]

In *Miller v Miller; McFarlane v McFarlane*,[32] in an echo of Regan's argument, Lord Nicholls held that obligations arise from the interdependence created by marriage:

> In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights … This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of

27. Matrimonial and Family Proceedings Act 1984, amending Matrimonial Causes Act 1973 s 25 and inserting s 25A.
28. For judicial consideration of the issue, see the judgment of Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam) [2015] 2 FLR 1124 [25]–[31].
29. *Granatino v Radmacher* [2010] UKSC 42 [2011] 1 AC 534.
30. Matrimonial Causes Act 1973, ss 25(2)(b) and 25A(1).
31. M Regan *Alone Together: Law and the Meanings of Marriage* (Oxford: Oxford University Press, 1999) pp 188, 190.
32. [2006] UKHL 24 [2006] 2 AC 618.

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interdependence. The parties share the roles of money-earner, home-maker and childcarer. Mutual dependence begets mutual obligations of support.[33]

In an apparent limitation to this approach, Thorpe LJ asserted, in *North v North*,[34] that 'an ex-spouse is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility'. Nonetheless, the court recognised the possibility that the ex-spouse *should* be required to make provision to relieve the wife's need – at least that caused by her 'misfortune', rather than her 'mismanagement'. Lord Wilson approved Thorpe LJ's dictum in *Wyatt v Vince*[35] – but the Supreme Court still allowed the wife's appeal against the striking-out of her financial remedies claim, made almost 20 years after obtaining her divorce, against the husband, who had since become a multimillionaire.

It can therefore be said that marriage carries an obligation that may result, at the least, in post-divorce transfers of income and/or property, if this is required to meet the dependent party's ongoing needs, or to compensate her for losses resulting from the marriage and in recognition of her contribution to the welfare of the family. Such transfers may potentially last for the life of the recipient if she is unable to join the job market, and may endure for far longer than the marriage itself, but such ongoing transfers in the form of periodical payments are increasingly rarely ordered and are regarded as anomalous and to be discouraged.

The parental obligation to maintain one's child

The position regarding the spousal obligation to maintain is reasonably straightforward in so far as the duty is *imposed upon* each spouse, and is normally *owed* to the other spouse (although in the past, where the state had provided support, the duty was to *reimburse* the state for its costs). The legal position regarding child maintenance is more complex. Any right they may have to maintenance must be enforced by others acting on their behalf, who will, in practice, be those caring for the child.[36] One must therefore consider both the question of who owes the obligation to maintain and, secondly, to whom it is owed.[37] Depending upon the particular legal mechanism under consideration, these may vary.

As was noted above, the parent's (or father's) duty to maintain their child was regarded as a moral rather than legal obligation[38] and, as with the husband's duty to

33. At [9]–[11].
34. [2007] EWCA 760 [2008] 1 FLR 158 at [32].
35. [2015] UKSC 14 [2015] 1 WLR 1228 at [33].
36. Cf Scotland. The Family Law (Scotland) Act 1985 ss 1, 2 permit a child to bring an action for aliment against the parent (or step-parent) and the Child Support Act 1991 s 7 permits a child aged 12 or over to seek a maintenance calculation against the non-resident parent where no such application has been brought by the person with care or non-resident parent.
37. The issue of whether parents owe a financial obligation to *each other* qua parents is not discussed here. For a convincing argument that they do, see A Blecher-Prigat 'The costs of raising children: towards a theory of financial obligations between co-parents' (2012) 13 Theoret Inq L 179. For consideration of the varying potential obligations to the child, other parent or the state, see M Garrison 'Autonomy or community: an evaluation of two models of parental obligation' (1998) 86 Cal L Rev 41.
38. Contrary to the view of Baroness Hale, who argued that the father's 'common law obligation' has never been abolished, in *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48 [2006] 1 AC 42 at [69].

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maintain his wife, it was unenforceable. The Bastardy Laws[39] came to impose a liability of support upon the unmarried mother and from time to time, depending upon the policy goals that predominated, upon the putative father.[40] The modern basis of the enforceable obligation to maintain is contained in statute and consists of a 'public-law' system, contained in the child support legislation, and private-law provision in both matrimonial legislation and the Children Act 1989.

CHILD SUPPORT

The Child Support Act 1991 s 1(1) provides that 'each parent of a qualifying child is responsible for maintaining him'.[41] A child is a 'qualifying child' if one or both of his parents is, in relation to him, a non-resident parent; that is, not living in the same household with the child.[42] As with spousal maintenance then, the law is concerned with the position where the family unit of parent and child has become (or always was) fragmented, with the parties living apart from each other.[43] The basic purpose of the child support scheme was to seek to recoup social security expenditure on lone-parent families from absent parents, usually fathers,[44] and the way in which the scheme was developed and administered reflected that approach. Until 2008, if the lone parent was receiving out-of-work welfare benefits, she was required (unless she could show 'good cause' such as fear of violence) to authorise the Secretary of State to pursue the other parent to recover the cost of supporting the child.[45] All money recouped was offset against the benefits paid, so that the child saw no improvement in her standard of living.[46]

A review of the scheme recommended that these provisions be repealed[47] and since 2010, any child support payments have been fully disregarded in calculating the parent's benefits. The aim behind this and other changes recommended by the review was to encourage parents to make their own private arrangements for maintenance rather than use the state system. This can be seen as an acknowledgement of the failure of the state to have brought about, through the mechanism of law, social and cultural

39. Described by Wikeley, above n 20, as conceptually distinct from the Poor Law, since the illegitimate child was a *filius nullius*: p 47.

