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# Unmarried Fathers and Parental Responsibility: A Case for Reform?

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**Abstract:** Following a Consultation exercise conducted by the Lord Chancellor's Department, the British Government has announced its intention to amend the Children Act 1989 so that the unmarried father who jointly registers the birth with the mother will acquire parental responsibility automatically. In this paper, I draw on the responses made to the L.C.D. Consultation, in order critically to evaluate the arguments for and against reform. A poverty of relevant empirical research makes it impossible to reach a properly informed view on the positive or negative impacts of implementing the proposal. However, the principled arguments: that unmarried fathers and their children are subject to discrimination, or that it is unfair for men to pay child support, yet have no automatic rights with regard to their children, are ultimately unconvincing. I also attempt a more explicitly sociological exploration of the Consultation and reform process, focusing on what it can tell us about evolving social attitudes towards the statuses of 'father' and 'family' and how they should be valued and protected.

**Keywords:** equality, families, family law, fatherhood, parent with care, parental responsibility, parental rights, unmarried fathers

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Following a Consultation exercise conducted by the Lord Chancellor's Department (L.C.D.), the U.K. Government has recently announced its intention to reform the law relating to parental responsibility (P.R.) so that the unmarried father who jointly registers the birth with the mother will acquire P.R. automatically.<sup>1</sup> This represents an extension of the provisions of the Children Act 1989 which currently foresee automatic acquisition of P.R. only by the mother of a child and, where she is married, by her husband. As the law currently stands, the unmarried father can obtain P.R.

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<sup>1</sup> See clause 91 of the Adoption and Children Bill, introduced to the House of Commons on 15 March 2001. See also L.C.D. (1998) for preparatory discussion and Hansard 9 Dec 99 398w for the announcement of the reform.

only by agreement with the mother or by court order. The reform will relate only to births registered after the new law comes into effect.

This paper seeks both critically to assess the case for reform and, more ambitiously, to understand the proposal within a broader social and political context. In order to do so, I will draw extensively on the responses submitted to the L.C.D. Consultation which preceded the decision to reform. These responses provide an invaluable resource. First they have obvious, though non-quantifiable, policy significance by virtue of any impact which they may have had on the L.C.D.'s eventual recommendations for reform. Secondly, the responses provide an interesting snapshot of a broad range of views held in the U.K. at this particular moment in time (both on the narrow question under discussion and on broader issues of paternal rights). Thirdly and finally, the responses also constitute a rich and unique resource, pooling the knowledge and experience of an extensive array of interested pressure groups, individuals particularly affected by the law and professionals and academics who work in this area.

I start by outlining the current state of the law and providing a brief description of the Consultation process. I then attempt an overview of how the proposed reform can be located within broader thinking on fatherhood and the family before going on to assess the arguments for reform. I conclude with an assessment of whether the case for reform has been made.

## BACKGROUND TO REFORM

### *The Law*

P.R. accords “all the rights, duties, powers and responsibilities and authority which by law a parent of a child has in relation to the child and his property”.<sup>2</sup> This includes the right to administer a child's property and to take important decisions regarding her upbringing including where she will live, how she should be educated, in what religion she should be raised, and what non-essential medical treatment she should receive.<sup>3</sup> P.R. also accords the right to be heard regarding a child's proposed adoption or emigration, and to appoint a guardian for her following one's death.<sup>4</sup> A father without P.R. is not thereby prevented from applying for residence or contact orders, but in practice it seems that P.R. is often viewed as a first step to obtaining these rights.<sup>5</sup> Further, it is likely that the Government may rely on P.R. in the future in other aspects of family policy: for example, possession of P.R. is one criterion to be used in determining who is eligible to apply for parental leave.<sup>6</sup> Even from this brief

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<sup>2</sup> s. 3(1) Children Act 1989.

<sup>3</sup> Whilst Eekelaar and McLean (1997, p. 37) have argued that a father who is in a practical position to make medical decisions has a *de facto* if not a *de jure* authority to make them, the British Medical Association advises its members only to accept consent from a carer with P.R. (B.M.A., response to L.C.D.). It seems that P.R. is also likely to play an important role in decision making regarding the use and treatment of a child's body after its death. The enhanced consent requirements for the taking and retention of organ and tissues in post-mortem examination of dead children suggested by the Chief Medical Officer in the wake of the Alder Hey scandal provide that consent should be sought from ‘those with parental responsibility’ (Department of Health, 2001, p. 38).

<sup>4</sup> See generally Bromley's Family Law (1998, pp. 347-76); Eekelaar (1991), Eekelaar and McLean (1997, pp. 35-7), Barton and Douglas (1995, p. 114) on the rights included within P.R.

<sup>5</sup> Lack of P.R. may also pose problems for unmarried fathers who apply for an abducted child to be returned to the U.K. under the Hague Convention on child abduction (L.C.D., 1998, para. 50).

<sup>6</sup> The Maternity and Parental Leave etc Regulations 1999 (S.I. 1999 No. 3312), regulation 13. The L.C.D. proposal would have no real impact in terms of parental leave. Under regulation 13, both those who possess P.R. and anyone recognised as a parent on the birth certificate are entitled to

description, it can be seen that whilst the intention behind the Children Act may have been one of encouraging greater parental *responsibility*, in practice the impact of the provisions is largely to allocate parental *rights* (whether exercisable against the state or the other parent) to make certain decisions with regard to the upbringing of children. P.R. does not give children (or anyone else) enforceable duties against P.R. holders; whilst a non-resident parent can be forced to make financial provision for offspring, it is not possible to enforce the exercise of any positive duties under P.R.<sup>7</sup>

The practical significance of P.R. will obviously be greater when parents are separated and less likely to be in agreement over significant decisions. Of particular importance is the extent to which a non-resident parent's possession of P.R. imposes duties on the parent with care to consult. The Law Commission believed that whether or not parents are living together, to impose any legal duty of consultation would be "both unworkable and undesirable" (1988, para. 2.10) and this viewpoint was reflected in the Children Act 1989.<sup>8</sup> However, the courts have held that a mother with P.R. must be consulted about important educational decisions such as a change of

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leave in order to care for a child provided other conditions are fulfilled.

<sup>7</sup> The only duties that a person with P.R. has are expressed negatively: the child must not suffer significant harm, be neglected, abused, not educated and so on. Eekelaar (1991) has noted that the idea of P.R. can represent two ideas: first, that parents must behave dutifully towards their children and secondly, that responsibility for child care belongs to parents, not the state. He argues that the second idea has come to replace the first as the dominant conception in the Children Act (1991).

