COLLECTED ESSAYS IN LAW

Michael Freeman

Family Values and Family Justice

Michael Freeman F.B.A.

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ASHGATE

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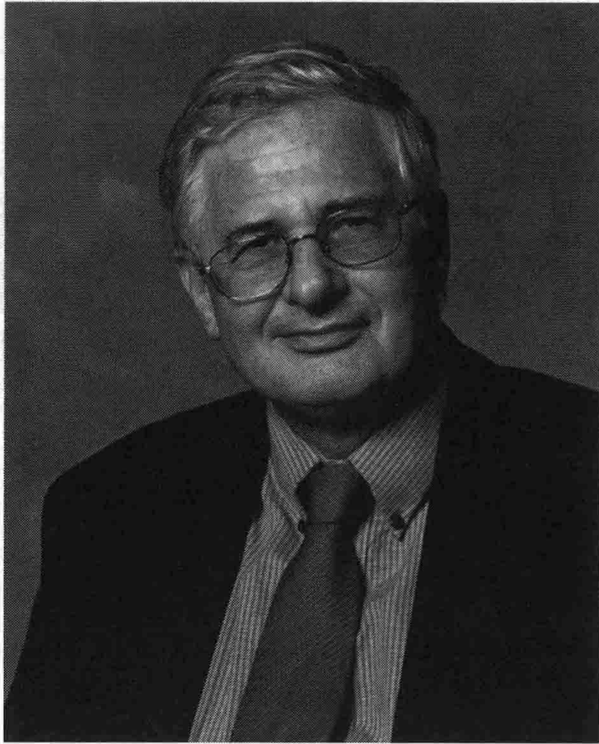
Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.



Michael Freeman

Introduction

The essays contained in this volume span a quarter of a century, and range from discussions about patriarchy and mediation, to same-sex marriages and saviour siblings. There is much about children's rights and about parental responsibility. If there is an underlying theme it is about the limits of the state so far as the family – that most intimate of relationships – is concerned.

The volume derives its title from an essay contributed to a collection on law and public opinion at the end of the twentieth century.[1] Twelve years on the moral panic is still there, if its ground has shifted. There is still concern about youth crime and misbehaviour (and we now have anti-social behaviour orders[2]), about child support and errant fathers (and the sanctions have been substantially increased[3]), about child abuse (the image of Baby Peter glares at us unforgivingly[4]). The family rights of the gay have been increased: they can now adopt[5] and enter into civil partnerships.[6] We no longer talk of pretended family relationships[7], and we have eased access to fertility treatment for single and lesbian women by removing the requirement that clinics should consider the child's need for a father.[8] But many of these changes were contested.[9] But the trend is towards inclusivity, unimaginable a generation ago, and barely on

1 *See* M. Freeman, *Law and Opinion at the End of The Twentieth Century*, Oxford, Oxford University Press, 1997.

2 But little changes: *see* D. Hayes, 'The Same Old Story', *Community Care*, 11 September 2008, 18–19.

3 I discuss these in *Understanding Family Law*, London, Sweet and Maxwell, 2007, ch.12.

4 *See* the Laming report, discussed in J. Carvel, ' "Cinderella Service" will be shaken up, minister pledges', *The Guardian*, 13 March 2009, 6–7.

5 Adoption and Children Act 2002 s.144(4), as amended by the Civil Partnership Act 2004 s.79.

6 Civil Partnership Act 2004.

7 The Local Government Act 1988 s.28 was repealed by the Local Government Act 2003, Sch. 8(1), para 1.

8 This direction in Human Fertilisation and Embryology Act 1990 s. 13(5) was replaced by one emphasising the need for 'supportive parenting' in the Human Fertilisation and Embryology Act 2008 s.14(2).

9 *See* N. Watt, 'MPs Vote for Hybrid Embryos after Brown makes plea to permit "Moral Endeavour"', *The Guardian*, 20 May 2008, 4; J. Randerson *et al*, 'Ethical Concerns in Embryos Bill Divide MPs', *The Guardian*, 12 May 2008, 4.

