UNIVERSAL THEORY IN FAMILY LAW

Brian H. Bix, University of Minnesota, U.S.A.*

Can there be a single universal theory of Family Law, that is, one that will be equally true for all areas of Family Law, and without regard either to historical period or country?

I trust that most Family Law scholars will react like doctrinal scholars in other fields when it is suggested that there might be a universal theory of this sort for their field. They will treat such a suggestion as nonsense, unworthy of their time and attention (and will modify their opinion of the person bringing this suggestion accordingly). Let me assure you: this suggestion for Family Law sounds silly to me, too. I would not even mention it, but for two facts:

- First, there are a number of other doctrinal areas, where prominent theorists seriously put forward general and universal theories – that is, theories that purport to explain or justify that area of law, without limitation as to sub-topic, country, or historical period.¹
  (Additionally, “law” itself has been the subject of proposed conceptual or universal theories.)²

- Second, in a recent exchange with a publisher about a Family Law book I was being asked to write for a series of introductory law texts, the general editor told me that she was seeking texts that would offer a universal theory for each topic, and that editor was very resistant to my claim that no such theory could possibly work for Family Law.

* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota.

This might be an appropriate moment to pause to summarize what work is done, or can be done, by general theories in and about law. When commentators put forward theories about contract law or tort law, such theories are usually offered for one of two (overlapping) reasons: rational reconstruction and explanation.

“Rational reconstruction” theories are probably the most familiar (even if the term is not); these are theories that are partly descriptive of the practice, but partly a form of prescription – recommending reform of the practice in line with certain values.\(^3\) Rational reconstruction is commonly seen in litigation: where lawyers arguing a case, or judges resolving a case, offer a (more or less) coherent reading of the prior cases on a subject, where those prior cases, on first appearance, might have seemed inconsistent, or at least lacking in any unifying principle. A second (and related) context for rational reconstruction is law teaching, where law professors try to give law students (future advocates) a way of making sense of the cases in some area. One matter to note about these sorts of rational reconstructions of the case-law: they primarily occur in discussions of specific issues or small sub-areas of law; they are less common, and perhaps more mysterious, when the subject is an entire doctrinal area of law.

When one does see something like rational reconstruction occurring at the area of full doctrinal fields (or some other quite large category), one often comes across references to the need either to “explain” or justify that area of law. “Justification” is the idea that the law should be consistent with the requirements of justice, morality, political theory, or some other ultimate

---


\(^3\) There is a connection between the “rational reconstruction” of legal practice and teaching and the “constructive interpretation” Ronald Dworkin offers as his approach to law generally. See Ronald Dworkin, *Law’s Empire* (Harvard, 1986).
criterion\(^4\) (or, at least, that one should prefer an understanding of existing legal practices that does better against such standards as compared with one that does less well). Explanation is a more opaque notion, but one that has intuitive appeal for theorizing generally: we want the material explained – an increase in our understanding of the matter, whether that means moral justification, recharacterization to show consistency in objective (whether that objective be morally attractive or not), or tying a practice to historical intentions or historical circumstances of its development.

Returning to the main discussion: theoretical works in other fields frequently propose that there is a single value or theory that explains and justifies much of the doctrinal area (e.g., corrective justice for tort law,\(^5\) autonomy or the obligation to keep promises for contract law;\(^6\) or efficiency as the “law and economics” explanation for all private law areas\(^7\)). One rarely, if ever, comes across a comparable attempt for Family Law, or even for any of the large sub-areas of Family Law (“best interests of the child” for custody decisions may be an exception). Why is Family Law so resistant to broad theory of this sort? Does this reflect something (good or bad) about the area of law, or, alternatively, something (good or bad) about the people who write in this area?

One thing that undermines potential claims for universal theory is variety in what is to be explained. Debates within the philosophical foundations of property, tort law, and contracts are

---

\(^4\) For some, efficiency is an obvious alternative, and the idea of efficiency as a justification and a basis for rational reconstruction seems to underlie much of law and economics thinking. For others, the idea that efficiency is or could be a justification seems significantly wrong-headed.


vibrant and interesting, in part because there has been so much convergence in doctrinal rules across societies, and, in most societies, over long periods of time. This convergence, which seemingly supports the idea of a single concept of, and single explanatory theory of property/contract/tort, has been combined with enough variety – enough divergence – to give a foothold to skeptics of such an approach.\(^8\) Thus, the debate can be joined.

However, we do not have the same sort of background conditions in Family Law. The rules and principles in regulating domestic relations have simply changed too drastically (and too obviously) over time.\(^9\) The rules of 21st century Europe and North America would barely be recognizable to our counterparts of 200 or 300 years earlier (though those same counterparts would feel much more at home if we talked about the current rules for tort, property, and contract). Some might argue that the divergence in current laws when comparing Europe and North America with more traditional or theocratic societies would likewise negate any thought of a universal theory of family law.

Is there room even for mid-level grand theories in family law: theories or principles that purport to explain a large area of law for one jurisdiction (or a group of closely-related jurisdictions)?

It may be that much of English Family Law at various times could be well understood by the image that a man was to his family and household either as a sovereign to his subjects or as an owner to his property; and that the family household was largely immune to state intervention (a purported haven, which we know could often be more of a hell for the children and wives that

---

\(^8\) As a matter of full disclosure, I am writing a book that is skeptical about universal theories for contract law.

\(^9\) Sweeping historical works, showing the evolution of Family Law, are rare (and, it seems, significantly rarer than in other fields), but there are some. See, e.g., Stephanie Coontz, *Marriage: A History* (Viking, 2005); John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Westminster John Knox Press, 1997).
were mistreated with immunity – or even encouragement\textsuperscript{10} – under the laws and norms of the time).