<sup>8</sup> Under s. 2(7), where more than one parent has P.R., each may act alone, unless some other enactment requires the consent of more than one person. An example of such an 'enactment' is provided in s. 13(1) which provides that where a residence order is in force, no person can change a child's surname or take him or her outside the U.K., without either leave of the court or agreement of all P.R.-holders.

school<sup>9</sup> and, more recently, that P.R. gives a right of consultation with regard to change of surname even where no residence order is in place.<sup>10</sup>

### *The Consultation Process and Proposed Reform*

The 1998 L.C.D. Consultation aimed to canvass views, *inter alia*, on whether it would be right to make P.R. more easily available to unmarried men subject to any necessary safeguards.<sup>11</sup> Opinions were specifically sought on whether any such reform should be limited to certain categories of men (for example, those who jointly registered the birth, were co-habiting with the mother, or were subject to a child maintenance assessment); what would be the practical implications of any such change (in particular whether it would make either fathers or mothers reluctant to register the birth); whether P.R. acquired in this way should be revocable and, if so, on what basis; and whether current law discriminated against unmarried fathers and thereby breached the European Convention of Human Rights (1998a, para. 62).<sup>12</sup>

The L.C.D. received 104 responses to the consultation, 101 of which were available for public scrutiny.<sup>13</sup> The majority of these were from concerned organisations

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<sup>9</sup> *Re G. (Parental Responsibility: Education)* [1994] 2 F.L.R. 964. See also *Re C. (disclosure)* [1996] 1 F.L.R. 767 recognising that a parent with P.R. has the right to information regarding that child.

<sup>10</sup> *Re T. (Change of Surname)* [1998] 2 F.L.R. 620, *Dawson v. Wearmouth* [1997] 2 F.L.R. 629, *Re P.C. (Change of Surname)* [1997] 2 F.L.R. 730. See Eekelaar (1998) for the argument that *Re P.C.* was wrongly decided. See n. 51 below and associated text for consideration of the impact of the proposed reform in terms of extending consultation duties.

<sup>11</sup> The consultation also considered paternity testing and the merits of establishing a sole test for determining paternity. These issues are not considered here.

<sup>12</sup> Art. 8 requires a respect for family life and art. 14 provides that rights and freedoms under the E.C.H.R. shall be secured “without discrimination on any ground such as sex [...], birth or other status”. See Karsten (1999), Bainham (1998) and Lowe (1997) on this issue.

<sup>13</sup> Two respondents wished their responses to be treated as confidential. One response could not

including other government departments (42 responses) and individuals (40 responses), with contributions also made by academics (eight responses), barristers or solicitors (seven responses), and members of the House of Lords (two responses). The L.C.D. also received one response from a sitting Member of Parliament, and one from Mrs Justice Hale, currently a High Court judge and formerly the Law Commissioner who was the prime architect of the Children Act 1989. The organisations which responded represent a good cross-section of interested opinion on the narrow issue canvassed and a useful source of expert commentary on the proposed reform. They included groups representing the interests of men,<sup>14</sup> women,<sup>15</sup> and children,<sup>16</sup> those with an interest in the family and particular family forms,<sup>17</sup> interested professional groups and organisations, and other government departments.<sup>18</sup> Over two-thirds of the individual respondents whose gender is known were men, with thirteen declaring themselves to be unmarried fathers and three to be women writing because of their close relationship to an unmarried father. Only two respondents identified themselves as unmarried mothers.

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be found. All other responses are on file with the author.

<sup>14</sup> Families Need Fathers; U.K. Men's Movement.

<sup>15</sup> Standing Conference of Women's Organisations; Rights of Women; Justice for Women; Women's National Commission; Women's Aid (Federation of England); Halt Domestic Violence; Welsh Women's Aid; Leeds Inter-Agency Project (Women and Violence).

<sup>16</sup> The Children's Society; National Society for the Prevention of Cruelty to Children; National Council of Voluntary Child Care Organisations; Thomas Coram Foundation; Child Concern.

<sup>17</sup> National Family Trust; Children and Parents After Divorce; National Stepfamily Association; Churches Together for Families; C.A.R.E. (Christian Action Research and Education); Gingerbread; National Council for One Parent Families; Both Parents Forever; Baby Naming Society; Shared Parenting Information Group; One Plus One; Association for Shared Parenting.

<sup>18</sup> Law Society: Family Law Committee; Solicitors' Family Law Association; Family Law Bar Association; Magistrates' Association; Justices' Clerks Society; Inner London and City Family Proceedings Court; Salford Law Centre; British Medical Association; British Agencies for Adoption and Fostering; British Association of Social Workers; Social Services Department (Corporation of London); Human Fertilisation and Embryology Authority (commenting specifically on the implications for parents of children following assisted reproduction); Child Support Agency; Office for National Statistics; Society of Registration Officers.

Whilst it is obviously impossible to make any claims for the statistical representativity of the responses in relation to broader public opinion, it should nonetheless be noted that the Consultation produced a significant majority in favour of reform. Of those who expressed a clear view, over seventy per cent were clearly in favour of extending automatic P.R. to (certain categories of) unmarried fathers, with just over one third of these favouring a more general extension than that which is now proposed by the L.C.D. The strength of this majority is clearly influenced by the fact that the most effective mobilisation around this issue was achieved by the pressure group, *Families Need Fathers*, and also by the narrow way in which the issue was framed. However, the consensus in favour of reform was not limited to individual respondents.<sup>19</sup> The impetus for change also accords with an expanding body of academic commentary (Conway, 1996; Lowe, 1997; Burgess and Ruxton, 1996) and fits closely with what seems to be a growing body of public opinion that believes women are unfairly favoured by the provisions of family law (see Sheldon, forthcoming 2001).

Before going on to review the arguments which were advanced in favour of reform, it is worth pausing also to consider the broader social and political context of reform. How does the reform fit into a context of evolving ideas of what is meant by 'father' and 'family' and how these statuses should be valued and protected? Does it strike the right balance between the interests of parents and children, and those of individual men and women? And how does it fit within broader identifiable trends in family law and policy?

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<sup>19</sup> The largest majority in favour of reform was found amongst individual respondents (29 out of 40 responses). Organisations were more equally divided (21 for, 14 against and seven expressing no clear view on reform). The eight academics were roughly equally divided. All seven of the barristers or solicitors' firms expressing a view were in favour of reform.



## THE CONTEXT OF REFORM

The L.C.D.'s proposal for reform comes at a time when different parenting and household living arrangements have proliferated. As Silva and Smart have noted, a new vocabulary has not developed to deal with the complex family arrangements which have emerged (1999, p. 10). As such, concepts like 'parent', 'father' and 'family' are being stretched to cover a broad range of relationships and it is therefore not surprising that contestation over the 'true' meaning of these terms has become fiercer, and tensions and inconsistencies in their usage are revealed. Much of the dispute around the L.C.D. proposal for reform might be characterised in this way.

