‘Sperm Bandits’, Birth Control Fraud and the Battle of the Sexes

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Abstract: This article briefly reviews the US case law dealing with the issue of birth control fraud and speculates on the possibility of a similar action succeeding in the UK. It then focuses on media reporting of one such case. A common media reading of this case, and one which can also be detected in some academic commentary of similar cases, is to contextualise it as part of an ongoing 'battle of the sexes' where historic poles of inequality have become reversed and women have gained unfair (legal) advantage in procreative matters. It is argued that such an understanding is flawed and misleading, serving to distract attention from the legal structuring of these kinds of disputes. The article concludes that the operation of the law can here be better understood as seeking to support the nuclear family in a way which can impact negatively on both individual men and individual women. The birth control fraud cases invite us to rethink the way that parental obligations are imposed and to justify more rigorously the choices which we make in this regard.

Keywords:

INTRODUCTION

'Women buy men's sperm but leave men out. A man's increasingly traceable sperm is used to bind him to economic relations he would not have chosen and often cannot sustain. Now, like a woman, a man can be made materially accountable for, yet socially alienated from, his sexual activities; he may therefore feel that, like a woman (though surely less painfully) he is a victim of his procreative body.'[1]

Let me start with a story. A young woman called Kellie Rae Smith gets a job in an estate agency. Her boss, Peter Wallis, turns out to be a like minded person. They get on well and eventually realise that there is a mutual attraction between them. They date, begin a relationship, and, after some time, decide to move in together. Although they had agreed that they would not have children, Kellie becomes pregnant. Peter asks her to have an abortion.

When she refuses, he asks her to marry him. Again, she declines, claiming that he doesn't love her (if he does, why is he only asking her to marry him now that she is pregnant?). Their relationship degenerates. He accuses her of lying to him about her contraceptive use. She maintains that she was just unlucky; contraceptive failure is a part of life. Things go down hill still further and they go to court. He accuses her of 'intentionally acquiring and misusing his semen'. She

retorts that his ejaculate was a gift and that he 'surrendered any right of possession to his semen when he transferred it during voluntary intercourse'. The imagination of the popular press is caught and the drama is played out in the world's media even before it reaches the courts.[2] As this language suggests, in the case of *Wallis v Smith*, Peter Wallis is threatening to sue Kellie Smith *inter alia* for the conversion of his sperm.[3] His action is only the latest in a long line of similar cases which allege what is known as birth control fraud. The only novelty of this case lies in the fact that conversion is alleged in addition to the more usual actions in breach of contract, deceit or trespass to the person.

Take a second, somewhat more unusual, case.[4] SF attends a party at TM's house. SF has been drinking for several hours before arriving at the party and, when they get there, his brother has to put him to bed (fully clothed). When SF wakes up the following morning, he is wearing only his unbuttoned shirt and TM is standing in the doorway, towelling herself dry. TM later claims to have had sex with SF while he was passed out and jokes that it has 'saved her a trip to the sperm bank'. That she made these remarks was witnessed by three people, and expert evidence testifies to the medical possibility of ejaculation in these circumstances. TM does not dispute SF's account but merely seeks to have certain additional evidence - notably the fact that she had attended the party dressed as a condom, and that intercourse had occurred three times during the night - struck out as irrelevant to the proceedings. In the states of New Mexico and Alabama where these stories unfolded, if an unmarried woman becomes pregnant as a result of sexual intercourse, legal paternity is established on the basis of genetic fatherhood and entails an automatic liability to share in the costs of raising the child.[5] Actions have also been brought in a number of other states and there is no reason to dismiss out of hand the possibility that a similar claim could be made on this side of the Atlantic or, indeed, in any other country which imposes financial responsibility for child support on the basis of genetic parentage.[6] Consequently, these cases should in themselves be of interest to lawyers working in other jurisdictions. However, these cases are also significant for another reason which will form a major focus of this paper. It is my contention that the media reaction provoked by *Wallis v Smith* reveals fascinating insights into contemporary cultural understandings of gender relations concerning, in particular, men's role in reproduction. Finally, I want also to argue that these cases are useful in providing a prompt to rethink what legal weight should be accorded to the biological fact of genetic parenthood. In the first part of this paper, I will outline the US case law and briefly discuss the possibilities of an action in birth control fraud succeeding on this side of the Atlantic. In a second section, I will scrutinise newspaper reports of this case. I will argue that the media's unproblematic location of it within an ongoing 'battle of the sexes', where women seem to be gaining the upper hand, provides a dangerous and erroneous understanding of what is at stake here. In a third section, I attempt a brief and inevitably partial review of why liability for child support came to be based primarily on a genetic link. I conclude with some general thoughts on the biological basis for establishing legal fatherhood and paternal rights and obligations and some specific suggestions as to what thinking about the birth control fraud cases might contribute to our understanding.[7]

Before moving on, I should make one brief point of clarification. The rights and obligations attached to legal fatherhood are governed by a number of disparate legal provisions.[8] Here my focus is exclusively on genetic fathers who are not

married to the mother of the child in question. Such a man will automatically be liable to make financial provision for the child under the Child Support Act 1991 and, where the mother is in receipt of social security benefits, he may be pursued for such money regardless of her wishes.[9] However he will not have parental responsibility (and decision making power with regard to the child) unless he makes an agreement with the mother in the prescribed form or obtains a court order to such effect pursuant to s 4 of the Children Act 1989.[10] Neither does he have any automatic rights to contact.

THE CASES

In a series of cases argued before the US courts, men and women have sued their (former) sexual partners on the basis of alleged misrepresentation regarding the latter's professed sterility or use of some form of birth control.[11] In these cases, it is claimed that reliance on a partner's representations has resulted in a pregnancy which was unwanted by the plaintiff and which has caused her/him harm. In the majority of the cases, the injury alleged is that a male plaintiff now finds himself liable for some eighteen years of child support payments. In their attempts to recover this money, men have sued in breach of contract, fraud, trespass to the person and, most recently, conversion.12 The US courts have responded with a considerable degree of coherence, rejecting all the actions brought by men and at least one similar claim for damages brought by a woman.[13] They have, however, allowed recovery for actual, physical injuries sustained as the result of an abnormal pregnancy[14] or for the cost of an abortion.[15]

In rejecting these actions, the courts have relied on three broad grounds. First they have held that where the damages sought represent liability for child support payments for a healthy child, that this is an attempt to avoid statutorily imposed obligations. Thus, to allow the claim would be to subvert the intention of the legislature regarding how such obligations should be apportioned, and to go against its professed aim of protecting the welfare of the child. The fact that the father seeks damages from the mother rather than to avoid the payments *per se*, cannot disguise an intention to evade those obligations. Secondly, the courts have expressed concerns about privacy, arguing that to police such intimate matters as birth control agreements between consenting adult sexual partners would be an unwarranted and unjustifiable intrusion. Thirdly, the courts have exhibited considerable hostility towards the idea of leaving the taxpayer financially liable to support illegitimate children. What of the outcome in the two cases outlined above? In *S F v T M*, SF's action failed. The court emphasised that any wrongful conduct on the part of the mother should not alter the genetic father's duty to provide support for his child, and noted that SF's appropriate response was to file for criminal sanctions to be brought against TM. One dissenting judgement disagreed only to the extent of reasoning that the father should be liable merely in so far as the mother is unable to support the child on her own earnings ability.[16] Other cases have similarly refused to allow the genetic father to escape liability for child support when he was a minor at the time of intercourse, and hence where the mother had been guilty of statutory rape[17] or where the father had learning disabilities and was argued to be incapable of consenting to father a child.[18] In both these cases, as in *S F*, the court reasoned that the man's appropriate response is to petition for criminal sanctions to be brought against the mother. His obligation to support the child is unaltered.