the horizon even in 1996. The change reflects a new human rights agenda.[10] There have been changes since 'Family Values and Family Justice' was written: the divorce reform was never implemented[11], and a restructuring of the divorce process is now relegated to a distant back seat. The Gender Recognition Act 2004 now allows post-operative trans-gender persons to marry in their new identity, and the gay may regularise their relationships in civil partnerships. The debate about gay marriage continues but it is less prominent in the UK than in California, for example.[12] We are beginning to think 'beyond conjugality', 'outside the marital and conjugal box'.[13] The Law Commission of Canada has gone further, asking whether the distinction between conjugal and non-conjugal relationships is consistent with the value of equality. Autonomy, it argues, will be furthered if 'the state's stance is one of neutrality regarding the individual's choices whether to enter into personal relationships'.[14] The unlikeliest of test cases was fought in 2008 by two elderly unmarried sisters.[15] They had lived together all their lives in a property built on land inherited from their parents. They were concerned that the surviving sister would be forced to sell the property to pay inheritance tax. This, they maintained, was discriminatory, since spouses and civil partners were exempt from this tax. Their claim was rejected by the European Court of Human Rights which held the relationship between siblings was 'qualitatively' different from that between married couples and homosexual civil partners. The court said in marriage and civil partnership there was a public undertaking. This, of course, could easily be introduced. But is the case not rather about the absence of a sexual relationship? The Misses Burdens are the unlikeliest of revolutionaries but they may well be harbingers of reform. But how soon?

The next chapters (2–8) centre on issues relating to children. The Children Act 1989 still governs disputes over children. Concerns that the paramountcy principle would not survive the Human Rights Act 1998 have proved alarmist. This was already apparent in 1982 in *Hendricks* v *The Netherlands*[16], and

10 The Human Rights Act 1998 incorporated the European Convention on Human Rights into UK law. On an increasing backlash against it (or rather the Court) see 'Courting Disaster', *The Guardian*, 11 April 2009, 36.

11 On calls to re-activate the divorce law reform debate *see* G. Morris, 'Times They Are A-Changing'. (2009) 159 *New Law Journal* 494–95.

12 Where the legalisation of gay marriages was overturned by popular vote in November 2008.

13 *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships*, 2002.

14 *See* B. Cossman, 'Beyond Marriage' in (ed.) M.L. Shanley, Just Marriage, New York, Oxford University Press, 2004, 97.

15 *Burden* v. *United Kingdom* [2008] 2 FLR 787.

16 (1982) 5 E.H.H.R.223.

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was affirmed in *Payne* v *Payne* in 2001 by Thorpe L.J. who noted that 'the acknowledgment of child welfare as paramount must be common to most if not all judicial systems within the Council of Europe'.[17] Subsequently (in 2004), Munby J. described the welfare principle as 'a core principle' of human rights law.[18] In 'Disputing Children' I observed that some of the most hotly contested disputes about children concerned contact arrangements. If anything this problem has got worse. The relationship between domestic violence and contact has come into stronger focus, the Court of Appeal, wrongly I believe, being reluctant to impose a presumption against contact where there has been domestic violence.[19] There has also been more attention paid to the recalcitrant mother, with new initiatives to tackle the problem in the Children and Adoption Act 2006. Parents (it will usually be mothers) can now be made to do up to 200 hours of unpaid work for breach of a contact order.[20] Another change in the law since 'Disputing Children' was written has seen the status of the unmarried father increase. He now acquires parental responsibility if he is registered as the child's father on the birth certificate.[21] There is even now talk of his being given automatic parental responsibility.

When one reads a leading Kantian philosopher writing about a child's main remedy is to 'grow up',[22] and another finding it strange to think of children as having rights,[23] it is perhaps not surprising that influential monographs like those by Goldstein, Freud and Solnit and by Martin Guggenheim can propagate anti-children's rights sentiments. And, as I write, there is an Equality Bill before the UK Parliament which targets just about every discrimination imaginable but strategically omits that against children.[24] Chapters 3 and 4 of this book

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17 [2001] 1 FLR 1052,1065.

18 In *CF* v. *Secretary for the Home Department* [2004] 2 FLR 556.

19 *Re L, Re V, Re M, Re H* [2001] Fam 260. New Zealand has a presumption against unsupervised contact in cases of violence: see A. Perry, 'Safety First? Contact and Family Violence In New Zealand' (2006) 18 *Child and Family Law Quarterly* 1.

20 Schedule A 1, para. 4 of Children Act 1989, added by Schedule 1 of the Children and Adoption Act 2006. For further commentary see M. Freeman, *Understanding Family Law*, London, Sweet and Maxwell, 2007, 238–40.

21 Children Act 1989 s. 4(1)(a) and (1A), as amended by the Adoption and Children Act 2002.

22 *See* O. O'Neill, 'Children's Rights and Children's Lives' (1998) 98 *Ethics* 445–63.