40. M Finer and OR McGregor 'The history of the obligation to maintain' in the Finer Committee *Report of the Committee on One-Parent Families* Cmnd 5629, 1974, vol 2, App 5; N Wikeley, above n 20, ch 2.

41. For authoritative discussion of the genesis and operation of the Act up to 2006, see Wikeley, above n 20; for a summary of subsequent developments, see N Lowe and G Douglas *Bromley's Family Law* (London: Butterworths, 11th edn, 2015) pp 800–825.

42. Child Support Act 1991 s 3(1)(2).

43. Where the child lives in a shared care arrangement, the amount of child support may be reduced and where the time spent is equal, there is no liability under the Act: Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) reg 50.

44. Department of Social Security (DSS) *Children Come First: The Government's Proposals on the Maintenance of Children* Cm 1264, October 1990, vol 2, p i.

45. Child Support Act 1991 s 6. Failure to cooperate without showing good cause would result in a reduction to her benefit payment: s 46.

46. Sir David Henshaw *Recovering Child Support: Routes to Responsibility* Cm 6894, July 2006, p 4.

47. Ibid, pp 18, 22. The provisions were repealed by the Child Maintenance and Other Payments Act 2008 s 15.

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acceptance of the obligation to support a child when one does not live in the same household,[48] but ideologically it brings public policy much more into line with the traditional view of minimal state intervention in family life.[49] The position therefore seems to be that, while governments place increasing rhetorical emphasis on the importance of good parenting, they have given up – after more than 400 years – seeking to impose a public-law obligation on parents to support their children.

Instead, the focus is on exhorting the making of 'family-based arrangements' – *voluntary* agreements and settlements.[50] Such arrangements are encouraged in various ways. The normative message is conveyed that such voluntary arrangements are superior to use of the state system because they are more flexible (and the child support formula certainly produced highly inflexible results) and promote shared post-separation parenting. Parents might therefore be expected to prefer to see themselves as 'civilised' parents using this 'civilised' system than resorting to compulsion and conflict. The approach is in line with empirical evidence that families usually prefer to 'negotiate' their responsibilities towards each other, applying normative guidelines to working out individual arrangements rather than following rigid rules,[51] although this does – crucially – depend on the power dynamics between the parents.[52]

This message is then reinforced through the barriers put in the way of parents trying to use the child support system. First, the website that provides the basic information and first point of contact with the system strongly promotes the use of private agreements. Secondly, a parent must have a 'gateway conversation' with the Child Maintenance Service to discuss the options available before proceeding to use the system. Thirdly, there is a charge of £20 to make an application.[53] Fourthly, there is a collection fee if the parent wishes the Service to collect the money on her behalf. The *paying* parent is required to pay 20% on top of the calculated amount, and 4% is deducted from the amount paid to the recipient. If a parent is sufficiently determined, deluded or desperate to overcome these hurdles, she will then find that, should the Service fail to collect the payments due, she has no standing to seek to recover the money herself.

This is because the original policy of the Child Support Act 1991[54] was to remove jurisdiction over child maintenance from what were regarded, with good reason, as the ineffective family courts so far as possible. In *R (Kehoe) v Secretary of State for Work and Pensions*,[55] the House of Lords held that the legislation had accordingly

48. For the view that the Act *did* succeed in bringing about a shift in acceptance of the obligation, see B Fehlberg and M Maclean 'Child support policy in Australia and the United Kingdom: changing priorities but a similar tough deal for children?' (2009) 23(1) Int J Law, Pol & Fam 1 at p 19.

49. A consequential amendment to the law amended the 'liable relative' rule so as to exclude reference to a parent being liable to support his or her children. For a critique of the change, see Wikeley, above n 21, p 346.

50. Department of Work and Pensions (DWP) *Strengthening Families, Promoting Parental Responsibility: The Future of Child Maintenance* Cm 7990, January 2011, p 10.

51. The major study of kinship arrangements is that by J Finch and J Mason *Negotiating Family Responsibilities* (London: Routledge, 1993) discussed below, but similar evidence is available in the child support context: see N Wikeley et al *National Survey of Child Support Agency Clients*, DWP Research Report No 152 (2001).

52. C Bryson et al *Kids Aren't Free: The Child Maintenance Arrangements of Single Parents on Benefit in 2012* (London: Nuffield Foundation, 2013).