At the time of writing, there has been no reported decision in *Wallis v Smith.* Although there is no reported birth control fraud case in New Mexico to stand as precedent, given the huge weight of authority against Wallis in other states, it seems inconceivable that he will succeed even if he is able to prove his version of the facts (which, in itself, is likely to be difficult). The only part of his action which seemed novel - the claim in conversion – has recently failed in a parallel case brought in Tennessee.[19]

AN ACTION FOR BIRTH CONTROL FRAUD IN ENGLISH LAW?

Would a plaintiff in the position of SF or Wallis be more likely to succeed in the English courts? The only directly relevant reported UK authority is the Scottish case of *Bell v McCurdle*.[20] Here, the question arose of whether a man could avoid providing financial support for a child born after his partner had failed to use the contraceptive pills which were in her possession. The sheriff held that these facts allowed room for an argument along similar lines to contributory negligence and *volenti* (the mother had voluntarily assumed the risk of falling pregnant). Thus, he held, the genetic father should be liable only to make nominal child support payments. Overturning this ruling in a judgement strongly critical of the sheriff's reasoning, the Court of Second Division held that it was not within the power of the courts to limit the father's financial obligations because of imprudence on the part of the mother. In *Bell v McCurdle*, there was no allegation that the woman had deliberately misled the man as to her (lack of) contraceptive use. Further, at least part of the Court of Second Division's reasoning would suggest scope for distinguishing this case from one of deliberate fraud. In particular, the Court notes that: 'there is a duty on the man to take contraceptive precautions, or to take reasonable care to ensure that his partner does so. If he does not do so, he may literally have to pay for the consequences'[21]
We are left to speculate, therefore, as to how far the Court would be prepared to distinguish the situation where the man could establish that he *had* taken reasonable care with regard to contraception[22] or, indeed, that he was unconscious during sexual intercourse and thus in no position to take steps to avoid conception taking place. No relevant precedent exists south of the border, but it is clear that the various actions which have failed in the US would also face difficulties in the English courts. The action for breach of contract would seem to be precluded by the principle of English law that a contract will only be formed where the parties have displayed an intention to create legal relations. As such the courts are unlikely to be convinced by the claim that the agreement of the parties to have sexual relations is a contract capable of containing a declaration, similar to a condition in a contract, regarding the use of contraceptives (or other facts that negate, or minimize the risk of pregnancy).[23] The action for conversion would face all the problems of proving sperm to be property,[24] and of establishing that Smith had performed a positive act in the taking of it: conversion has never lain where the defendant once had the plaintiff's goods but was unable to return them because they had been lost or negligently destroyed.[25] The actions which look technically most plausible are assault and deceit. At the heart of the action in assault is the idea that a false declaration can negate consent. In the US whilst the various actions which have been brought by men on this ground have failed, a successful action has been brought by a woman against her attorney with whom she consented to have sex in reliance on his declaration that he was not capable of

having children.[26] It was held that she had only consented to the intercourse on the basis of this assurance, and hence her consent was vitiated: there had been no consent to the act of impregnation. However, it could be difficult for men in the position of Wallis to make this argument as all that needs be shown is consent to the general nature of the contact. Wallis would have to show that consenting to non-procreative sex is of a different general nature than consenting to procreative sex or, more accurately, that consenting to sex entailing a very small risk of conception is of a different nature from consenting to sex with a much larger risk of conception.[27] A plaintiff in the position of SF, on the other hand, has given no consent to intercourse and has a clearer action in assault. However, his problem would be to establish that the damages awarded should cover his child support payments, and I will consider this below.

The most appropriate action for a plaintiff in the position of Wallis would seem to lie in the action for deceit. A will be liable in tort to B if knowingly or recklessly, A makes a statement to B with intent that it shall be acted upon by B, who does act upon it and thereby suffers damage.[28] If the plaintiff does rely on the statement, it is no defence that he acted incautiously and failed to take reasonable steps to verify its truth. In principle, the plaintiff is entitled, so far as money can do it, to be put into the position in which he would have been had the fraudulent statement not been made. Can this include the claiming back from the mother of sums equivalent to child support payments? Here is the crucial issue. Although the English legal context is different from that of the US, it seems likely that similar policy considerations would pertain. A desire to protect the privacy of consenting adult sexual partners has long been a guiding principle of family law[29] and receives new weight with the full introduction of the Human Rights Act 1998. Secondly, whilst the welfare of the child is not paramount under the Child Support Act 1991, it does remain a consideration.[30] Thirdly, whilst the welfare state context is rather different in England and Wales, the hostility towards the notion that it should be taxpayers who support illegitimate children is rather familiar.[31] Further, following a recent House of Lords decision in *Macfarlane & Anor v Tayside Health Board* (1999), it seems clear that the will be reluctant to award damages which suggest that the life of a healthy child is a compensatable harm.[32] It seems likely, therefore, that an English or Welsh SF or Wallis would find himself unable to escape a share of the financial liability for his genetic offspring. This remains true even when conception results from sexual assault, and even where a woman has deliberately misled a man with regard to her contraceptive usage. Whilst there is surprisingly little written on this issue, at least two commentators have argued that the courts have struck the wrong balance in such cases, treating the male plaintiffs unfairly. Both Shifman[33] and Terrell Mann[34] contend that public policy considerations of the welfare of the child dictate that where fraud is established, men should be liable for child support only to the extent in which the mother is incapable of providing for the child herself. In other words, the father's claim in tort should be allowed in so far as it cannot be demonstrated that the child will be adversely affected by a finding in the father's favour.[35] The idea that the law is favouring women's reproductive rights at the expense of those of men draws on concerns which have been expressed by both lawyers and non-lawyers in other contexts. For example, having engaged in a more general review of the position of the father in comparative European legal perspective, one commentator has gone so far as to claim that the poles of gender inequality have now been reversed, with women gaining the upper hand to the

detriment of all: 'western women now have complete control over whether a man is to be a father and whether a child is to live or die. This change is all the more striking since men themselves have provided them with the opportunity and the right to break out of the magic circle of maternity in which she was imprisoned. But where does this lead, now that men in turn are under a pressure to care for their children? ... In the history of the relations between the sexes, inequality has been the rule for too long, and this inequality has engendered violence and vengeance. *It is impossible to defeat this violence and restore peace simply by reversing the poles of inequality and retaliation.*'[36] I want now to move on to consider some broader understandings of what is at stake in these cases. This will lead me first to use the newspaper reporting of *Wallis v Smith* to highlight some general ideas regarding contemporary understandings of men's role in reproduction. As will be seen, such reports resonate with the concerns expressed here by Meulders-Klein: things have gone too far and women are seen to be winning the battle of the sexes. I will then go on to attempt to locate the legislative provisions governing men's financial liability for their genetic offspring within a broader socio-political context. I will argue that similar ideas were at work here and were similarly unhelpful.