### *What is a family?*

'New Labour' family policy, whilst recognising the existence of diverse family forms at a rhetorical level and expressing a reluctance to 'moralise' about those who choose not to marry, has focused on 'strengthening' the family through a prioritization of the (conjugal) heterosexual couple and their children (Home Office, 1998; Silva and Smart, 1999). This has involved government in the maintenance of an uneasy balance between an expressed desire to protect marriage and a broader concern to bolster the nuclear family, whether or not the man and woman at its core are married (Home Office, 1998, see also Weeks, 1999). The logic of this position is clearly unsustainable. "It is not possible to favour one particular form of family without undermining others", argues Ros Pickford, noting that "[t]he way the current law on unmarried fathers operates illustrates this very clearly" (1999b, p. 45). But equally

obviously, the proposed extension of P.R. in itself privileges one particular form - the nuclear family with children raised by their genetic parents - above others. Crucially, the anomaly which the law seeks to address here is not a general problem that there are many people who find themselves without P.R. despite their long term commitment to take on a parental role which involves the day-to-day care of children, but rather that there are many men who do not have these rights despite being recognised as genetic fathers. This was clear from the L.C.D.'s narrow framing of the issues to be considered in the Consultation. As such, the proposed extension of automatic P.R. is far from radical. Its aim is rather to extend the status and rights enjoyed by the married couple to the unmarried who most closely approximate a marital situation (two genetic parents formally registered as such).

The partial nature of the proposed reform is best underlined in the one submission to the L.C.D. which explicitly deals with the position of non-heterosexual parents.<sup>20</sup> Lisa Saffron, writing from her own experience as a lesbian mother of a daughter conceived by self insemination and as author of a study of children born to lesbians and gay men, argues that P.R. should be awarded on the basis of social parenting rather than because of a genetic link:

In families created by lesbian and gay parents, there is no assumption that a person with a genetic bond to a child is necessarily a parent to that child. Parenting is an activity not a state of being. It can be demonstrated and it can be lost.

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<sup>20</sup> The fact that only one response was obtained from a lesbian mother, and none from gay male parents, itself speaks volumes on the narrowness of the issue addressed in the Consultation.

Saffron further argues that many lesbian mothers want to make information about the genetic identity of a child's father available to the child through birth registration, without according the father P.R.

The proposed reform also fails to address the situation of many other carers who are not genetically related to the child but who, nonetheless, play a day-to-day caring role and become established in the child's life as a parental figure. For example, in its submission, the Solicitors' Family Law Association point out that on breakdown of a relationship, a step-parent has no particular 'rights' and is therefore unable to continue to play a part in the child's life notwithstanding that he or she may have cared for a child for years and be well established as its psychological parent. In its exclusive focus on the situation of genetic fathers, the reform is prioritising a particular kind of family form, strongly influenced by a quasi-marital model.<sup>21</sup>

It seems, then, that the proposal is for a cautious and limited reform which fits clearly in the tradition of family policies designed to entrench the model of the nuclear family with a heterosexual couple at its core. It might also be seen as an attempt further to juridify the relationships of those who have chosen not to opt into marriage with the legally defined rights and obligations which it entails.

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<sup>21</sup> Notwithstanding the L.C.D.'s failure to consider this issue, clause 92 of the Adoption and Children Bill also introduces a more straightforward process for stepparents to acquire P.R. through either the courts or by way of consent. See Masson (1984) for an argument in favour of extending parental responsibility to stepparents.

### *What is a father?*

However, the reform is equally influenced by conflicting ideas of what it means to be a father. Whilst the need for paternal involvement does not come under serious attack from any L.C.D. respondent, the right way of identifying that father is much more contested. The issue of who should be legally recognised as a child's 'father'<sup>22</sup> has a complex legal history, with different laws prioritising: the man's marriage to the child's mother;<sup>23</sup> genetic paternity;<sup>24</sup> social parenting;<sup>25</sup> and intention to parent.<sup>26</sup> The responses to the L.C.D. consultation draw on all of these different ideas, often confusing and conflating the significance of marriage, genetics, intention, and social parenting in support of assertions about what is involved in being a 'real' father and hence deserving of rights as such.

The approach of the L.C.D. is similarly mixed, recognising elements of all of the above in formulating or justifying reform. First, the proposed reform preserves the privileges of marriage, in that all married fathers will continue to obtain irrevocable P.R. automatically. Secondly, whilst the purely genetic model whereby P.R. would be

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<sup>22</sup> This term may be confusing in itself, conflating various legal concepts. Bainham (1999) has recently suggested a very useful tripartite distinction between parentage (equivalent to genetic parentage), parenthood (which conveys ongoing legal status as a parent involving responsibility for raising a child), and parental responsibility (which involves the legal powers and duties set out above).

<sup>23</sup> As embodied in the principle *pater est quem nuptiae demonstrant*.

<sup>24</sup> e.g., as the basis for child maintenance obligations in the Child Support Act 1991. Further, media reports recently claimed that the Department of Health was considering according the right to children born of gamete donation to know the identity of their genetic parents.

<sup>25</sup> In determining arrangements regarding residence and contact following separation of the parents.

<sup>26</sup> In adoption and the status provisions of the Human Fertilisation and Embryology Act 1990, see Douglas (1994); Barton and Douglas (1995, pp. 94-6); and Hill (1991).

awarded automatically to all unmarried fathers regardless of registration of the birth was considered and rejected, the proposed reform does clearly move in the direction of according greater recognition to genetic fatherhood.<sup>27</sup> A large number of genetic fathers will benefit from the reform with no scrutiny of their commitment or involvement in parenting. Further and crucially, *only* genetic fathers are intended so to benefit: step parents or other carers are not affected. Thirdly, however, fathers' participation in social parenting was almost certainly also relevant in justifying the extension of P.R. The argumentation of both the L.C.D. and the individual fathers and men's groups who responded to the Consultation noted that parenting practices have changed and that men are now more actively involved in their families. They further note that unmarried fathers are no less involved in caring for their children than are married fathers and that encouraging social fatherhood is an important goal for family policy.<sup>28</sup> Finally, most of all seems owed to the idea of fatherhood as based on intention. Rightly or wrongly, the joint registration of the birth is posited as a sign of commitment to the family, of a man's intention to raise a child. The rationale for the reform presented by the L.C.D. is strongly justified in these terms, noting that the law is currently out of touch with people's desires and expectations, and that people expect that where the birth is jointly registered, the father will have the same rights as the mother (1998, para. 53). Further, the Government's belief that it is wrong to impose any change retrospectively on those who have already registered a birth

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<sup>27</sup> The genetic argument was, not surprisingly, relied on by many individual men and groups representing men's interests. As one individual respondent to the Consultation puts the argument: "the mother is only half of the genetic material of the baby. She should have no rights over the child greater than the father" (Ruben).

<sup>28</sup> An alternative criterion which was considered and rejected was cohabitation. Whilst this might be a better indication of whether the father was fulfilling a social parenting role, it lacks the legal clarity provided by birth registration.

could be taken not just as invoking the principle of non-retroactivity, but also as reflecting the importance of informed parental choice in allocating P.R.