23 *See* H. Brighouse, 'What Rights (If Any) Do Children Have?' in (eds) D. Archard and C. Macleod, *The Moral and Political Status of Children*, Oxford, Oxford University Press, 2002, 31–52, 37.

24 The Equality Bill 2009. See the discussion in C. Davies, 'Discrimination "a daily fact of life for children"', *The Observer*, 29 March 2009, 14.

respond first to Goldstein, Freud and Solnit[25] and then to Guggenheim.[26] Both books emanate from the US, which together with Somalia (which doesn't have a government) has not ratified the UN Convention in the Rights of the Child. Neither book really addresses the Convention[27], though Guggenheim is sceptical that ratification by the USA would make any difference. The main right Goldstein *et al* would give children is the right to autonomous parents.[28] Guggenheim concludes 'children have the right to be raised by parents who are minimally fit and who are likely to make significant mistakes in judgment in childrearing.'[29] I thought there was a typo here, but have been assured that there is not. What kind of a life does this offer children?

Chapter 5 was written as a response to Ellen Key's *The Century of the Child*, first published exactly 100 years earlier.[30] It is an audit and a critical assessment, and its themes still resonate. Child poverty is still endemic[31], such that *Save The Children* is now targeting child malnutrition in the UK.[32] We've had a commitment (by Tony Blair) to end child poverty by 2020: this now looks unattainable, and did even before recession hit us. We are no nearer conquering child abuse now than we were in 2000. The House of Lords has in *Re B*[33] upheld its earlier ruling *in Re H*[34], which I criticised in 'The Century of The Child'.[35] We've had at least two well-publicised scandals since 2000: the Victoria Climbié case[36] and that of 'Baby Peter'.[37] Both led to inquiries by

25 In particular to their *The Best Interests of the Child*, New York, Free Press, 1996.

26 *What's Wrong with Children's Rights*, Cambridge, Mass, Harvard University Press, 2005. Note the title is a statement, hence the omission of a question mark!

27 Guggenheim, when he does so, gets it wrong!

28 *Op cit*, note 25, 90. *See also* 140 (to be represented by parents) and 148 (to parents who care).

29 *Op cit*, note 27, 43.

30 In Swedish: it was first published in English in 1909.

31 The Government has failed in its goal to reduce it by 50 per cent by 2009. And *see* L. Elliott, 'Up. Up. Up. Child Poverty, Pensioner Poverty, Inequality', *The Guardian* 11 June 2008, 1–2.

32 *The Guardian*, 2 April 2009.

33 [2008] 2 F L R 141.

34 [1996] A C 563.

35 It also ruled that *Re M and R* [1996] 2 F L R 195 was correctly decided.

36 *See* Lord Laming, *The Victoria Climbié Inquiry* Cm.5730, London, The Stationery Office, 2003.

37 Who was failed by social workers, the police, doctors (see *The Times*, 28 November 2008, 21), and the legal system. We have been 'assured' it will not happen again! (see P. Curtis, 'Balls "was irresponsible" to promise Baby Peter case will not happen again', *The Guardian*, 12 December 2009, 7).

Lord Laming.[38] The latter report significantly quoted the UN Convention on the Rights of the Child, but it was Article 6 (on survival and development) which was seen as significant (as it is). Article 19 is equally pertinent (on abuse), and it got no mention at all. It is rather a pity that the relationship between child abuse and child chastisement is still so little addressed.[39] But, more generally, there is a failure to recognise the link between protecting children and protecting their rights.

Chapter 6 follows on from this. It focuses on the issue of corporal punishment of children by parents. There are now 27 countries which have made it unlawful for parents to hit children.[40] These include one English-speaking country, New Zealand, where there is already a move to reverse the legislation.[41] England now has a 'compromise' position, which essentially permits parents to assault their children so long as actual bodily harm (in lay language, a mark) does not result.[42] This followed a deeply embarrassing so called 'consultation' exercise in which the Swedish model (a total ban) was ruled out, and respondents were asked questions about permissible implements, parts of the body and so on.[43] The 2004 compromise satisfies no one. Those who call for an outright ban continue to do so. Those who see the legislation as unnecessary meddling with parents' rights to rear children as they see fit are critical of, what they see as, bungling interference. The police are unhappy too, so are social workers who cannot offer parents an unequivocal message. Parents cannot know in advance what the limits of what they can do are. But the Government resists change, even going to the extent of prolonging debate on other issues so that a vote on hitting children is not taken.[44]

The chapter on 'saviour siblings' was written contemporaneously with the *Hashmi* case.[45] The use of pre-implantation genetic diagnosis (PGD) and tissue typing (HLA) to create a child to save the life of an existing child gets less controversial, now what is involved is better understood. Nevertheless,

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38 Lord Laming, *The Protection of Children in England: A Progress Report*, March 2009. For reaction see *Professional Social Work*, April 2009, 5.