'SPERM BANDITS', *SMITH V WALLIS* AND REVERSING THE POLES OF INEQUALITY

'One of the worst fears of the male sex is being tricked into pregnancy. Both men and women desire sex, but women hold most of the cards. Condoms are fine for preventing disease, but, call it a failure of medical research or a failure of resolve, no current form of birth control is as reliable as those that are available only to women. So a man and woman sleep together. She assures him that she's using something. He believes her. And she gets pregnant. Once she's with child he can't legally force her to have the baby, and he can't force her to abort it. Since all the action from here on out takes place in her body, she gets to call the shots. That's the way it should be, since it's women not men, who suffer through morning sickness, swollen ankles, months of waddling about without being able to see their feet and the pain of childbirth. Women have a stake in pregnancy that men can't claim. But before pregnancy, they have an equal responsibility for what happens...Women frequently complain about men who avoid their responsibilities. But women have responsibilities as well ... A woman shouldn't be allowed to lie about something as crucial as birth control and then hold up the father for a lifetime of child support.'[37]

The press reporting of *Wallis v Smith* on both sides of the Atlantic was remarkable in the uniformity of the way in which it chose to frame the central issue of the case.[38] It was presented within a context of ongoing 'long simmering gender wars'[39] where, in the terms used by Meulders-Klein, poles of inequality are reversed with women gaining the upper hand.[40] Such accounts fit neatly within existing influential cultural narratives where men's role in reproduction is seen as increasingly marginalised and women are unfairly advantaged. The tone adopted by two journalists (writing respectively for an American and a British newspaper) is typical: 'Wallis' complaint touches upon ancient fears and frustrations. For centuries, it was believed that witches stole sperm from men as they slept and made them impotent or even sterile. Wallis, it would seem, has given that mystic tale an updated twist.

And some men's groups think he has a point. When it comes to procreation, they complain, women hold all the power'.[41]

'Whereas comeback for undiscussed pregnancy used to be that hapless men were tricked into parenthood, now the objection centres around loss of control. First women stole men's jobs, then their earning power, now their body fluid'.[42]

For both of these journalists, it seems, this is not an isolated and unusual case involving no more than the individual litigants concerned: rather it is a part of broader picture of male powerlessness. Moreover, its significance is not limited to reproductive matters, but is part of an identifiable and continuing trend whereby men have been pushed out of the labour market and undermined in the family. Such trends fit into broader cultural stories told in a flood of popular books such as Susan Faludi's recent bestseller *Stiffed: the Betrayal of the Modern Man*[43] and, on this side of the Atlantic, Melanie Phillips' *The Sex-Change Society: Feminised Britain and the Neutered Male*.[44] In contrary stance, Germaine Greer's most recent book sets out precisely to take on claims made even by feminists that 'feminism had gone too far'.[45] Developing the theme of male disempowerment and marginalisation, another British journalist entitles her discussion of *Wallis*, 'Sperm Bandits', thus implying an organised community of women who deliberately set out to steal semen.[46] Litvinoff's report is accompanied by an image of a distraught man clutching his head in anguish and exclaiming, 'And I thought it was love that she wanted'. The cartoon ironically reverses expectations: here we have not the familiar cultural figure of a woman seeking love who has been used for sex. Rather we are presented with a man who wanted love being used for his sperm then cast aside with callous indifference. The author locates her discussion of *Wallis* within the framework of the spectacular turning of the tables implied by this image. Where once men held all the power, it is now women who can decide when to become pregnant regardless of whether the man wants a child or whether he will be around later to help to raise it. It seems that now women *want* to be left holding the baby, whilst men are expected merely to hold their chequebooks at the ready. Men become the 'disposable sex', useful only for economic purposes.[47] In discussing W*allis*, Litvinoff makes reference to her own female friends who have similarly become pregnant against the wishes or without the knowledge of their sexual partners: 'A few [of these women] have been married to avowed non-procreators, but most have been in less stable relationships, or not in one at all, and have felt the pressure of the biological deadline. "I might just let myself get pregnant", they say. Sometimes it's because they want to tie a man more securely to them, usually it's because they want a baby. It doesn't matter what happens afterwards. They've got enough pent-up love for two.'[48] Thus, we are told, women are seeking sperm with no concern for the men who provide it. More than one journalist mentions those women who have famously selected men as a store of good genetic material rather than as potential social fathers. Madonna chooses a fine physical specimen (her personal trainer) to father her first child, Jodie Foster leafs through the records of a sperm bank in order to uncover the right combination of brains, health and stamina for hers.[49] Sperm is routinely, but wrongly, treated as a commodity, divorced from the man who has produced it:

'It even makes us ponder whether women have a right to "use" sperm in ways in which men never intended it to be used and whether in our high-tech society

sperm is becoming just another commodity to be used, stolen, banked or donated like so much grain or oil'.[50]

'As modern medicine has placed the male seed in the language of the market – sperm 'bank' and 'donor' - it is little wonder men are arguing that semen is property and women that ejaculation is a freebie'.[51]

'[M]odern fertility medicine has turned the male seed into a recognised commodity... Where will it end? Will spent men ring from the bedside, complaining: "I wish to report a theft?" Might semen be listed on the futures market alongside pork bellies?'[52]

As such, *Wallis v Smith* is compellingly located within broader concerns about men's procreative powerlessness. The reproductive oppression of women seems to have been replaced by that of men. In a particularly striking reversal of feminist rhetoric, several of the journalists commenting on *Wallis v Smith* go so far as to call for a *male* controlled contraceptive which will allow men to take control of their procreative capacities: 'At the least, this case cries out for more research on male contraception methods. The only mainstream method we now have is the condom, which is very far from foolproof in preventing either pregnancy or sexually transmitted diseases .... If men had a safe, effective birth control pill, the incidence of unwed fatherhood (and motherhood) would go way down.'[53]

If I have dwelled on the newspaper coverage of *Smith v Wallis* at some length, this is partly because such a close reading seems to be to be useful in capturing an intuitive anxiety which we might feel in reading the birth control fraud cases. Drawing on the same 'battle of the sexes' model detectable in the academic work of Meulders-Klein which I cited above, the media reporting provides a most tempting way of understanding what is at stake. This reading is no doubt exacerbated by the way in which the adversarial structure of tort law constructs such disputes: in the courtroom we have a man alleging a particular harm done to him by a woman, and we have a woman arguing for the needs of her child. In this framework, it might appear that men fare rather badly. In case after case, the man's action is dismissed and he is held liable to maintain the child living with its mother, even though he had no say in whether this child was to be born. In at least some of these cases, moreover, it seems undeniable that the defendant had acted extremely badly; on occasion criminally. From there it is an easy and, for some, a tempting step to locate these cases within existing cultural narratives which assert that feminism has gone too far, poles of inequality have been reversed and that women have now gained an unfair advantage.

Yet to generalise sympathy for the male plaintiffs in these cases within a broader framework of an ongoing 'battle of the sexes' is unhelpful. Crucially, what is concealed in this process is some scrutiny of the legal structuring of this dispute. Here, I do not intend just Wallis' attempt to translate the moral wrong which he believes he has suffered into the language of tort, but rather the fact that both actors are constrained by a law which attributes financial responsibility for children on the basis of genetic parentage. It is the underlying geneticised basis for support obligations which seems to lie at the heart of the problem. Accordingly, I would now like to push the discussion back a stage, in order to revisit the issue of why financial liability for children born outside of marriage is attributed primarily on this basis. It is my contention that the birth control fraud cases described above provide a useful prompt to rethink this principle. At this point, it will be helpful to review the historical development of the relevant laws in order to explore why the British and

US legislatures made this choice. As this historical development has already been extensively analysed by others, my own discussion will be very brief.