53. This is a small amount in comparison to taking legal proceedings, but significant for parents dependent upon subsistence-level benefits and tax credits.

54. Section 8(1)(3).

55. [2005] UKHL 48 [2006] 1 AC 42.

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abolished any pre-existing right of the parent (or child) to seek maintenance. As Lord Hope explained:

> The Act starts by asserting in section 1(1) that, for its purposes, each parent of a qualifying child is responsible for maintaining him. It describes the maintenance of any qualifying child of his by an absent parent in section 1(2) as a 'responsibility' … The Act uses the word 'duty' in section 1(3), where it refers to the duty of the absent parent with respect to whom the assessment was made to make the payments, and the word 'obligation' in section 4(2)(b), where it refers to the enforcement of the obligation to pay child support maintenance in accordance with the assessment. But nowhere in the Act is it said that the absent parent owes a duty, or is under an obligation, to pay that amount to the person with care. Nor is it said anywhere that the person with care has a right which she can enforce against the absent parent.
>
> The effect of the Act is that the obligation to pay the maintenance assessment is owed in respect of the qualifying child but that it is enforceable by the Secretary of State.[56]

Once a maintenance calculation has been made, the obligation of the non-resident parent to pay is thus owed to the state, not to the other parent, and still less to the child – another example of Maclean and Eekelaar's 'indirect obligation'. Baroness Hale dissented, arguing that the *child* retains a civil right to secure financial support and that all that the child support scheme does is to provide a different means of enforcing it, alongside the private-law provisions.[57] The European Court of Human Rights agreed with the majority decision of the House of Lords, but did not rule on the essential question of whether there is a 'civil right' to maintenance (of the parent with care or the child), within Art 6 of the European Convention on Human Rights.[58] With the promotion of private arrangements, the abolition of the duty on the parent with care who is in receipt of benefits to authorise recovery through the child support system, and the levying of a charge for the use of the child support system, it is hard to see why the 'right' – and the corresponding obligation to the parent or child – has not at the least been revived (if it had been abolished). Garrison argues that the public-law obligation is a duty to reimburse the state for its expenditure on supporting the benefit recipient.[59] Since the state no longer seeks such reimbursement, it is arguable that the obligation of child support can only be owed to the child or other parent. But the position under *Kehoe* appears to mean that the 'obligation to maintain', at least under the Child Support Act, is owed to the state: not to the other parent, nor to the child.[60]

THE PRIVATE-LAW OBLIGATION TO MAINTAIN

Any duty to the child or to the person caring for the child must therefore lie in the sphere of private law and can be enforced only where the courts retain their jurisdiction to make orders in favour of the child.[61] The power to do so depends upon the marital or parental status of the parties.

56. Ibid, at [33]–[34].
57. At [69]–[74]. For a critique of the majority and support for Baroness Hale, see N Wikeley 'A duty but not a right: child support after *R (Kehoe) v Secretary of State for Work and Pensions*' [2006] Child & Fam L Q 287.
58. *Kehoe v United Kingdom* [2008] 2 FLR 1014.
59. Garrison, above n 26, p 834.
60. As Wikeley, above n 20, pp 66, 279–280, points out, the position in Scotland is different, with a clear statutory obligation to the *child* in both private and child support law.
61. The detailed provisions are discussed in N Lowe and G Douglas, above n 41, pp 820–824.

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Where the applicant and respondent are spouses. As with the spousal duty to maintain, there are provisions in matrimonial[62] legislation enabling a married parent to seek an order for the maintenance of any child of the family. The Matrimonial Causes Act 1973[63] provides that either party to a marriage may apply to the court for an order on the ground that the other 'has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family'.[64]

The use of the term 'to make a proper contribution towards' is of interest as it suggests that the obligation is *to the other parent*,[65] rather than to the child. This would reflect a mutual obligation on parents to maintain their children and suggests that it is assumed that the parent caring for the child is also making a contribution in this regard (which might not be in cash but could be through the provision of a home, or non-financial contributions in caring). This approach is reinforced by the fact that the income and resources of each parent, amongst other matters, are taken into account in arriving at the amount to be ordered.[66] On the other hand, payments can be made directly to the child, or expressed as being 'for the benefit of' the child.[67] Moreover, a child who has reached the age of 16 may him- or herself apply for a variation of an existing order, perhaps to extend payments to cover higher education or training.[68] These provisions suggest that the child is seen as the primary beneficiary of the obligation, and that the applicant adult is regarded as acting on behalf of the child rather than on her or his own account.

Provision under Schedule 1 to the Children Act 1989. There was no private-law duty on the 'natural' parents of illegitimate children to maintain them until 'affiliation proceedings' allowing an unmarried mother to seek a maintenance order against the putative father were introduced in 1844. When discrimination against children born outside marriage was finally abolished in 1987, provision for their maintenance was overhauled and assimilated with that for legitimate children.[69] This is now contained in the Children Act 1989 Sch 1 (subject to the jurisdictional rules of the child support scheme). This imposes the obligation to pay maintenance upon a legal parent or a step-parent of the child.[70]

62. Including, for these purposes, the Civil Partnership Act 2004.

63. Section 27. The equivalent provision under the Civil Partnership Ac 2004 is Sch 5 Pt 9 para 39(1). Similar provisions are contained in the Domestic Proceedings and Magistrates' Courts Act 1978.