It is noteworthy that the reform owes most to the idea of intention in founding parental relations, given that elsewhere genetic factors seem to be gaining an unprecedented degree of significance.<sup>29</sup> Is a move towards recognising the relevance of 'intention to parent' a positive thing? Douglas (1994) notes that it is in many ways a very male way of thinking about parenthood (and as such, it is not surprising that it assumes such relevance in a reform dealing only with the status of unmarried *fathers*). In this sense, the possibility of making a conscious decision of whether or not to recognise children as one's own or to participate in their upbringing, is not normally experienced by women. The question of the merits of a move towards increasing the importance awarded to intention, is impossible to answer the abstract.<sup>30</sup> A general move towards intention with the result, for example, that men could disclaim financial responsibility for children they had not intended to father would obviously be problematic.<sup>31</sup>

So for a more informed view on this issue, we will need to think about the concrete benefits and problems related to reform. A critical assessment of the arguments for and against reform constitute the focus of the next part of this article. Here, I draw heavily on the responses to the L.C.D. Consultation.

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<sup>29</sup> In particular, it was recently reported that the Government is also to consider whether children born of gamete donation should have the right to trace their genetic parents.

<sup>30</sup> As Bainham (1999) has noted, in assessing such a shift, it is also important to be clear about what aspect of 'parenthood' we are talking about: allocation of P.R., attribution of obligations (such as for child support) or recognition of someone as the parent.

<sup>31</sup> Although see Sheldon (forthcoming, 2001) on the problems raised by the cases of so-called 'birth control fraud' where the man alleges that he has been tricked into fathering an unwanted child on the basis of his partner's false representations of sterility or birth control use.

## WHY REFORM AND WHY NOW?

The proposal to extend automatic rights to unmarried fathers is not new. Over twenty years ago the Law Commission advanced the (then radical) suggestion of entirely abolishing the status of illegitimacy with the consequence that every father would share full parental rights with the mother (Law Commission, 1979; see generally Hayes, 1980; Lowe, 1997, pp. 198-9). Whilst at that time the idea of giving unmarried fathers automatic parental rights proved too unpopular to implement, the current proposal for reform is supported by an assessment that public opinion has shifted, with any differential treatment of married and unmarried fathers now seen as unjustifiable. As the L.C.D. notes: “[i]t is clearly impossible to assume that most unmarried fathers are irresponsible or uninterested in their children, and do not deserve a legal role as parents” (1998, para. 51).<sup>32</sup>

How is it that this matter has now come to be reconsidered with such different results? Four major arguments regarding reform are made with particular persistency and force by L.C.D. respondents and thus may be judged to be worthy of some further scrutiny here.

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<sup>32</sup> Yet it was only recently that the Conservative Government ignored the recommendation of the Scottish Law Commission that P.R. should automatically be awarded to all genetic parents in order to impose a solution similar to that in place for England and Wales in the Children (Scotland) Act 1995.

### 1. Current procedures are not working

Whilst there are procedures whereby an unmarried father may acquire P.R. - by way of a formalised agreement with the mother or a P.R. Order<sup>33</sup> - these are infrequently used. In 1996, 232,663 (35.8 per cent) of the births registered in England and Wales were outside marriage, yet only around 3,000 parental responsibility agreements are registered each year and, in 1996, the courts made only 5,587 parental responsibility orders (L.C.D., 1998, paras. 52-3).<sup>34</sup> The low number of P.R. Orders awarded is certainly not due to a lack of judicial sympathy towards unmarried fathers' applications. Although it would be wrong to describe an award as automatic, reported decisions dealing with fathers' applications for P.R. orders have leaned strongly in their favour.<sup>35</sup> Rather, the most convincing explanation for this low figure is public ignorance of the law and a common assumption that an unmarried father has the same legal rights and obligations as the mother, especially where they have jointly registered the child's birth (L.C.D., 1998, para. 53, Pickford, 1999a). Ros Pickford recently conducted a study of 219 fathers for the Joseph Rowntree Foundation. She found a widespread ignorance of the law surrounding P.R., with many unmarried co-habiting fathers shocked and dismayed to discover that they did not have it. Three-

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<sup>33</sup> See Children Act 1989, s. 4.

<sup>34</sup> The father's details were included on the birth certificate for 181,647 (78%) of births outside marriage. The father and the mother were living at the same address in 74.4% of these joint registrations, and in 58% of all births outside marriage (L.C.D., 1998, paras. 52-3).

<sup>35</sup> *Re G. (a Minor) (Parental Responsibility Order)* [1994] Fam. Law 372, *Re E. (A Minor) (Parental Responsibility Order)* [1995] Fam. Law 121. The courts will at least consider the degree of commitment which the father has shown towards his children, the degree of attachment between them, and his reasons for applying for the order: *Re H. (Illegitimate Children: Father: Parental Rights) (No. 2)* [1991] 1 F.L.R. 21. The fact that refusals to grant P.R. orders have been so rare may be partly a reflection of the fact that fathers who have been more closely involved with their children are more likely to apply for them. As Lowe has pointed out, there has as yet been no reported case where a father who has had absolutely no contact with his child has applied for an order (1997, 206).



quarters of the men she questioned were unaware that there was any legal difference in status between married and unmarried fathers (1999a).

A large number of L.C.D. respondents cite these figures (which are set out in the L.C.D. Consultation paper) as cause for concern. Yet two points remain in need of further explanation. The first is whether it is really a serious problem that so few unmarried fathers acquire P.R. One plausible explanation both for general ignorance regarding P.R. and low acquisition rates is that whether the father has P.R. makes little practical difference to the day-to-day lives of the vast majority of families.<sup>36</sup> In any event, the fact that a particular procedure is not being used is surely not *intrinsically* problematic: it only becomes so when there are *extrinsic* reasons for wishing someone to make use of it (and some such possible reasons are explored below). Secondly, even if this is a problem, it is uncertain whether statutory change is needed to remedy the situation. It is arguable that many more people would make P.R. agreements if new parents were given better information and if the procedure for drawing up a P.R. agreement were simplified.<sup>37</sup> A large number of L.C.D. respondents noted the need for a public information campaign whether or not the law is subject to reform.

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<sup>36</sup> Pickford found that hardly any of the cohabiting fathers had encountered practical problems as a result of their lack of P.R., although as most were first-time parents with children under two years this might be because there had been limited time for problems to arise. However, she does report the case of one father who, having driven his child fifty miles to hospital, was told that he was not allowed to consent to medical treatment on his behalf (1999a, p. 27). Almost all of the non-cohabiting fathers who had been recruited as a result of their application for a P.R. order had experienced problems as a result of not having P.R., but this is unsurprising – the very fact that they had applied for P.R. would make them a self-selecting group who cannot be treated as representative of the norm with regard to this issue.