'FECKLESS FATHERS' AND 'DEADBEAT DADS': THE CONTEXT OF REFORM IN THE 1980S

'Not only is it just that fathers should contribute to the upkeep of their children: it is also crucial that we begin to break the culture which views it as acceptable for a man to walk away from the consequences of his actions in this way. Ensuring that fathers help support the mothers of their children is one way of doing that'.[54]
As has been well documented by a number of writers in both Britain and the USA, the prioritisation of a genetic basis for legal fatherhood is of relevantly recent origin.[55] Historically the primary consideration was the legal contract of marriage (between husband and wife) and not the biological relationship (between genetic father and child). The latter was presumed to follow the former, regardless of the realities of conception.[56] In the 1970s, with a growth in divorce rates, the creation of large numbers of step-families and an increase in cohabitation outside of marriage, other methods of ensuring that men assumed responsibility for their dependent children were deemed necessary.[57] One such idea, the concept of 'child of the family', made men responsible for the support of children whom they had treated as members of their families. Whilst this served some purpose in regulating obligations of an ever growing number of step-fathers, there were other families where no man had ever assumed a parenting role and where another solution was therefore necessary. Does it make sense to understand the perceived need for reform within the context of a battle of the sexes? The use of such imagery was certainly rife within the political debates in the 1980s and early 1990s which heard frequent expressions of concern that men were evading their responsibilities to women.[58] Such men were constructed as 'feckless fathers' (or, in the USA, 'deadbeat dads') who would desert their child(ren), leaving their ex-partners to cope in conditions of considerable hardship.[59] In reforming the law, legislators claimed they would punish male immorality, whilst also congratulating themselves that something would be done for women and children.[60] In the UK, such sentiments ultimately gave rise to the much derided Child Support Act 1991, a piece of legislation based on the principle that genetic parentage involves an absolute and unreserved responsibility to provide financial support for one's children.[61] To what extent was this legislation a victory for women? In some quarters, it was certainly represented as such, with men's groups such as *Families Need Fathers* criticising it as a result of feminism gone too far.[62] However, as numerous commentators have pointed out, the legislation seems to benefit the taxpayer more clearly than it does the single mother.[63] Evidence given by the Government indicated that of £530 million social security savings expected to be achieved by the Child Support Agency in its first year of operation, only some £50 million would find its way into pockets of parents with care.[64] One study of the operation of the activities of the Child Support Agency, found that not one of the 53 lone mothers interviewed had experienced a net gain in income following the Agency's intervention.[65] Further, the rather punitive tone of the debates may have displaced awareness of the reality of the limited resources available to be recouped from many 'absent fathers'. As Krause notes with regard to the USA, the administrative costs of collecting support payments from fathers with low incomes an sometimes exceed the amount of money recovered.[66] Garnham and Knights

cite the Child Support Agency's attempts to recover through the courts the arrears owed by one errant father who had been ordered to pay £6 per week despite the fact that he was unemployed.[67] If the 1991 Act was not primarily concerned with helping women and children, then does it make sense to see it as about nothing more than cost cutting? Clearly not: whilst financial savings were important, the Act was surely also influenced by a moral agenda. Yet the normative vision of the reforms might be more accurately described as aiming to support the nuclear family than to increase provision for women and children. In an extensive body of work which predates the introduction of the 1991 Act, Carol Smart has analysed how family law operates to link genetic fathers to children where it is the genetic father who is most likely to reproduce some semblance of a nuclear family. She argues that where the genetic father is not available, or is unsuitable, then the social father will suffice. Where there is a genetic father and a social (step)father (as in the course of divorce and remarriage) the law will seek to preserve the rights of the genetic father in the 'best interests of the children'. In other cases where there is both a genetic and a social father (as with infertility treatment services involving donor sperm) the tendency is to ignore the genetic father and to invest all the rights of legal fatherhood in the social father who will be the head of a two-parent family.[68]

Whilst the desire to tie fathers to their genetic offspring cannot be entirely reduced to a desire to protect the nuclear family,[69] there is much to be learned by applying Smart's analysis to the 1991 legislation. It was clearly hoped that enforcing the obligation to pay maintenance might persuade fathers to retain their marital and paternal duties and also to make them less inclined to conceive children outside of marriage.[70] Further, against the idea that the reforms were aimed to help deserted women, it can be noted that single and unmarried mothers were increasingly under attack from the very same politicians who were criticising 'absent fathers'. Locating the child support provisions in the context of a desire to bolster the nuclear family also brings into relief the extent to which the law operates to the disadvantage of individual women as well as men in this context. Imagine the following case: a male friend provides sperm to a lesbian couple who use it to inseminate one partner. The three discuss at length his gift and sign a document stating that the man should have neither rights nor obligations towards the eventual child. Whilst the lesbian partners can both be granted parental responsibility under s.4 of the Children Act 1989, this man remains the child's legal father and, unless the child is given up for adoption, nothing he can do will divest him of that status. If the couple want to claim social security benefits, the man will find himself pursued by the Child Support Agency for his share of the costs of the child's upbringing. If she attempts to withhold his name, the mother may find her benefits reduced. Experience suggests that where a genetic father chooses to go to court, he is unlikely to be denied a Parental Responsibility Order[71] and further problems may arise if he attempts to assert contact rights. Likewise, in the US, it has been held that a signed affidavit relinquishing all parental rights cannot be binding on a man.[72]

Further, as has been well documented by feminist writers, the genetic vision of paternity pushes women into a state of financial dependence on individual men with whom they may no longer want any contact.[73] To return to *Wallis v Smith*: Kellie Smith says that she would prefer not to receive child support from Peter

Wallis, but realises that because she has filed for sole custody, the state will probably force him to pay.[74] She may thus find herself forced back into a position of economic dependence on a man with whom, one might safely assume, she is no longer on the best of terms. And whilst liability for child support, the attribution of parental responsibility, residence and contact arrangements are all legally separate issues, it would be naive in the extreme to think that they are unrelated. A requirement that men financially support their offspring will inevitably lend moral weight to their claims to have greater rights to contact with them.[75] To be clear: my point here is not that men should have either greater or lesser rights in relation to their children, my claim is simply that a genetic link *per se* is not the best way of deciding complex parental claims.[76] One particularly ominous note is sounded by a US court's decision that the father who had committed the felony of statutory rape in the third degree did not forfeit his right to establish paternity.[77] Here the Court held that the plaintiff was not merely looking to benefit from his wrongdoing, but desired to assume the responsibility of supporting his child. Whilst the courts may feel it appropriate to allow the plaintiff to redeem himself or live up to his responsibilities in this way, the woman who is forced to take his money (and a proportionate cut in any welfare benefits) may view things rather differently.[78] The woman who has conceived during non-statutory rape is equally likely to find herself in this position. What would the English courts decide in such a case? Under s 6(2) of the Child Support Act 1991, the woman will not be financially penalised if she can convince the Child Support Agency that authorising the collection of money from him would cause her or her child a risk of harm or undue distress, but this may not be straightforward.[79] Conception resulting from rape may seem to be a clear and uncontroversial example of such a case, however proving that conception results from rape will not always be easy. In most cases, the woman will not have a court judgeme nt to supporther claim: research suggests that the majority of rapes are not reported, the majority of those which are reported are not prosecuted, and the majority of those which are prosecuted do not result in conviction.[80]

CONCLUSION

'[N]o child should come into the world without a man - and only one man - who can ensure that the child has a sociological father; that is to say, a guardian and a protector, a male link between the child and the rest of the community'.[81]
'If the traditional social structure - the traditional, ongoing two-parent family - no longer exists, can its ghost support traditional financial responsibility?'[82]
I began this paper with a brief discussion of two cases of so-called 'birth control fraud'. If we accept for the sake of argument that in these cases the men's stories are to be believed, it seems that both have been badly mistreated and yet are left without any means of recouping the substantial financial burden imposed on them by the duplicity of their sexual partners. Nonetheless, I have argued that a location of these cases within what I called the 'battle of the sexes' model (as accepted in the newspaper reporting and alluded to in some academic discussion) results in a misleading understanding of what is at stake here. I then went on to use these cases as a basis for discussing the genetic basis for legal paternity in broader terms, considering it within the context of political discourses targeting 'feckless fathers' and supporting the need for rules designed to protect the nuclear family and to punish 'irresponsible', recreational sex.