64. A 'child of the family' is defined as (a) a child of both spouses or civil partners; and (b) any other child … who has been treated by both of those parties as a child of the family: Matrimonial Causes Act 1973 s 52, as amended.

65. The duty is placed on the other party to the marriage, constituting an exception to the usual principle that only a legal parent has the liability to maintain, but the court must have regard to whether there is a parent available to support the child in the first instance: 1973 Act s 27(3A), 25(4); 1978 Act s 3(3), 7(5).

66. When the child support regime was first introduced, the formula used to calculate the amount to be paid also included elements taking account of the financial position of the parent with care, suggesting the same approach, but subsequently, this was abandoned as part of the attempt to simplify the formula.

67. 1978 Act s 2(1)(c)(d); 1973 Act s 27(6)(d)(e)(f).

68. 1973 Act s 27(6A); 1978 Act s 20(12)(b). Section 20A(1) also allows the child to apply for an order made by the magistrates but which has ceased to have effect because he or she has reached the age of 16 to be revived.

69. Family Law Reform Act 1987 ss 12–17.

70. Children Act 1989 Sch 1 para 16(2). As under the matrimonial jurisdictions, the step-parent must be, or have been, married to or in a civil partnership with, a parent of the child and have treated the child as a child of the family.

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In contrast to the matrimonial legislation, the power to make orders relates only to the *form* of the provision – not to its purpose. An applicant is not required to prove that the respondent has 'failed to provide or to make a proper contribution towards, reasonable maintenance' for the child. Rather, the court is simply required to have regard to the usual checklist of factors relating to both the parties and the child.[71] In practice, the basis of the claim is precisely that reasonable provision has not been made for the child, taking into account matters such as parental standard of living. Importantly, the court may order settlements of property and property transfers, so that, for example, a home may be purchased in which the child and the caring parent are to live while he or she is growing up. The fact that the respondent might be required to provide lavish support while the child is growing up and that this is tied to what is appropriate for the child to experience in the light of the respondent's living standard suggests that here again, the obligation to make provision is owed to the *child* rather than to the carer to offset their expenditure.

Although use of the child support system has been discouraged, the restriction on making use of these private-law remedies has not been lifted. Unless the parties can reach agreement (which may then be embodied in a court order by consent), or the payer is so fabulously wealthy that the provision likely to be ordered exceeds the child support maximum, they will generally not be able to use these jurisdictions. The emphasis on reaching voluntary agreement has thus rendered the parental 'obligation' to maintain largely a matter of personal preference rather than binding duty.

A 'SENSE' OF OBLIGATION

The social context in which family law operates cannot be ignored in seeking to understand how it translates behaviour and emotion into legal mechanisms. Empirical evidence suggests that this rather complex picture of the nature of legal obligations between family members may not be a weakness of the law but a reflection of the contingent nature of obligation as it is felt and experienced by family members. The most significant body of evidence shedding light on how families view and perform their obligations is that of Finch and Mason.[72] Although this did not focus on the nuclear family but was concerned with wider kin, their findings have resonance for our understanding of how adults in intimate relationships view their obligations.

The researchers found that people in kin relationships did not feel that there was a widely acknowledged set of 'rules of obligation' as they termed them, to govern how to behave:

> For most people responsibilities towards relatives were not fixed. They are far more fluid than the notion of 'rules of obligation' implies … the concept of 'guidelines' seems to fit our data much better than 'rules'.[73]

Finch and Mason characterised these guidelines as 'procedural', meaning that 'they indicate how to work out whether it is appropriate to offer assistance to a particular relative, rather than ones which point to what you should do in concrete terms'.[74]

71. Sch 1 para 4.
72. J Finch and J Mason, above n 51. For a critique, see D Miller 'What is a relationship? Is kinship negotiated experience?' (2007) 72(4) Ethnos 535.
73. Finch and Mason, above n 51, p 166.
74. Ibid.