It may be that the control of property during marriage has operated under simple principles at various times: in some American jurisdictions, an equal division of (community) property summarized most of the law for both during marriage and after dissolution; while in (most) other American jurisdictions, control according to title was the principle for both during and after marriage.

Some might argue that under contemporary American law dealing with children – especially the rules for child custody and visitation -- everything notoriously turns on a single principle that seems to be everywhere: “the best interests of the child.” I am ambivalent even here as to whether one should speak of a general theory of an area of law. In my more skeptical moments, I would join those who see “best interests of the child” as simply a grant of relatively unconstrained (because largely unreviewable) discretion to trial court judges to do whatever they think best. More concretely, I would note all the times that “best interests of the child” must give

\textsuperscript{10} Reference here to the authority, or moral obligation, of a man to use “reasonable correction” on his wife and children.
way, even in core custody and visitation issues, to other rules and principles: parental rights and various public policy objectives.

Finally, there is probably something to be said about the importance of genetic ties in explaining a number of doctrines of parental rights and obligations, but this “theme” is unevenly expressed across that sub-field.

In Family Law, we have little theorizing beyond the most basic forms of rational reconstruction of a court’s doctrinal declarations on some topic. Still, one might think about whether there could be a role for a broader or grander theory within Family Law.

As already noted, rational reconstruction on a broader level – not merely trying to make sense (say) of a series of apparently contradictory decisions on a particular question (e.g., given apparently contrary holdings and principles, what is the rule for when permanent alimony rather than rehabilitative alimony is appropriate under Minnesota law?) – is a useful mixture of explanation and justification, deriving certain principles from prior decisions, but allowing for some selection or revision in order to make the area of law better. Rational reconstruction could, in principle, be either for the Family Law (or some area of Family Law) of a certain jurisdiction, or across jurisdictions. As earlier noted, the divergence of practices probably dooms rational reconstruction across jurisdictions. It may be that divergent or inconsistent principles cause difficulty even when discussing a single area of Family Law, in a single jurisdiction, at a

---

11 Under American law, a court will not lightly take away a legal parent’s right to visitation, even in the face of objective evidence that this visitation is not in the best interests of the child. See, e.g., Kemp v. Kemp, 399 A.2d 923 (Md. App. 1979), reversed on other grounds, 411 A.2d 1028 (Md. Ct. App. 1980). In most states, custody will not be given to a non-parent in a custody contest with a legal parent on the basis of the child’s best interests alone; usually, some higher standard must be met, e.g., proving that custody with the legal parent would harm the child.

One could argue that we can – as both a factual and legal matter – assume that parents will act in the best interests of their children, and that is why we create presumptions for parental custody and visitation rights. However, the presumptions and priorities parents get in custody matters are much stronger than the rebuttable presumption that could be derived from the above argument.
single point in history.

Beyond rational reconstruction there would be, of course, also room for purely prescriptive theories: theories arguing that government regulation of domestic relations should be in line with a particular world-view (e.g., the view of a particular religious tradition, a particular view of feminist theory, or the like). However, it is rare to come across broad prescriptive theories of this kind for Family Law. Additionally, it is worth thinking about why there is not more moral theorizing on a broad scale that starts from basics: that is, not applying some pre-existing theological or political programme to Family Law, but thinking about the morality of Family Law itself, and from scratch.

As Martha Minow pointed out to me some years ago, our moral thinking (and legal scholarship) tends to be grounded in either individualistic premises, or from grand theories about the proper organization of the state or society, with not a lot of resources for how to think at the level of smaller groups -- intermediate institutions in general or family groups in particular. This means that we tend to be poorly equipped to think either systematically or well about Family Law issues.

It is perhaps not surprising that a project of general (or even “somewhat general”) Family Law theory cannot get off the ground. Consider some rather basic questions for the field: what do parents owe their children? (and what do children – grown or otherwise – owe their parents?); what do spouses owe one another?; and what is the purpose of marriage? Most

---

12 See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984) (existence of private racial prejudice, and possible effect on child, cannot constitutionally be considered as a basis of changing custody from mother to father).

13 There is some writing on this subject (though not a lot, and not, on the whole, terribly impressive). For one of the better examples, see Jane English, “What do Grown Children Owe Their Parents?,” in Having Children: Philosophical and Legal Reflections on Childhood (Onora O’Neill & William Ruddick, eds., Oxford, 1979).
Family Law scholars (or practitioners or judges), if forced to answer, would probably either not articulate adequate answers to these questions, or, if they did, those answers would likely be simply some repetition or slight variation of either the position of current law or the doctrines of their religion. Not that law or religion are to be either ignored or disparaged, but a general theory of rights and obligations, presentable to an academic or general audience, needs a different sort of grounding.

Most of us, in public and academic debate, revert to a kind of consequentialism: which proposals will likely have the best effects for the well-being of children, for marital stability, for societal harmony, etc. This is not because we are all thorough-going consequentialists, but for reasons relating to what John Rawls called “public reason” – that in a democratic and secular society, it is incumbent on those advocating changes to society or government to give reasons accessible to all, not just to those who share one’s religious beliefs or comprehensive theory of the good. However, we should be able to construction – and we should seek to construct – a publicly accessible structure for analysis and argument that takes into account the special moral and political role of families and other forms of care-giving.

Conclusion

I did finally persuade the editor at the publishing house that one should not expect to find a tenable general theory for Family Law – so I am off the hook, for now. However, I think the question about general theories remains one to ponder – perhaps focusing on “mid-level” general theories, and general principles on which to build a (secular) prescriptive theory of Family Law. It is a task for all of us.