There is no reason to believe either that the political currency of supporting the nuclear family has diminished over the past fifteen years nor, indeed, that it is confined to politicians of the right. Rather it seems that family policy in the UK has been remarkably consistent across governments[83] and that the new Labour Government is keen to establish itself as the party of the (nuclear) family. For example Prime Minister, Tony Blair, has argued that:

'[i]t is a matter of *good common sense* that it is best for children, if you can achieve it, that they end up in a stable family environment with their parents ... [it is] inadvisable for women to have children with no intention of entering into a stable relationship with the father.'[84]

Underlying the above discussion and central to my argument has been an assertion of the need to challenge precisely the common sense wisdom of these kinds of ideas; to recognise that the attribution of legal responsibilities on the basis of the biological fact of genetic parenthood is a social choice[85] and, notably, one which we have made neither for women nor for men in all circumstances.[86] Pointing out that this is a choice, of course, provides no guidance regarding what other choices we might make or how we should make them. However, it can prompt us to state more explicitly and to interrogate our reasons for deciding in a particular way. Attribution of parental status, rights and obligations on the basis of genetics alone is out of step with the plurality of ways in which people choose to structure their living arrangements and parental choices in contemporary western society. I have also argued that it will lead to significant unfairness in a variety of cases. I would tentatively suggest that such unfairness will be more marked the further that the circumstances of conception depart from the law's implicit standard: the heterosexual, monogamous norm of the nuclear family.[87]
In a careful and reasoned assessment of whether parents are morally obliged to care for their children, John Eekelaar has argued that such parental duties as exist are derived from a general social duty to promote human flourishing. It is social practices which place particular responsibility on some individuals.[88] He notes: 'Appreciation that social rules, not moral principles, attach duties to parenthood has important implications .... Such rules must be rational, in conformity with other principles of equity, and never overshadow the duties everyone owes to the child'.[89]

Here, I have sought to demonstrate that the attribution of duties of child support liability to men who are victims of birth control fraud is part of a larger system of imposing the model of the nuclear family which benefits neither men nor women as a group in any unproblematic way, but which does serve precisely to overshadow the general duties which society as a whole owes to the child. The geneticisation of liability not only perpetuates women's dependency on men but also obscures the need for a proper debate about social responsibility for child care provision and funding. The birth control fraud cases are significant in prompting us to re-examine the genetic basis for the attribution of financial liability for children and in providing a particularly compelling example of where a genetic basis on its own is inadequate. If the versions of events presented by Wallis and SF are to be believed, then their stories pose a particular ethical problem for us. If we cannot provide a convincing answer to the question of why these men, rather than society as a whole, should be financially liable for these particular children, then we need to rethink what ethical principle it is which underlies the idea that individual parents

are financially responsible for their genetic offspring. To put it another way: whatever position one takes on the issue of whether children should be primarily a social or an individual responsibility, it is impossible to fix responsibility on particular individuals without some convincing reason as to why they should be liable rather than others. To state the existence of a genetic link is to make an empirical rather than a normative claim: it does not in itself provide any moral argument. To provide an answer to such complex ethical questions is beyond the scope of this paper. However, what should be clear is that the moralistic and punitive normative underpinnings of the Child Support Act 1991 are signally incapable of contributing towards a convincing response. A more useful first step might be provided by the research of Gillian Douglas. Commenting on the decision of the Californian Supreme Court in a surrogacy dispute,[90] Douglas raises the issue of whether intention should play a greater role in the attribution of parental status and rights. In conclusion, she notes that: 'We still require, or at least prefer, some sort of biological link to a child, be it genetic *or* gestational, because we view children as in some way the physical recreations of their parents. We still refuse to face up to the reality of our acceptance of the importance of social parenthood - to an idea of parenthood as departing from the traditional, pseudobiological model of two people of the opposite sex creating and rearing their offspring'.[91]

Thinking about the birth control fraud cases discussed above lends some support to Douglas.

The cases provide a particularly clear example of the potential unfairness of imposing parental obligations where intention to parent is clearly lacking. Yet at a time when the Government is both proposing the automatic extension of parental responsibility to greater numbers of unmarried fathers[92] and is reported to be considering granting children born of gamete donation the right to trace their genetic parents, the genetic view of parenthood seems to be on the ascendancy.[93] Along with the well documented confusions caused by surrogacy and the new reproductive technologies, the cases discussed in this article provide a prompt for some further scrutiny of the fundamental principles at stake. The challenge which remains is how to rethink parental obligations and social responsibility for children in a way which is fairer, whilst recognising the need not to exacerbate the already unequal distribution of parenting obligations between men and women.

References

[1] T Laqueur 'The Facts of Fatherhood' in M Hirsch and E Fox Keller (eds) *Conflicts in Feminism* (NewYork and London: Routledge, 1990) at p 232.

[2] These facts are taken from the newspaper reports of the case: see B Erbe 'A father's rights' *Scripps Howard News*, http://www.news-observe.com/newsroom/ntn/voices/120198/voices8_11252_noframes.htm, (1 December 1998); S Litvinoff 'The Sperm Bandits', *Independent on Sunday* (29 November 1998); S McCarthy 'A Couple's Deal to Use Birth Control is a Deal', *Dallas Morning News* (20 November 1998); R Prasad 'The Sperm that Turned', *Guardian* (11 February 1999); B Vobejda 'Sexual Commodities' *Minneapolis Star Tribune* (24 November 1998).

[3] The tort of conversion is committed when a defendant deals with the goods of a person in a way which constitutes an unjustifiable denial of her/his rights in them or which involves the assertion of rights inconsistent therewith. Such interference must be deliberate and not just negligent: see generally W V H Rogers *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 15th edn, 1998) at pp 588-612.

[4] *S F v State ex rel T M* (1996) 695 So 2d 1186, 1996 Ala Civ App LEXIS 856 (Court of Civil Appeals of Alabama).