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But they seem more appropriately described as providing a set of criteria to apply to help determine what to do. For example, they found that it was most likely that people would 'endorse family responsibilities in "deserving" cases where the need is presented as entirely legitimate and the person who needs assistance is not at fault in any way'. Secondly, 'people were more likely to accord responsibility to relatives when the assistance needed is fairly limited – in terms of time, effort or skill'. Thirdly, responsibilities between parents and their adult children were 'accorded a special status' coming closest to having fixed rule-based responsibilities associated with them, but even there, responsibilities were not seen as 'automatic or unlimited'.[75]

The use of such 'guidelines' is reminiscent of the checklist of factors used in the law to structure the discretion exercised by courts in determining when and how to exercise the power to order financial payments between spouses and from parents to children, which in turn reflects the kinds of factors likely to be regarded as morally relevant by parties negotiating to reach settlements between themselves. It helps explain opposition to the rigidity of the child support formula and to other formulaic approaches to assessing financial remedies after relationship breakdown. Such factors reflect issues of significance to the parties, which can be argued about – and sometimes at least, resolved – through the process of negotiation, the centrality of which Finch and Mason posit as the second key finding from their research.[76]

Finch and Mason do not use the term 'negotiation' simply in the sense in which lawyers might understand it, as a process of reaching agreement over a dispute (although they do include such forms of 'explicit' negotiation), but are more focused on the process as taking place over a period of time and as part of that family's history and context. They argue that through both explicit and implicit negotiation, applying the guidelines they recognise as normatively important within their family, kin build up 'developing commitments' to each other and 'become committed to accepting certain sorts of responsibilities, to particular individuals, over time'.[77]

The notion that obligation flows from the history of the relationship and the nature of the parties' behaviour towards one another is in line with Maclean and Eekelaar's study of the obligations felt by married and cohabiting couples.[78] They found that while for some married people, marriage provides an 'external' source of their obligations to each other, other respondents (both married and unmarried) focused more on their obligation accruing as their relationship developed, or deriving from independent ethical values, such as the golden rule to 'do as you would be done by'.[79] Such research is persuasive in suggesting that the underlying family context should be taken into account in attempting to understand why the *legal* obligation might often be difficult to enforce. The final dimension that needs to be explored in order to do this is the rationale for imposing the obligation in the first place, and here we can build upon Finch and Mason's emphasis on the idea of 'developing commitments' over time.

75. Ibid, pp 18–19. Finch, above n 21, pp 154–177, elucidates a further set of guidelines drawing on previous research literature, including the relationship between the parties in terms of genealogy; the quality of their relationship; and the extent of prior mutual assistance.
76. Ibid, p 60.
77. Ibid, pp 61–62.
78. It also endorses the view of Regan, above n 31, pp 26, 190, that obligations between spouses grow 'from the accretion of experience in a relationship of interdependence'. They 'make a host of subtle contributions and sacrifices in reliance on continuation of a shared life together'.
79. M Maclean and J Eekelaar 'Marriage and the moral bases of personal relationships' (2004) 31(4) J L Soc'y 510.

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COMMITMENT AS THE BASIS FOR LEGAL FAMILY OBLIGATION

The idea that 'commitment' lies at the heart of family life has become commonplace, being used by everyone from politicians to agony aunts. The arguments that 'lack of commitment' explains why marriages break down more frequently than in the past,[80] or that cohabiting couples can be 'just as committed as married couples',[81] are regularly employed by those seeking to roll back the tide of liberal permissiveness or to extend legal protections to 'non-traditional' family forms. While commitment is not a legal term, it has been used in both legislation and case-law to assess the quality of the relationship under scrutiny. For example, the Family Law Act 1996[82] requires a court deciding whether to make an occupation order excluding a partner from the home, on the application of a cohabitant who has no right of her own to occupy the property, to consider, inter alia,

> the nature of the parties' relationship and in particular the level of commitment involved in it.

This replaced the original formulation contained in the Act, which rejected the very suggestion that cohabitants may be 'as committed' as spouses, by requiring the court to 'have regard to the fact that [the parties] have not given each other the commitment involved in marriage'.[83] The court is now invited to assess whether the parties have been committed 'enough' to justify the grant of an order.

An unmarried father's 'commitment' to his child has also been used in determining whether to grant him parental responsibility (and thus equal rights with the mother). Where the father's name is not included on the birth register, he can acquire parental responsibility by order under s 4(1)(c) of the Children Act 1989. Although Black J has commented that 'parental responsibility is not a reward for the father for his commitment to and involvement with [the child] but an order which would only be made in [the child's] best interests',[84] the 'discipline' to be applied by a court in weighing whether to make the order makes 'the degree of commitment' he has shown towards the child a key factor.[85] When government was consulting on whether to legislate so that all unmarried fathers who *are* named on the birth certificate would have parental responsibility automatically, it was argued 'that joint registration could probably be assumed to imply the mother's agreement, and to demonstrate an appropriate degree of commitment to the child'.[86] And when it was suggested that there should be a duty on the mother

80. E Scott, above n 2, p 1905.
81. A Barlow et al *Cohabitation, Marriage and the Law* (Oxford: Hart Publishing, 2005) p 1. This statement is not in conflict with that of Scott – Barlow et al go on to argue that marriage 'self-evidently cannot be seen any longer as a commitment for life …'.
82. Section 36(6)(e), amended by s 2(2) of the Domestic Violence, Crime and Victims Act 2004.
83. Section 41.
84. *Re M (handicapped child: parental responsibility)* [2001] 3 FCR 454 at 479b.
85. *Re H (Minors)(Local Authority: Parental Rights)(No 3)* [1991] Fam 151, 158; *Re S (Parental Responsibility)* [1995] 2 FLR 648 at 652–657; *Re M (Parental Responsibility Order)* [2013] EWCA Civ 969 [2014] 1 FLR 339 at [15].
86. Lord Chancellor's Department *Consultation Paper on the Procedure for the Determination of Paternity and the Law on Parental Responsibility for Unmarried Fathers* (1998) p 59.