<sup>37</sup> Pickford notes that it may be difficult to educate the public regarding the law in this area, as the law on P.R. is inconsistent with many areas of law relating to unmarried fathers which people do know something about such as income support and child support (1999a, p. 26).

## 2. Current Rules are Unfair and Discriminatory

Whilst the practical inconveniences caused by a lack of P.R. may be negligible for most, the symbolism of denying automatic P.R. to unmarried fathers certainly causes much hostility. An increasing body of opinion amongst academic commentators (Burgess and Ruxton, 1996; Conway, 1996; Lowe, 1997), media reports, and, most vocally, men's pressure groups assert that the current rules are discriminatory.<sup>38</sup> Such concerns accord with broader worries that men are unfairly treated with regard to family issues. Ulrich Beck has contextualised this within men's loss of power in the labour market. He notes that:

... to the degree that the economic inequality between men and women is decreased ... *fathers become aware of their disadvantage*, naturally and partially legally. The woman has *possession* of the child as a product of her womb ... The men who free themselves from the 'fate' of a career and turn to their children come home to an empty nest (1992, p. 139).

*Families Need Fathers* cite three heads of discrimination in their response to the L.C.D.:

Unmarried fathers are a discriminated minority because they do not share the same rights as married parents or unmarried mothers. Their children are a discriminated minority because they do not share the rights to a father enjoyed by children of married parents. They suffer from the last vestiges of bastardy. This is plainly wrong.

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<sup>38</sup> And, as such, a possible breach of the European Convention of Human Rights, see n. 12 above.

Are unmarried men discriminated against vis-a-vis women? Whilst the current legal regulation clearly treats men *differently* from women, the claim of discrimination requires further that such differential treatment is unjust. In her submission to the L.C.D., sociologist Carol Smart disagrees, asserting that whatever greater rights mothers have now acquired with regard to their children derive from the responsibilities which historically they have assumed in relation to them. Contemporary experience might also be cited. As Mrs Justice Hale advises the L.C.D.:

... by far the greater responsibility for the care and upbringing of children is taken by mothers, married or unmarried, separated or cohabiting. We know that the outcomes for the children of separated parents are closely associated with how well the caring parent is able to cope: this is a more significant factor than the relationship with the other parent, important though that is.

It is thus argued that whilst it is reasonable to make an assumption that women should get automatic P.R. - on the basis of the demonstrably high probability that they will be primary carers and thus in a better position to make important decisions regarding the child's welfare - rather more research is necessary before it is possible to make the same assumption regarding any category of fathers. This is not to deny that some unmarried fathers make an active contribution to raising their children, it is merely to recognise that this has yet to be established as the norm.

If the differential treatment of mothers and fathers can be empirically justified on the basis of child care practices, is the differential treatment of married and unmarried fathers more problematic? Pickford's (1999a) study found no difference between married and unmarried fathers in terms of the level of commitment shown to children. Eekelaar and MacLean were less certain: their study concluded that marriage represented a higher degree of investment in the parental relationship than was the case both for parents who had never lived together and also those who had cohabited. They note: "[m]arriage is an outward sign of stable, joint parenthood" (1997, p. 133). An argument, albeit a rather more problematic one, could also be made that there is a distinction between married and unmarried fathers in terms of their *intention* to parent: by marrying, individuals choose to opt into a set of legal rights and obligations defined by the state. These obligations may extend not only to their relationship, but also to their relationships with their children. For some, although obviously not for all, this might include a commitment to provide for their children when they take their marriage vows.<sup>39</sup> The L.C.D. recommendations seem to rely on the idea that signing the birth certificate is "a formal commitment to family life" (L.C.D., 1999, para. 3(ii)) and thus adopting a responsibility which is in some way

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<sup>39</sup> As an individual respondent to the Consultation puts it: "where the couple are not married, it must be assumed that at least one of them (or maybe both) doesn't wish to commit to a legally regulated relationship and it would be wrong to impose an additional legal status when the indications are that they have rejected such forms of tie." (Ward). An interesting example is provided by the case of Diane Blood whose very public campaign to achieve artificial insemination using the sperm taken from the body of her dead or dying husband caught the popular attention. As part of her evidence that her husband would have wanted his semen to be used in this way, Mrs Blood relied on their traditional marital vows as displaying an intention to have a family as a symbol of their union. See *R v. Human Fertilisation and Embryology Authority ex parte Blood* [1997] 2 All ER 687 (CA) and commentary by Biggs (1997). Likewise in a French case with very similar facts, *Parpalaix v. CECOS (Centre d'Etudes et de Conservation de Sperme)* Gazette du Palais, September 15 1984, the fact that the couple had married shortly before the husband's death was accorded great significance in the Court's decision to hand over the sperm to his widow.

analogous to that taken on by married men.<sup>40</sup> However, we actually know very little about what responsibilities a man thinks he is taking on when he co-registers the birth and, indeed, what rights a woman thinks he is attaining when she allows him to do so.<sup>41</sup> L.C.D. respondents are divided on this issue. Some argue that signing the birth certificate shows a clear intention to act as a parent whilst others, including the only two respondents who replied to the L.C.D. in their capacity as unmarried mothers, disagree. One of them, writes: “I agreed [to let my partner sign the register] because I didn't see that it mattered one way or t'other” (anonymous response).

Are the children of unmarried fathers subject to discrimination because of their father's lack of P.R.? Again, it is difficult to see how this could be the case - as was seen above, P.R. is more concerned with giving decision-making rights to parents. Whilst a child may be disadvantaged if a father fails to maintain contact, any role which P.R. may play in encouraging such contact is unproven.

One particularly contentious aspect of the discrimination claim is that whereas unmarried men do not always enjoy P.R., they do have automatic liability to make financial contributions towards the upkeep of their children under the Child Support Act 1991.<sup>42</sup>

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<sup>40</sup> Cf the rhetoric of *Supporting Families*: “children need stability and security. Many lone parents and unmarried couples raise their children every bit as successfully as married parents. But marriage is still the surest foundation for raising children ....” (Home Office, 1998, p. 4).

<sup>41</sup> Pickford notes that 21% of her sample of fathers did see joint registration of the birth as having this kind of significance (1999a, p. 26).

<sup>42</sup> In her submission, Carol Smart notes that this is a version of the claim of “no taxation without representation”.

It is terribly wrong for a woman to bar the father from seeing his children out of spite, yet he is harassed by the csa to pay for them (I think you could compare it to buying a car on HP but not being allowed to use it) (Knight, individual respondent).