[5] The respective parent's share in the costs will be determined by the courts taking into account the income of each.
[6] For an assessment of how a similar action might be received in the Israeli context, see P Shifman 'Involuntary Parenthood: Misrepresentation as to the Use of Contraceptives' (1990) 4 IJLF 279.
[7] In this paper, I will use terminology in the way recently proposed in a helpful article by Andrew Bainham. He suggests that we need three separate legal constructs: parentage (which is 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 which are associated with raising a child). I will use the 'fatherhood' as the specifically male equivalent to the more general 'parenthood'. See A Bainham 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A Bainham, S Day Sclater, and M Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999).
[8] For a useful overview see G Douglas and N V Lowe 'Becoming a Parent in English Law' (1992) 108 LQR 414.
[9] Subject to the exemption contained in s 6 of the Act which is discussed below, see nn. and accompanying text.
[10] The Government has recently announced its intention to reform the law so as to grant parental responsibility automatically also to the unmarried genetic father who jointly registers the birth, see Hansard 9 Dec 99 398w, Lord Chancellor's Department *Consultation Paper: Court Procedures for the Determination of Paternity and the Law on Parental Responsibility for Unmarried Fathers* (London: HMSO, 1998).
[11] See for example: *L Pamela P v Frank S* 59 NY 2d 1 (22 March 1983); *Stephen K v Roni L* 105 Cal App3d 640 (12 May 1980); *In the Matter of Alice D v William M* 113 Misc 2d 940 (27 April 1982); *Orlanda C Hughes v Carl K Hutt*, 500 Pa 209; 455 A 2d 623 (28 January 1983); *S F v State ex rel T M* 695 So 2d 1186; 1996 Ala Civ App LEXIS 856; *Erwin L D v Myla Jean L*, 41 Ark App 16 (10 Feb 1993); *Cynthia Beard v Nathan Richard Skipper Jr*, 182 Mich App 352 (10 Oct 1989); *Sandra Kay Faske, v Antonio Bonann*, 137 Mich App 202 (5 Sept 1984); *Merley Polo Murphy and County of Olmsted v John Dale Myers*, 560 N W 2d 752 (8 April 1997); *Mark J Welzenbach v Patricia T Powers*, 139 N H 688 (30 June 1995); *C A M v R A W*, 237 NJ Super 532 (9 Jan 1990); *Jose F v Pat M*, 154 Misc 2d 883 (13 July 1992); *Douglas R v Suzanne M*, 127 Misc 2d 745 (14 Feb 1985); *Larry Aubrey Henson v Elizabeth Ellen Sorrell,* C A Tennessee, Western Section at Jackson (8 Jan 1999); *Linda D and Baby Boy D-C v Fritz C* Wash App 288 (23 July 1984)
[12] For convenience, and despite the range of actions involved, I will refer to these cases together as the 'birth control fraud cases'.
[13] A woman who claimed that she had acted in reliance on a man's assertion that he had had a vasectomy, was unable to claim compensation for damages relating to the birth of her child. The man's financial liability extended no further than the payment of child support: *C A M v R A W* (1990) 237 N J Super 532. In a dissenting judgment, Stern J reasoned that '[i]f physical injury premised on the failure of a spouse or nonspouse sexual partner to disclose a contagious disease is actionable ... I fail to see why another type of fraud resulting in the 'unprotected' sexual relationship should not be cognizable at least where the sexual activity has impact on the plaintiffs physical condition' (at 547).
[14] *Barbara A v John G* (1983) 145 Cal App 3d 369. In this case, a woman's reliance on her lawyer's assurance that he 'couldn't possibly get anyone pregnant' and the damage she incurred (an ectopic pregnancy) were sufficient to convince the court of her action in intentional and negligent fraud and deceit as well as battery.
[15] *In the Matter of Alice D v William M* 113 Misc 2d 940.
[16] See the judgment of Crawley J at 1191.
[17] *Mercer County Department of Social Services v Alf M,* 155 Misc 2d 703, 589 NYS 2d 288 (Fam Ct 1992).
See also *State ex rel Hermesmann v Seyer*, 252 Kan 646, 847 P 2d 1273 (1993) and *In the Matter of Noah Weinberg as Assignee of Patricia Ann H v Omar E* (1984) 106 AD 2d 448; 482 NYS 2d 540; 1984 NY App Div LEXIS 21486.
[18] *Matter of Department of Social Servs v Victor A R,* 120 AD 2d 526.
[19] *Larry Aubrey Henson v Elizabeth Ellen Sorrell*, 1999 Tenn App LEXIS 12.
[20] (1981) SC 64.
[21] Ibid at 159.

[22] Whilst it may be imprudent to rely on claims made in the context of a casual liaison, there is surely a strong case for arguing that it is reasonable to rely on the assurances of a long term sexual partner.
[23] On sexual contract cases in the USA, see J Larson 'Women Understand So Little, They Call My Good
Nature "Deceit": A Feminist Rethinking of Seduction' (1993) 93 Columbia L Rev 374; D Subotnik '"Sue Me, Sue Me, What Can You Do Me? I Love You": A Disquisition on Love, Sex and Talk' (1995) 47(3) Florida L Rev 311.
[24] In the UK the legal status of sperm remains unclear. As Kennedy and Grubb note, sperm banks treat sperm as the property of donors, but sperm donation is usually treated as a service rather than a commodity transaction, see I Kennedy and A Grubb *Principles of Medical Law* (Oxford: Oxford University Press, 1999), paras 15.18 - 15.22. See generally G Dworkin and I Kennedy 'Human Tissue: Rights in the Body and its Parts' (1993) 1 Med L Rev 291.
[25] Wallis characterised his provision of semen as a bailment: a contract that provides for the delivery of personal property by the owner for a specific purpose. Only possession is transferred; the owner retains title and ownership. When the purpose is fulfilled the property is returned. This, however, seems no less tenuous.
[26] *Barbara A v John G* (1983) 145 Cal App 3d 369.
[27] See *Chatterton v Gerson* [1981] QB 432. There is a parallel here with cases involving the transmission of sexual disease. Does a trespass to the person take place where my partner conceals knowledge of his HIV + status with the result that I consent to have unprotected intercourse and become infected myself? See *R* v *Clarence* (1988) 22 QBD 23; S Bronit 'Spreading Disease and the Criminal Law' [1994] Crim LR 21.
[28] *Pasley v Freeman* (1789) 3 TR 51.
[29] A Diduck and F Kaganas *Family Law, Gender and the State* (London: Hart Publications, 1999).
[30] The welfare principle first found its way into the English statute books in 1925, although it was already part of case law. For a useful discussion of its development see N Lowe 'The House of Lords and the Welfare Principle' in C Bridge (ed.) *Family Law Towards the Millennium: Essays for P M Bromley* (London: Butterworths, 1997); see also S M Cretney '"What Will the Women Want Next?" The Struggle for Power Within the Family 1925-1975' (1996) 112 LQR 110. Child welfare must be the paramount concern in all decisions where the upbringing or administration of a child's property is before the court, see s 1(1) of the Children Act 1989. The principle is not paramount in the 1991 legislation, but is merely one factor to which the Child Support Agency must have regard, see *Ex parte Biggin* [1995] 1 FLR 851.
[31] See below, n //-// and accompanying text for more discussion.
[32] **All ER Ref** ////. In *Macfarlane*, the House of Lords held that parents of an unwanted healthy child born as a result of a doctor's negligence could recover damages for the mother's pain, suffering and loss of amenity during pregnancy and childbirth, but not for the economic loss and costs of ordinary child care thereafter.
[33] Above n.
[34] J Terrell Mann 'Misrepresentation of Sterility or of Use of Birth Control' (1987-8) 26 Jo Fam L 623.
[35] In the US, precisely this argument failed in *In the Matter of L Pamela P v Frank S* (1983) 59 NY 2d 1, although it was accepted in a minority judgment in *S F v T M*: above, n. Neither author attempts a justification of why child welfare considerations dictate that the father's tort claim against the mother should be so limited in cases of birth control fraud but not in others.
[36] M-T Meulders-Klein 'The Position of the Father in European Legislation' (1990) 4 IJLF 131 at pp 135, 151, my italics.
[37] McCarthy, above n.
[38] This provides some support for Richard Collier's claim, *pace* those who have contended the anti-feminist backlash is a specifically US phenomenon, that the language of 'sex war' also has much resonance on this side of the Atlantic: R Collier '"Waiting Till Father Gets Home": The Reconstruction of Fatherhood in Family Law' (1995) 4 SLS 5.
[39] Vobejda, above n
[40] Above n at p 151.
[41] Vobejda, above n.
[42] Prasad, above n.
[43] S Faludi *Stiffed: The Betrayal of the Modern Man* (London: Chatto & Windus, 1999). As it says on the inside cover: '[a]t the end of the millennium it is men who are in crisis. Even in the world that they are supposed to own and run, Faludi finds that men just as much as women are at the mercy of cultural forces that distort their lives