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to name the birth father so that he could be registered, it was argued that 'a father's name on a birth certificate symbolises his commitment to his child'.[87]

Defining commitment

Yet the term is rarely defined or explained in the legal or policy literature,[88] although it has been the subject of greater scrutiny in socio-legal and sociological enquiries. A particularly influential contribution comes from Giddens' conception of the 'pure relationship' in late-modern societies.[89] In these relationships, commitment – 'a particular species of trust' – to the relationship as well as to the other, is key:

> Commitment, within the pure relationship, is essentially what replaces the external anchors that close personal connections used to have in pre-modern situations … What is the 'committed person' in the context of a close relationship? She or he is someone who, recognising the tensions intrinsic to a relationship of the modern form, is nevertheless willing to take a chance on it, at least in the medium term – and who accepts that the only rewards will be those inherent in the relationship itself … A person only becomes committed to another when, for whatever reason, she or he decides to be so …[90]

There is a similarity here to Finch and Mason's emphasis on personally negotiated commitments as the best way of understanding obligations between kin. We can also see the contrast with the understanding of legal 'obligation'. Obligations are imposed upon the person whether he or she wills them or not (although it might be possible to negotiate them away). Commitment, as discussed here, implies an active choice made by the individual (or couple).[91] The dictionary definition of commitment refers to 'the act of committing or pledging' and it describes the term 'to commit' as meaning to 'pledge or align oneself'. Commitment, in this sense, looks like a promise and it fits the idea of marriage (especially marriage as viewed as a contract) very easily. It becomes clearer why cohabitation may not appear so readily translatable as another manifestation of commitment.

However, Finch and Mason also construe commitment in a rather different way. For them, although commitments are 'created' by negotiation, rather than 'ascribed' by fixed norms,[92] they are 'consolidated over time' because it 'becomes too expensive for people to withdraw from them'.[93] They use the term 'commitment' interchangeably with 'obligation' and 'responsibility' to imply something that becomes (even though it does not start out as such) a burden.

87. Department of Work and Pensions (DWP) *Joint Birth Registration: Recording Responsibility*, June 2008, Cm 7293 at para 8. The duty was included in the Births and Deaths Registration Act 1953 s 2A, inserted by Sch 6 para 4 to the Welfare Reform Act 2009, but has not been brought into force.
88. See, for example, the report from the Centre for Social Justice, *Fully Committed? How a Government Could Reverse Family Breakdown* (2014), which at no point explains what it means by 'committed' relationships.
89. A Giddens *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991) p 6. See also A Giddens *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge: Polity Press, 1992) p 58.
90. Giddens, above n 89, *Modernity*, pp 92–93.
91. See, too, the studies by J Lewis *The End of Marriage? Individualism and Intimate Relations* (Cheltenham: Edward Elgar, 2001) and C Smart and P Stevens *Cohabitation Breakdown* (London: Family Policy Studies Centre, for the Joseph Rowntree Foundation, 2000).
92. Above n 51, p 96.
93. Ibid, p 94.

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The social psychology literature also distinguishes between commitment as consensual choice, and commitment as burden, in seeking to explain why people may or may not stay in relationships.[94] Stanley and Markman,[95] for example, identify two key dimensions of commitment: *personal dedication* – 'the desire of an individual to maintain or improve the quality of his relationship for the joint benefit of the participants'; and *constraint commitment* – 'the forces that constrain individuals to maintain relationships regardless of their personal dedication to them'. The former fits the view of commitment reflected in English law of a volitional assumption of obligation bound up in the relationship, while the latter reflects Finch and Mason's concept of a commitment from which it is too costly to withdraw. This dual understanding of the dimensions of commitment is helpful in explaining how the concept is commonly used – we 'enter into' commitments, and we then 'have' commitments that bind us.

Stanley and Markman drew on previous work by Johnson, which distinguished three separate strands to commitment: personal, moral and structural.[96] *Personal commitment* is the extent to which the person wishes to stay in the relationship, affected by attraction to the person, attraction to the relationship itself, and its importance to his or her own identity. It is the form of commitment recognised by Giddens in the pure relationship. *Moral commitment* is 'the sense that one is morally obligated to continue a relationship', and is a function of three components; the values attached to the morality of dissolving the relationship, the personal moral obligation felt to the other person and one's general moral consistency of behaviour. *Structural commitment* is the sense of constraint or perception of barriers to leaving the relationship. Later researchers summarised this as follows: 'spouses remain married because they want to (Personal Commitment), because they ought to (Moral Commitment), or because they have to (Structural Commitment)'.[97]

The analysis demonstrates the interrelationship between obligation and commitment and explains how the terms can often be used interchangeably. However, in legal policy, and in the law itself, 'commitment' is understood in the first sense, of 'personal' commitment. The same meaning is clearly intended when used by those advocating the extension of protection to cohabitants on relationship breakdown who argue that their 'commitment' can be just as strong as that of married couples.