[T]here is considerable resentment amongst unmarried fathers that whilst they share same maintenance responsibilities for their children as married fathers, they are not automatically entitled to make the contribution to the child's welfare that parental responsibility permits. *We feel strongly that awarding parental responsibility to unmarried fathers would dull this resentment and foster a climate conducive to greater co-operation on the part of unmarried father with the Child Support Act, or any successor agency (Families Need Fathers, emphasis in original).*<sup>43</sup>

It is not surprising if reform seems attractive to a government who have inherited one of the Conservatives' least popular legislative innovations. Granting men more rights with regard to their children is an obvious and cheap way of defusing conflict. However, if the guiding criterion is to be the child's welfare, there seems little principled justification for linking the issues. One L.C.D. respondent notes that to do so serves to commodify children, being "tantamount to allowing the father to 'buy' P.R." (Twigg-Flesner, academic lawyer).

### *3. Current Rules Fail to Encourage Men to Act as Fathers and Destabilise the Family*

Unmarried fathers' failure to obtain P.R. is especially worrying for a government keen to foster men's commitment to their families (Home Office, 1998), and the

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<sup>43</sup> This rather careful wording might reflect the fact that *Families Need Fathers* have previously been accused of encouraging fathers to refuse to pay their child support, see Collier (1995).

proposed reform has been heralded as a way of encouraging unmarried fathers to take a greater day-to-day interest in raising their offspring (Woolf, 1999). It is argued that denying P.R. will destabilise the family unit and thus contribute to the creation of lone parent families which are popularly cited as lying at the root of many other social problems (see Collier, 1995; Smart and Silva, 1999). Granting automatic P.R. to unmarried fathers is seen as a way of fostering an assumption of paternal duty to provide for the child's emotional and moral developments as well as their financial needs. Denying this 'stamp of approval'<sup>44</sup> to fathers may alienate them and refuse them the vital encouragement necessary for them to take on board family responsibilities:

In our experience, the overwhelming numbers of unmarried fathers wish to demonstrate a commitment to their children. We feel strongly that they should be encouraged to do so, and that the awarding of automatic parental responsibility would assist in this process (*Families Need Fathers*).

We believe that it is important to encourage fathers to exercise parental responsibility wherever possible, and that the law and structures of family support should support this objective wherever possible. It is therefore important in our view to try to reinforce the concept of parental responsibility, particularly in relation to fathers who may not otherwise believe that they have any role in their children's upbringing (*Children's Society*).

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<sup>44</sup> Ward L.J. in *Re S. (Parental Responsibility)* [1995] 2 F.L.R. 648.

It is worth noting that if P.R. were to encourage more men to take responsibility for their children, then it would equally be welcomed by many single mothers. Women complain more about men's lack of involvement with their children, than they do about men's attempts to assert their rights over them (Eekelaar and McLean, 1997). Yet the statement that according automatic legal status through P.R. to unmarried fathers will create more stable family units is a claim in want of empirical support. It is also challenged by other respondents who express concerns that this move may destabilise marriage, therefore ultimately working to the detriment of children:

If the law gives automatic parental responsibility to unmarried fathers there will be almost no incentive for men to marry at all. They will get what, historically, was the major 'advantage' of marriage - a legal relationship with their children - without the major 'disadvantage' - responsibility for their mother. An even greater reliance on the state by separated and unsupported mothers can be predicted with some confidence (Mrs Justice Hale).

[T]he evidence is that, in general, cohabiting relationships do not last as long as marriages, and are not as beneficial for either children or adults ... it is important to retain legal differences between cohabiting couples and married couples to reinforce the importance of the committed nature of marriage, with its benefits to children and the wider society (Rev. Martin Smyth, M.P.).

Respondents are able to call upon little empirical evidence to support either set of concerns which thus remain speculative. On balance, it seems rather improbable that a status of which the vast majority of the population has remained demonstrably in



ignorance, and which accords limited advantages and gives no right to contact with children, is likely to have much influence on men's commitment towards parenting. It seems equally unconvincing that automatic acquisition of P.R. is likely to prove much of an incentive or disincentive to marry.<sup>45</sup> Both arguments must ultimately fail to bite whilst they lack the support of further empirical research.

#### *4. Creating Problems for the Parent with Care*

Finally, we come to an argument made against reform. Whilst many women would undoubtedly welcome greater paternal involvement, this is not viewed by all as an unproblematic good. *Gingerbread*, an organisation with extensive experience of working with single parent families, argues:

Generally speaking, it is desirable and in the best interests of the child that fathers should play a positive, active role in the upbringing of their children. However, the automatic conferring of parental responsibility on all unmarried fathers will have little meaning for or effect on those who have no relationship and no intention of establishing a relationship with their child. But in a situation where there is conflict between parents, it is likely to strengthen the position of those fathers who wish to continue a negative conflict with the mother with the child caught in the middle. In many cases the mother already feels the unequal partner in these negotiations.

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<sup>45</sup> It is interesting to note that in expressing their concerns about the families, respondents did not develop an argument which had been influential in the work of the Law Commission: the idea that extended automatic P.R. might disrupt the harmony of new families where a mother had remarried and a new man had adopted the role of father, received little attention.

Jeremy Roche has raised similar concerns, questioning whether the automatic award of P.R. to *married* men made the situation facing the primary carer worse by symbolically re-emphasising the other parent's responsibility and power, thus undermining the position both of the primary carer and the child, whose welfare is inextricably bound up with her well-being (Roche, 1991, p. 357; see also Diduck and Kaganas, 1999, pp. 257-8). Inevitably, in so far as these problems exist, extension of P.R. to new categories of fathers will extend these problems to new categories of mothers and children.<sup>46</sup> It should also be noted that whilst a P.R. order can be brought to an end by the courts, P.R. acquired automatically cannot (although the court can limit the powers exercised under P.R. by restricting contact or issuing prohibitive steps orders under s.8 of the Children Act 1989). As yet the Government has made no announcement regarding whether P.R. accorded to unmarried fathers should be revocable.<sup>47</sup>

More serious problems are also raised. Several respondents note the possibility that men may use rights over their children in order to threaten or harass their ex-partners. The *Women's Aid (Federation of England) (W.A.F.E.)* argues that greater parental rights given to unmarried fathers could considerably worsen the difficulties faced by women and children fleeing domestic violence. Their concern is that, in practice, obtaining P.R. can be a first step to obtaining contact rights which can then be used to find women. W.A.F.E. cites a survey of 54 refuges which they carried out

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<sup>46</sup> See also Grand (1994, p. 587) and Standing (1999). Many of the women in Standings' study perceived policies which stressed joint parenting and parental responsibility as a way of extending the father's authority beyond the end of the parents' relationship (1999, p. 41).