and plague our culture. Her journey through the modern masculine landscape takes her deep into the lives of individual men whose accounts reveal the agonized heart of the male dilemma. *Stiffed* brings us vividly into the world of men ... whose sense that they've lost jobs, skills, roles, wives, teams and a secure future is only one symptom of a wider betrayal.'

44 M Phillips *The Sex-Change Society: Feminised Britain and the Neutered Male* (London: The Social Market Foundation, 1999).

45 G Greer *The Whole Woman* (London: Anchor, 2000) at p 1. See also Beck's contention 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': U Beck *Risk Society: Towards a New Modernity* (London: Sage, 1992) at p 113, emphasis in original. For an interesting discussion of Beck's approach, see C Smart and B Neale *Family Fragments?* (Cambridge: Polity, 1999) at pp 13-19.

46 Litvinoff, above n.

47 The phrase 'disposable sex' belongs to K W Farrell *The Myth of Male Power: Why Men are the Disposable Sex* (New York: Simon & Schuster, 1993). See generally Collier, above n.

48 Litvinoff, above n.

49 Litvinoff, above n ; Prasad, above n. As Michael Thomson has pointed out to me, the choice of Jodie Foster and Madonna by these journalists is, in itself, significant as the sexuality of both women has been a subject of intense public debate and speculation. Madonna's second child was born in the context of her stable, monogamous relationship with the child's father, English film director, Guy Ritchie. The different reaction of the British press to the two pregnancies has been marked.

50 Erbe, above n.

51 Prasad, above n.

52 M Lawson 'Hands off my Sperm' *Guardian*, 26 November 1998.

53 Erbe, above n . See also McCarthy, above n.

54 Kenneth Baker, then chairman of the Conservative Party, cited in J Bradshaw, C Stimpson, C Skinner and J Williams *Absent Fathers* (London: Routledge, 1999) at p. 1.

55 See particularly C Smart, *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations*. London: RKP, 1984); C Smart '"There is of Course the Distinction Dictated by Nature": Law and the problem of Paternity' in M Stanworth (ed.) *Reproductive Technologies: Gender, Motherhood and Medicine* (Oxford: Blackwell, 1987); A Diduck 'The Unmodified Family: The Child Support Act and the Construction of Legal Subjects' (1995) 22(4) JLS 527; Diduck and Kaganas, above n at p 30; L Harding *Family, State and Social Policy* (London: Macmillan, 1996); R Collier 'The Campaign Against the Child Support Act', "Errant Fatherhood" and "Family Men"' [1994] Fam. Law 384; R Collier, above n //.

56 This is not to claim that the genetic link is historically without importance. Bastardy and affiliation proceedings were used to attach unmarried women to men long before the 1980s, albeit with varying degrees of success. See particularly C Barton and G Douglas *Law and Parenthood* (London: Butterworths, 1995) at pp 195- 202; Smart, above n.

57 Between 1971 and 1986, the number of sole parent families increased from 600,000 to over one million: Office for Population Censuses and Statistics *The General Household Survey* (London: HMSO, 1990). Between 1980 and 1989, the number of sole parent families dependent on supplementary benefits increased from 330,000 to 770,000. By the late 1980s, it was believed that private arrangements and the courts were ineffective in obtaining a significant measure of financial support for children from absent parents. Indeed in 1986 only 11% of total lone mother income came from child maintenance: R Boden and M Childs 'Paying for Procreation: Child Support Arrangements in the UK' (1996) 4(2) FLS 131 at p 140. For similar concerns and reform in the Australian context, see S Parker 'Rights and Utility in Anglo-Australian Family Law' (1992) 55(3) MLR 311.

58 For example, Peter Lilley lambasted those 'Dads who won't support the kids of ladies ... they have kissed (cited in Bradshaw et al, above n at p 1). Bradshaw et al also cite Margaret Thatcher: 'No father should be able to escape from his responsibility and that is why the government is looking for ways of strengthening the system for tracing an absent father and making the arrangements for recovering maintenance more effective' above n // at p124.

59 For a discussion of the way in which such images of absent fathers were contested by men during the campaigns for change of the Child Support Act 1991, see J Wallbank 'The Campaign for Change of the Child Support Act 1991: Reconstituting the "Absent" Father' (1997) 6(2) SLS 191; Collier, above n.

60 The context of reform was often explicitly punitive. For example, one US senator argued: 'This is a matter to be pressed *to* the point of punitiveness ... Hunt, hound, harass: the absent father is rarely really absent, especially the teenage father, but merely unwilling or not required to acknowledge his children's presence ... As for the too much-pitied unemployed teenage male there would be nothing wrong with a federal work program – compulsory when a court has previously ordered him to support his children - with the wages shared between father and mother.
... [Such a programme would] make a statement about legitimacy: there must be an acknowledged providing male.' Moynihan, cited in H D Krause 'Child Support Reassessed: Limits of Private Responsibility and the Public Interest' in J Eekelaar and M MacLean (eds) *A Reader on Family Law* (Oxford: OUP, 1994) at p 238.
61 Bradshaw et al, above n. at p 226; see also A Diduck, above n. The legal parents will normally be the genetic parents, but will also include those who are parents by virtue of the operation of ss. 27, 28 or 30 of the Human Fertilisation and Embryology Act 1990, or by having legally adopted a child.
62 See Collier, above n at p 7; Wallbank, above n at pp 210, 212. Wallbank cites Bruce Lidington, Chair of *Families Need Fathers*: 'Non custodial fathers are one of the most vulnerable sections of society, most are financially and emotionally exhausted by the divorce process and, with the possible exception of Families Need Fathers, have no organised way of challenging any untruths published by powerful interests', at p 206.
63 **Bainham and Freeman (1999)** go so far as to argue that the 'Child Support Act' should actually have been titled the 'State Support Act'. A similar point is made in A Garnham and E Knights, *Putting the Treasury First: the Truth about Child Support* (London: CPAG, 1994). There is an obvious difference in the application of the Act to women on state benefits and those not. Whilst the legislation applies to all children, there is no obligation on parents to make an application to the Child Support Agency. Consequently, those parents not in receipt of state benefits may choose to negotiate payments between themselves. However, where the mother wishes to claim benefits then she must involve the Agency. And where she does not give the father's name she may be penalized by a 'reduced benefit direction', unless she can prove 'risk to her or the child of harm or undue distress' (see below).
64 Boden and Childs, above n at pp 155-6.
65 K Clarke, G Craig and C Glendinning 'Money isn't Everything, Fiscal Policy and Family Policy in the Child Support Act' (1995) 29(1) *Social Policy and Administration* 26.
66 Above n at p 218.
67 Garnham and Knights above n at p 71.
68 Smart, above n, see also C Smart 'Regulating Families or Legitimating Patriarchy? Family Law in Britain' (1982) 10 IJLS 129.
69 For example, the desire to protect the nuclear family cannot entirely explain the operation of the Child Support Act's definition of the 'absent parent' in s.3(2). This does not include anyone who has performed the social
functions of a parent in the past without becoming a legal parent. Such a person may abandon this role without legal liability. Whilst recognising social obligations, the changes announced to the assessment formula by the Government's 1995 White Paper continue to prioritise genetic links: see Lord Chancellor's Department *Improving Child Support* Cm. 2745 (London: HMSO, 1995); Boden and Childs, above n at p 148. See also the discussion in n below.
70 Bradshaw et al, above n at p 124.
71 *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, however, 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 FLR 21. Under proposed reform, if the man's name is recorded on the birth certificate then he will also be accorded automatic parental responsibility: see above n.
72 *In the matter of Karen Beth B v Douglas G* (1995) 216 AD 2d 12; 627 NYS 2d 367; 1995 NY App Div LEXIS 5831. In the case of *G v Netherlands* (1993) EHRR CD 38, however, the argument that a man can establish the existence of 'family life' with a child purely on the basis of a genetic link was rejected. In this case, after a number of visits, a man who had donated sperm to lesbian friends was refused access to their baby. Respect for his family life had not been violated under Article 8 of the European Convention of Human Rights, as 'family life' involved close personal ties in addition to genetic parentage.
73 See Diduck, above n , Boden and Childs, above n at p 150.
74 Vobejda, above n.