ALTERNATIVE RATIONALES

The problem with relying on the personal dimension of commitment as the justification for the imposition of legal obligations is that it necessarily excludes from the ambit of such obligations those relationships where such commitment is lacking. This is neither accurate in terms of understanding how the law currently imposes obligations[98] nor appropriate in terms of family policy.

94. This work is drawn on in particular by Lewis, above n 91 and Barlow et al, above n 81.
95. S Stanley and H Markman 'Assessing commitment in personal relationships' (1992) 54(3) J Marriage & Fam 595.
96. Subsequently tested empirically: see M Johnson et al 'The tripartite nature of marital commitment: personal, moral and structural reasons to stay married' (1999) 61(1) J Marriage & Fam 160, 161.
97. JM Adams and WH Jones 'Conceptualization of marital commitment: an integrative analysis' (1997) 72(5) J Pers & Soc Psychol 1177 at 1180.
98. See Smith, above n 7, who argues that there are two 'obligation-creating practices' – promising (contracting) and reciprocity (indebtedness): p 73. As shown below, there must be more than these – the parent–child relationship does not readily fit within either mechanism.

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It is clear that the spousal duty to maintain becomes meaningful at the point when the marriage is breaking down, when at least one of the parties no longer 'feels' personally committed to the other and is seeking to withdraw. One can point to the initial marriage contract as the taking on of the 'commitment' of support, but the law provides few bolsters to sustain *moral or structural* commitment at such times of strain, because it allows the relationship to be terminated with relatively little difficulty. Moreover, while the traditional moral duty of the father to maintain his *legitimate* child can be presented as akin to the entry into a marriage – a voluntary personal commitment towards the child whom the father acknowledges or recognises as 'his' – the public-law liability to support imposed upon the unmarried father (or mother) was historically anything but voluntarily assumed. And, despite its apparent unwillingness to enforce it, the law continues to impose the duty of child support regardless of the circumstances of the conception or the existence or quality of the relationship with either the other parent or the child.[99] The *basis* for the obligation cannot lie in the concept of commitment in the sense of voluntary pledge or acceptance.[100]

The use of personal or moral commitment as the rationale for the imposition of obligations (and rights) is equally problematic from a policy perspective, as is clearly demonstrated when considering financial remedies on relationship breakdown. It was argued above that it is not illogical to impose post-divorce duties of support upon a former spouse, because these are implicitly capable of being levied as part of the marriage contract. The marriage itself provides the structural constraint. But this cannot be true of a cohabiting couple where it is particularly likely that there will be dispute precisely over the degree (or presence) of personal and moral commitment at the point of breakdown[101] and the law provides even fewer structural constraints on termination. The rationale for imposing an obligation to meet the cohabitant's ongoing need or to recognise her contribution to the relationship has to be found elsewhere. Equally, if personal commitment were to be accepted as the relevant basis for the parental obligation to maintain, it would become impossible to enforce it against any unwilling parent – that may be the practical effect of current policy, but it would take a bold government to put it forward as the overt object of the law. A number of alternatives might be put forward; as illustrations, just two are noted in outline here.

Relationship-generated disadvantage

The act of entering into a relationship (including 'drifting' into a cohabiting relationship in a rather 'contingent' way) and taking actions in response to life events as they subsequently occur, such as the birth of a child, the taking or losing of job opportunities, or decisions to acquire property in sole or joint names, have long-term consequences for the parties, which may lead to relationship-generated disadvantage that affects one party disproportionately *while the other may reap the long-term benefits*. The rationale for a discretionary regime providing some form of redistribution is therefore to rectify

99. Although these factors could be relevant to private negotiation or to a court-based determination of liability.

100. See also Giddens, above n 89, *Modernity*, p 98; Fineman, above n 18, pp 139, 304; Garrison, above n 26, pp 826, 828.

101. See eg R Tennant et al *Separating from Cohabitation: Making Arrangements for Finances and Parenting*, DCA Research Series 7/06 (2006); G Douglas et al *A Failure of Trust: Resolving Property Issues on Cohabitation Breakdown* (Bristol: School of Law/Cardiff: Cardiff Law School, 2007).

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the imbalance between the parties.[102] This is already well established in divorce law and has been proposed by the Law Commission in relation to cohabitation.[103] The recognition that it is unfair to allow one party to take the benefit of a windfall provides a moral justification for redistribution across family relationships, regardless of type, without needing to address the question of their degree of commitment, and thus sidesteps the argument that providing financial remedies to cohabitants could 'undermine the institution of marriage'.