39 'Can We Conquer Child Abuse If We Don't Outlaw Physical Chastisement of Children?', paper at ISPCAN Conference, Hong Kong, September 2008 (to be published).

40 *Global Initiative To End All Corporal Punishment of Children* updates data regularly. Croatia and Costa Rica are the latest examples.

41 Which was passed in 2007.

42 *See* Children Act 2004 s.58.

43 *Protecting Children, Supporting Parents: A Consultation Document on the Physical Punishment of Children*, 2000.

44 During a debate on the Children and Young Persons Bill in October 2008.

45 *R (on the Application of Quintavalle) (on behalf of the Prolife Alliance)* v. *Secretary of State for Health* [2003] 2 A C 687.

it fuelled controversy during the passage of the 2008 Human Fertilisation and Embryology Bill. But the end result is that legislation now permits these techniques to be used.[46] The concern about where it will end (designer babies and the like)[47] remains, if now somewhat muted. The question I raise at the end of 'Saviour Siblings' – whether there is a parental obligation to have a saviour sibling – ties in with the debates in chapter 10 of this book on responsible parenting. The new legislation does not, of course, create such an obligation.

The next chapter returns to the theme of children's rights. My writings on this subject go back to 1980[48] and can be traced through two books, *The Rights and Wrongs of Children* (1983)[49] and *The Moral Status of Children* (1997).[50] Essays on 'taking children's rights seriously' have evolved through three versions.[51] The version here is the most recent, though an essay entitled 'The Human Rights of Children' is due to appear in 2010.[52] As we saw earlier, there are those who deny children have human rights at all (even if they admit they may have certain legal rights). Others are prepared to concede that children have welfare rights though not agency rights.[53] I have always argued that children have both welfare rights (to protection and to the provision of certain basic goods, like healthcare and education), and agency rights (participation, freedom of speech, association etc.), even if on occasion it may be necessary to curtail certain freedoms to protect future autonomy.[54] Drawing the line is not easy: when, for example, should a competent child be denied the right to refuse

46 Human Fertilisation and Embryology Act 2008 Sch. 2, para. 3.

47 On which see, *inter alia*, R.M. Green, *Babies by Design – The Ethics of Genetic Choice*, New Haven, Yale University Press, 2007, and C. Gavaghan, *Defending The Genetic Supermarket: Law and Ethics of Selecting The Next Generation*, Abingdon, Routledge Cavendish, 2007.

48 'The Rights of Children in the International Year of The Child' (1980) 33 *Current Legal Problems* 1–31 (the text of a lecture to mark the IYC in 1979).

49 London, Frances Pinter, 1983.

50 The Hague, Martinus Nijhoff, 1997.

51 'Taking Children's Rights Seriously' (1987) *Children and Society* 299–319. 'Taking Children's Rights More Seriously' (1992) *International Journal of Law and the Family* 52–71 and the essay which appears in this volume as chapter 8.

52 In (2010) *Current Legal Problems*. It is the text of a lecture given first at the Hebrew University of Jerusalem in June 2009 and then at UCL in October 2009.

53 For example, James Griffin: *see now* his *On Human Rights*, Oxford, Oxford University Press, 2008, 83–95.

54 So argued in note 49, above, ch.2, where I defend, what I call, 'liberal paternalism'.

medical treatment?[55] I have addressed this elsewhere in an essay not included in this volume.[56]

Chapter 9 is about the private and the public,[57] about patriarchy and about why the law had then (in 1984), and also now, failed to conquer domestic violence. Family law, like law generally, has often been seen apart from the values it embodies and helps to structure and restructure. Many of the examples cited in the paper are now relegated to history. The marital rape immunity, for example, was put to rest in 1991.[58] But much remains, and the thesis in this chapter that the law is unlikely to solve the problem of domestic violence[59] so long as it remains part of the problem is, it is submitted, still convincing.