<sup>47</sup> The L.C.D.'s Advisory Board on Family Law have recommended that on balance it should be, reasoning that an unmarried mother might be more reluctant to encourage her partner to jointly register the birth if she knew that he would thereby acquire P.R. irrevocably (L.C.D., 1999, v).

in 1997 to assess to what extent contact arrangements were affecting abused women and children. Sixty-seven per cent of refuges reported that women had been abused when they were handing over children for contact visits, thirty-one per cent reported that children had been physically or sexually abused during contact, and fifty per cent reported that ex-partners who had obtained contact orders failed to maintain the contact, to the distress of the children involved. Eight refuges stated that the address of the refuge had been given out on the contact order thus endangering every women and child staying there (see also Hester and Radford 1996; Anderson 1997; and more generally Brophy 1982).

Salford Law Centre expresses similar concerns, arguing that it is only when we see evidence that law is capable of adequately ensuring women's safety that we should we countenance extending P.R. to a wider group of fathers. It cites low reporting rates of domestic violence and child abuse and deficiencies in the legal remedies currently available to combat them.<sup>48</sup> Several respondents note that even if the discussion is strictly limited to considerations of child welfare, with women's own safety ignored (the merits of which position must in themselves surely be open to question), it cannot be believed that exposing the child's mother/primary carer to violence from its father can be good for the child itself. *Rights of Women* and *Halt Domestic Violence* both cite research regarding the psychological impact on the

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<sup>48</sup> Further, the courts have authorised contact even in the presence of a history of male violence, and, on occasion, have jailed for contempt of court women who have refused to meet the requirements of contact orders with fathers whom they fear to be violent: see Smart and Neale, chapter 8; *Z. v. Z* (1996) Fam. Law 225, *R. v. N. (Committal Refusal of Contact)* [1997] 1 F.L.R. 533; Hall J (1997) writing extra-judicially, and *Re D. (Contact: Reasons for Refusal)* (C.A.) [1997] 2 F.L.R. 48.

child, and the greater risk of violence to the child itself, where the father is known to abuse his partner<sup>49</sup>

One thing which is particularly striking about the reform process is that the dangers of male control, intimidation, and violence towards women seem to carry far less weight with the L.C.D. now than they did with the Law Commission in 1979. Such concerns are not even mentioned in the response of the Advisory Board on Family Law to the L.C.D. It is surely impossible that the L.C.D. believe that domestic violence is a less serious problem today than it was twenty years ago, given the wealth of clear evidence to the contrary (Mooney, 1994; Stanko et al., 1998; McGee, 1997). Whilst the links between domestic violence and use of P.R. following separation are more speculative, one would have thought that the fact that they were cited by major organisations working in this area, would, at the very least, give some pause for thought.

## A CONVINCING CASE FOR REFORM?

Taking the figures for 1996 as a rough guide, if the Adoption and Children Bill enjoys a successful passage through Parliament and the proposed extension of the Children Act becomes law, we can expect that anywhere up to 175,000 more unmarried fathers will acquire automatic P.R. for their children each year.<sup>50</sup> Is this a good thing?

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<sup>49</sup> This claim is supported by a large academic literature which details links between domestic violence and child abuse. See for example, McGee (2000); Brandon and Lewis (1996); and Ross (1996). McGee (2000) provides a useful overview of the available literature.

<sup>50</sup> Pickford found no evidence in support of concerns that men would be less willing to register the birth if this meant that they would acquire P.R. Whilst she was less certain of whether the reform would deter some women, she speculated that this was unlikely as women probably shared the same erroneous impression as their partners: that registration already confers this status (1999a,

In terms of the practical impact of reform, it might seem that it barely matters whether unmarried men are accorded automatic P.R. or not. The rights included within it are narrowly bounded and, as was noted above, in post-separation families the consultation duties imposed on the parent with care are extremely limited. For the vast majority, the change in the law will have little or no impact. More general consequences of reform are impossible to quantify because of the paucity of empirical evidence regarding how P.R. is operating at present. Claims that extending automatic P.R. will encourage unmarried fathers to take more responsibility for their children and claims that such a move would discourage marriage are equally speculative and ultimately require far more study to be convincing.

However, some statements can be made with more confidence. On a positive note, reform would bring the law into line with expectations of many of the fathers in Pickford's study and will accord those fathers who are intimately involved in their children's lives the formal legal authority to make the kinds of decisions which, in practice, they are already making. On the other hand, the proposed reform will impose consultation duties on a larger number of parents with care which could prove problematic for some, possibly causing further litigation in this respect.<sup>51</sup> Most serious

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pp. 42-3). What effect greater public information will have on this number is impossible to know.

<sup>51</sup> There is an interesting difference of opinion on this point between the eminent family lawyer, John Eekelaar and the Solicitor's Family Law Association (S.F.L.A.). Eekelaar contends that, subject to some concerns that the recent decision in *Re P.C. (Change of Surname)* [1997] 2 F.L.R. 730 may signal more general duties of consultation that were previously believed to exist, P.R. is a largely symbolic concept with little practical significance. Denying it to unmarried fathers, he argues, just gives parents an additional reason to litigate. Taking exactly the opposite view, the S.F.L.A. argue that P.R. would lead to more parents to going to court because of disputes regarding consent to adoption, the general duty to consult on important matters, applications for prohibited steps or specific issue orders, applications for change of name, or to seek permission for an order that the relevant child could leave the country for more than 28 days. They also express a concern that P.R. could impose onerous duties on the parent with care to find the non-resident parent for these

- but again largely unverifiable - are concerns that P.R. may increase the ability of non-resident parents to interfere in the lives of their ex-partners and children in a way which at best challenges the decisions of the parent with care and, at worst, threatens acts of violence both against her and her child(ren).

A major difficulty in assessing the case for reform is that whilst the L.C.D. is clearly right that it is “impossible to assume that most unmarried fathers are irresponsible or uninterested in their children, and do not deserve a legal role as parents” (L.C.D., 1998, para. 51), it is equally unconvincing to assert that all unmarried fathers *are* assuming such a useful and positive role. Unmarried fathers are not a homogenous group and any attempt to formulate a single policy with regard to them is fraught with difficulties. It is, however, somewhat easier to generalise about unmarried mothers. Whilst always recognising the existence of exceptions, it is nonetheless true that most unmarried mothers *are* assuming an active parenting role. Thus, in so far as it makes sense for at least one parent to get automatic P.R., mothers - as the usual primary carers - are the most suitable recipients. As was noted above, any rights allocated to women in this regard are explicable with reference to the contemporary reality that women are typically primary carers, and thus will generally be in the best position to make decisions on behalf of their children. Where men are assuming a social parenting role there are already mechanisms in place for them to obtain P.R., albeit ones which undoubtedly require better publicisation.