Causation

But what can provide a justification for the law's imposition on unwilling parents of a duty to maintain their child? It has been argued by Eekelaar, among others, that the moral obligation to maintain (and care for) a child does not derive from the biological (or legal) parental link of itself; rather, the community as a whole has a duty to alleviate need and to promote human flourishing, and it is a matter of particular social arrangement that the duty may be delegated to parents.[104] However, this does not explain why societies would, or should, usually 'arrange' for the duty to fall primarily upon the legal parents, other than as a matter of convenience.

It is suggested that, contrary to such a view, causation is *not* morally irrelevant in answering this. The act of knowingly engaging in behaviour that runs the risk that a child will be created who will be vulnerable and dependent is a valid moral basis for imposing the prior obligation to support that child. Causation both reflects the current legal rationale for the duty to maintain the child and provides a valid and sufficient moral basis for it, which caters for the situation where the parent is not *committed* to the child. As Garrison argues,

> The risks that children's dependence impose on both individuals and communities necessitate the identification of responsible caregivers, and parents are the obvious candidates because they – and they alone – caused the state of dependency that mandates care-giving.[105]

CONCLUSION

This paper has sought to explore the nature of obligation in family law and to seek to understand why it appears to be so problematic. It has been argued that the concept of obligation implies a requirement to be bound, imposed upon the obligor without his or her consent as part of the normative nature of law. This is in contrast to the increasingly commonly used idea of commitment, which suggests a *voluntary* undertaking or promise to be bound, which fits well with the contractual notion of marriage.

Using the example of the way in which the obligation to maintain a spouse or a child has been developed by the law, it is suggested that family obligations are best seen,

102. As Smith, above n 7, suggests, the basis of such restitution is the broad principle of reciprocity: p 64.

103. As in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [2006] 2 AC 618. See Law Commission (Law Com No 307) *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007).

104. J Eekelaar 'Are parents morally obliged to care for their children?' (1991) 11(3) Oxford J Legal Stud 340. See also Ferguson, above n 13; Wikeley, above, n 20, p 36; S Altman 'A theory of child support' (2003) 17(2) int J Law, Pol & Fam 173.

105. Garrison, above n 26, p 828.

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however, as 'soft' obligations, unclear in scope and uncertain in application. Even the apparently rigid child support scheme has been converted (if not subverted) into a residual jurisdiction to be avoided as far as possible, with parents encouraged to negotiate their own maintenance arrangements, which can take as much or as little notice of the state's formulaic norms as they wish. This might all appear to be a weakness in the law and it can certainly be subjected to criticism. But it was argued that consideration of the available empirical evidence shows that this way of operating actually fits quite well with how non-legal obligations are created and developed in kin relationships. The long-standing preference for private ordering, the exercise of discretion and recognition of room for manoeuvre in the application of family law are therefore socially and culturally understandable and appropriate, and it would appear to be important to caution against attempts to 'simplify' the law on financial remedies on divorce through the use of presumptions of equal sharing, or cut-off periods of support,[106] which limit rather than liberate couples seeking to shape their own arrangements.

However, it was also shown that the growing focus on commitment as the basis of family ties is problematic. Law and legal policy view commitment in the form of a voluntary, internalised pledge, but it can be seen that the concept also involves what has been called a 'structural' dimension that comes closer to becoming interchangeable with the idea of obligation itself. The notion of commitment is therefore more complex than its use in policy discourse tends to suggest.

Moreover, it is clear that the concept as used in legal policy cannot provide a sufficient rationale for imposing obligations (and bestowing rights) on all types of relationship and that it appears to fit best the entry into marriage or civil partnership. Even there, it becomes difficult (though not impossible) to explain the potentially enduring nature of legal obligations once the personal commitment to the other or to the relationship has gone. Certainly, the parental obligation to maintain cannot simply be derived from the notion of commitment, either as a matter of legal history or social policy. Nor can cohabiting relationships always demonstrate a sufficient level of commitment to satisfy the demands of legal policy. In such cases (and no doubt others), other rationales need to be found, and it was argued that relationship-generated disadvantage and causation already provide valid examples of alternatives.

Recent legal scholarship has produced major insights into the regulation of intimate relationships and the significance of recognising and responding to differential power and vulnerability within them. Most profoundly, scholars have challenged the primacy of the conjugal relationship as the basis for legal recognition of family ties, arguing for parenthood, or more broadly still, caring, to replace marriage as the paradigm and source of legal bonds.[107] This paper has sought to show that the task of translating such work into enduring policies and reforms can only be accomplished properly if the same degree of attention is paid to the consequences of such recognition.

106. See eg the Divorce (Financial Provision) Bill 2015–16 and note the criticism of the lack of judicial discretion under Scottish law by Lord Hope in Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 [2006] 2 AC 618, [101]–[121].

107. See eg M Fineman, above, n 18; J Herring *Caring and the Law* (Oxford: Hart Publishing, 2013).

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