It raises also the propriety and effectiveness of state intervention into the family; as does the next essay. One cannot raise the right to have responsible parents without discussing whether parenthood should be licensed. It looks like a dystopian spectre but, of course, it exists in the context of adoption and fertility treatment[60], and we accept there are circumstances in which a baby has to be removed from parents at birth. We have given too little thought to what parental responsibility means. It is clear that the meaning is shifting: where once it was about authority, now it is about accountability. But the implications of this shift in emphasis have not been thought through. Accountability to whom? Is it to the state or to children? And if the latter, how is it to be enforced, and by whom?

We have never quite made our minds up about surrogacy, the subject of Chapter 11. It started with a moral panic in 1985 with Kim Cotton,[61] a Finchley housewife being prepared to hand over a child she had carried to a 'foreign' commissioning couple for 'money'. The Warnock report had

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55 *See Re R* (*A Minor*) (*Medical Treatment*) [1992] Fam 11; *Re W* (*Medical Treatment*) [1993] Fam 64. *See further*, M. Freeman, 'Rethinking Gillick' (2005) 13 *International Journal of Children's Rights* 201–17.

56 'Removing Rights From Adolescents' in (eds.) Y. Ronen and C.W. Greenbaum, *The Case for the Child: Towards A New Agenda*, Antwerp, Intersentia, 2008, 309–25.

57 I do not here raise this in relation to children, but see T. Cockburn, 'Partners in Power: A Radically Pluralistic Form of Participative Democracy for Children and Young People' (2007) 21 *Children and Society* 446–57. *See also* J. Ribbens McCarthy and R. Edwards, 'The Individual in the Public and Private: the Significance of Mothers and Children' in (ed.) A. Carling, *Analysing Families*, London, Routledge, 2002, 199–217.

58 R v. R (*A Husband*) [1992] 1 A C 599.

59 See M. Freeman, 'Violence Against Women: Does The Legal System Provide Solutions or Itself Constitute The Problem?' (1980) 7 *British Journal of Law and Society* 215–41.

60 In both of which there is vetting.

61 *See Re C* (*A Minor*) (*Wardship: Surrogacy*) [1985] F L R 846.

already condemned surrogacy – in fact surrogacy for convenience – as 'totally ethically unacceptable'.[62] Legislation followed swiftly, targeted at the commercialisation of surrogacy, but it did so obliquely by criminalising not the surrogate or the commissioning parents, but professionals (lawyers and doctors) as well as newspapers and newsagents involved in negotiating arrangements or publicising surrogacy services.[63] Chapter 11 is my response to the Brazier report[64] which thought the best way of getting at surrogacy was to outlaw payments to surrogates. The Brazier report has not been implemented. It is unlikely that it will be. Surrogacy remains an unenforceable contract,[65] but legislation provides for a swift method of transferring parenthood to the commissioning parents.[66] 'Family values' dictated that this provision (the parental order) was only available to married couples[67] but 2008 legislation has extended this to those in civil partnership and to those in an 'enduring family relationship' (that is to gay couples who regularise their relationship and to those in stable cohabiting relationships).[68]

Chapter 12 puts the case for gay marriages. The debate has moved on in the last 10 years.[69] Three European countries (Belgium[70], The Netherlands[71] and Spain[72]) now permit same-sex couples to enter into a valid marriage. They are allowed also in Massachusetts[73] and in Canada[74], and were for a short time in California.[75] But, more significantly, the case against the legal concept of marriage grows. The writings of Fineman feature prominently.[76]

62 *Report of the Committee of Inquiry into Human Fertilisation and Embryology*. Cmnd. 9314, 1984, para. 8. 17.

63 Surrogacy Arrangements Act 1985, amended by the Human Fertilisation and Embryology Act 2008, s.59.

64 M. Brazier, A. Campbell and S. Golombok, *Surrogacy Review for Health Minister of the Current Arrangements for Payment and Regulation*, 1998, Cm. 4068.

65 The 1990 Act inserted a new s.IA into the 1985 Act.

66 Section 30 of the 1990 Act was inserted late in the passage of the Bill, as a simpler alternative to adoption.

67 Human Fertilisation and Embryology Act 1990 s.30.

68 Human Fertilisation and Embryology Act 2008 s.54(2).

69 *See* K. Norrie (2008) 4 *International Journal of Law in Context* 411–17.

70 In 2002.

71 In 2001.

72 In 2005.

73 *See Goodridge* v. *Department of Health* 798 N.E. 2d 941 (2003).

74 Civil Marriages Act 2005.

75 It was voted down in November 2008, raising uncertainties about the marriages of those entered into during the period when such marriages were permitted.

76 *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, New York, Routledge, 1995.

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