Perhaps the most interesting aspect of the proposed reform is the very fact of its existence: that the Government has chosen to act on the basis of such

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purposes. See the brief discussion of consultation duties, n. 10 above.

contradictory and inconclusive evidence. One crucial point of concern here is that men's groups may be succeeding in winning popular support in campaigns based on arguments of gender equality, whilst concerns voiced by women's organisations are not being heard. For the *U.K. Men's Movement*, the proposed reform establishes “the first tentative steps of a movement toward true equality (in the Post-Feminist era) and a recognition that men have rights too”. Likewise, the *Shared Parenting Information Group* argues:

The principle of strict gender equality should apply... [G]ender policy has largely to date focused on expanding opportunities for women in the public sphere of work, it may now be time to emphasise opportunities for men in the private sphere of home and parenting.

Others dismiss concerns regarding threats to women's safety, by citing women's domestic violence towards men as a more important cause for concern (*Both Parents Forever, U.K. Men's Movement*).<sup>52</sup>

Men's successful inversion of feminist arguments for gender equality is particularly worrying where intended to achieve an equalisation of formal status which will

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<sup>52</sup> The U.K. Men's Movement note: “The general argument of violence against the mother and child is spurious and must be nailed once and for all. 1. For every violent man there is one or more violent woman. In a confined space a given number of women are probably more likely to be violent than the same number of men (see Home Office Table 9.22. Offences Against Prison Discipline, GB (%) page 170). Incidence of child abuse across the Western world show (sic) clearly that women are more violent and abusive to children than (sic) biological fathers. 3. When it comes to murder by parents, O.N.S. and Home Office statistics show that women are more likely to murder babies and infants (0-12 months and 0-5 years respectively) than men. Part 3 and 4 of the F.L.A. will involve the Gov't in considerable expenditure as more men are displaced from their homes on mere 'allegations of fear' of violence. This apparently laudable measure does have a sexist down side. It does nothing for women's self-esteem. The law is in danger of returning the 19<sup>th</sup> century notion of treating women on a par with minors, drunks and the insane.”

conceal substantive inequality, here masking the very different contributions which mothers and fathers make to child care (see Fineman, 1989). As the feminist organisation, *Rights of Women*, argue:

The proposals would, in effect, give unmarried fathers a license to interfere in the decision making process without any equivalent requirement of equal participation in parenting.

Further, it is worrying that these claims are being used in such a way as to refocus what should be a debate about child welfare firmly on fathers' rights. In her response to the L.C.D., Smart notes that:

[T]he Children Act ties the concept of rights into the broader notion of parental responsibility and rights are only one component. It would be a pity if this Consultation Paper and the debate it gives rise to, serves to extract rights once again from the broader notion of parental responsibility.<sup>53</sup>

## CONCLUSION

The proposed reform of P.R. speaks to fundamental ethical questions of who should have the right and the responsibility to make decisions with regard to children. At the outset, I outlined various trends in policy-making which have focused variously on the importance of marriage, intention, social parenting, and genetic links. In a context

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<sup>53</sup> It should also be noted that whilst there is a possibility for children voices to be heard in applications for P.R. Orders, the same is obviously not true for automatic P.R. I thank Daniel Monk for this point.



where the welfare of the child has been rightly accepted as the most important concern, previous commentators have suggested that P.R. should be awarded on the basis of social parenting (Deech, 1992), contending that only someone who is intimately involved with the care of a child can make decisions regarding its upbringing. The arguments presented to the L.C.D. and discussed above do little to refute such reasoning.

P.R. with its inbuilt flexibility and its refusal to focus only on two genetic parents has the potential to respond to changing patterns of family life and to accommodate a focus on social parenting. The proposed reform's recognition of the validity of non-marital relationships must, in some ways, be seen as a step forward. However, in the face of massive shifts in household living arrangements, the attempt to map P.R. more closely onto the heterosexual unit is retrogressive. A more radical and, I would argue, more useful way forward would be to follow the recent work of sociologist, David Morgan (1996, 1999). Morgan, having recognised a fragmentation of families across households and an ever growing diversity of family forms, argues for the need to focus on family practices rather than the status of residing within a pre-given structure: on 'doing' rather than 'being' family. To transpose Morgan's suggestion into law would shift the focus from ultimately irresolvable disputes about who 'are' parents and what rights should they have as such, and would instead ask questions about what counts as 'doing' parenting, and what legal structures are necessary to support this important work.<sup>54</sup> Whilst this will also be contested, it may prove less so. The L.C.D. consultation process suggests that some - if not absolute - consensus might be found regarding what counts as doing parenting. L.C.D. respondents who were

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<sup>54</sup> This implies no particular view on recognising 'parentage' or 'parenthood' status (see Bainham, 1999).

otherwise in diametric disagreement often agreed on the necessary role of the parent as an active presence in the life of the child. I would suggest that ‘doing parenting’ would encompass all the caring work which is currently associated with caring for a child<sup>55</sup> such as day-to-day physical work in feeding, clothing, cleaning the child, playing with and talking to him/her, and providing her/him with intellectual stimulation and emotional support. Bearing in mind that our guiding criterion should be the welfare of the child, the work which should count is that which will result in building a relationship with that child and developing an awareness of its long and short-term best interests, emotional and practical needs. This would include neither financial provision for nor ‘emotional investment’ in the child.<sup>56</sup>

Such a shift in focus would render law less concerned with bolstering the nuclear family where children live with two cohabiting, heterosexual, genetic parents, or attempting to maintain its ghost in living arrangements which fall obviously outside this model. As Smart and Silva have recently argued, the aim should be for many forms of family experience to be supported by policy frameworks in order to enhance autonomous choices in living arrangements. For this to happen it is necessary to take seriously fluidity in family arrangements, rather than seeing change *per se* as something dangerous and undesirable (1999, p. 2). Paradoxically, the existing system of allocating P.R. fits this model more closely than does the proposed reform.

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<sup>55</sup> Feminists will find nothing novel in this suggestion. The idea that caring work should be accorded more recognition in cases where parental rights and responsibilities are disputed has a long lineage. For example, see the chapters in Smart and Sevenhuijsen (1989), especially those by Smart and Fineman.

<sup>56</sup> See Lacquer (1992) on parenting as emotional investment, and the response by Sara Ruddick in the same volume. In so far as emotional investment leads to concrete caring behaviour, then this should qualify.

In this paper, I have attempted to swim against a rising tide of opinion which supports the extension of P.R. on the basis of the need for fathers to be involved in bringing up their children and welcomes the accordance of greater rights to fathers. I oppose these views with no small amount of trepidation. If granting greater rights to men will play a positive role in encouraging them to play a greater role in bringing up their children, then men, women and children may be the primary beneficiaries. Yet whilst the empirical evidence to support such hopes is lacking, they must ultimately remain unconvincing. Whilst the dangers to primary carers of extending P.R. are equally hard to quantify, they should surely have given pause for thought and provided cause for further research before the L.C.D.'s proposal for reform was ever translated into legislation. If the Adoption and Children Bill now passes through Parliament without amendment on this point, then the stage may well be set for evidence of the dangers of extending P.R. to be made apparent in a far less desirable way.

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