[75] The pressure group, *Families Need Fathers*, certainly make this connection in their political campaigns: '"Absent Parents" may care very much and in no way have chose to be "absent" ... [fathers'] nurturing role must cover contact and residence (access and custody), as well as merely "footing the bill"' (1990, cited in Bradshaw et al, above n /, at p 183; see also Wallbank, above n at p 207; Garnham and Knights, above n; and Bradshaw and Millar *Lone Parent Families in the UK* Research Report No 6, DSS, (London: HMSO, 1991). One response to the Lord Chancellor's Department's recent Consultation on parental responsibility argued: '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)', see Lord Chancellor's Department, above n.

[76] See Bainham, above n .

[77] *Matter of Craig V v Mia W* 116 AD 2d 130, LEXIS 50371.

[78] It might be suggested that as many rapes take place within marriage as do outside it, yet it is never argued that the husband/father should not have parental responsibility or financial liability in respect of his child. Whilst this argument has some force from the point of view of the unmarried father, from the mother's point of view it is less compelling. It seems to suggest that given that one group of women are currently subject to certain problems, these problems should therefore also be extended to all women in the name of equality. Further, it could be argued that the married and unmarried rapist are distinguishable: where a woman is married to her rapist, she is unfortunately inevitably in an ongoing relationship with him which it would take legal procedures to dissolve. Recognising his financial responsibility towards a child could arguably be founded on this relationship rather than on conception *per se*. Whether such a man is a fitting holder of parental responsibility (which is currently awarded automatically - and therefore irrevocably - to all married fathers) is obviously a separate issue. Secondly, it might be suggested that a woman could have an abortion if she chose; even those with strong religious or other moral objections to abortion might feel justified in the case of rape. Whilst it is hopefully uncontroversial that a woman should be allowed access to termination in these circumstances, this is surely a matter for her choice, and to penalise her financially or to force her to name her rapist where she is reluctant to do so, seems extremely harsh. I would like to thank one of the anonymous referees for *Legal Studies* for raising these two points.

[79] The white paper which preceded the introduction of the 1991 Act and the DSS guidance which followed it both accepted rape and incest as clear examples of 'good cause'. However, it has been suggested that the likelihood of obtaining exemption varies greatly depending on who the interviewing CSA officer is, with Garnham and Knight giving one example of a woman being threatened with reduced benefit if she could not produce the name of her rapist, above n at p 85. Up to November 1993, around 6,600 parents with care (from a total of 327,000 application forms) had invoked this section, and in 4,900 cases the claim was accepted. A number of cases were still being processed, and only in 22 cases had reduced benefit orders been made where the parent's claim was rejected, see Boden and Childs, above n at p 149. What remains unknown is how many women have felt obliged to name the child's father because of the fear of reduced benefits. [MO**RE UP TO DATE CONSIDERATION IN BROMLEYS FAM LAW - 9TH ED.N - P. 732 - CHECK] The** CSA in a response to the Lord Chancellor's Department consultation on parental responsibility (above, n), go no further than saying that they would 'not *normally* insist on pursuing action on a case where there is evidence of rape, incest or sexual abuse' (my italics). [80] A recent Home Office Study looked at almost 500 incidents initially recorded as rape by the police in 1996. Of these, only 7% resulted in a conviction for an offence other than rape; and only 7% resulted in an acquittal or for the case to lie on file: see J Harris and S Grace *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (London: Home Office, 1999); see also S Lees *Carnal Knowledge: Rape on Trial* (Buckingham: Open University Press, 1996).

[81] B Malinowski 'The Principle of Legitimate Parenthood and the Basis of Social Structure' in R Laub Coser (ed.) *The Family, its Structures and its Functions* (New York: St Martin's Press, 1969).

[82] H Krause, above n at p 220.

[83] J Weeks 'Supporting Families' (1999) 70(2) The Political Quarterly 225.

[84] Cited in Diduck, above n at p 538 (italics in original). US Democrat President, Bill Clinton, has likewise noted that '[t]he single biggest problem in our society may be the growing absence of fathers from our children's homes because it contributes to so many other social problems', cited in D Fost 'The Lost Art of Fatherhood' (1996) 18 American Demographics 16.

[85] Laqueur, above n.

[86] Under the terms of ss 27 and 28, Human Fertilisation and Embryology Act 1990, where gametes are obtained through a licensed clinic, sperm and egg donors are not deemed to be legal parents. When the woman receiving treatment services is married, her husband will be the legal father unless he objects. Where she receives these services in conjunction with a male partner, he will be deemed to be the legal father.

[87] For an insightful discussion of some of the problems caused by family law's attempts to impose this model onto families fragmented across households, see C Smart and B Neale *Family Fragments?* (Cambridge: Polity, 1999). A more radical way forward might be suggested by the recent writing of David Morgan who has suggested that we would be better advised to think in terms of supporting family practices – of 'doing' rather than 'being' family, see D H J Morgan *Family connections* (Cambridge: Polity, 1996) and 'Risk and Family Practices: Accounting for Change and Fluidity in Family Life' pp 13-30 in E B Silva and C Smart (eds) *The* New *Family?* (London: Sage, 1999).

[88] Eekelaar notes several practical reasons in favour of the social rule that parents have particular obligations towards their children: first that such obligations coincide with the wishes and instincts of most parents and will usually be well performed by them; secondly, this is linked to a bonding process which can be of importance to the child's sense of identity; and thirdly it allows the costs of child rearing to accrue incrementally, and marginally, to the costs of an adult household, and is therefore economically efficient: J Eekelaar 'Are Parents Morally Obliged to Care for Their Children?' 11 OJLS 340 at p 352. These practical reasons fit well in the context of a nuclear family with parents living with their children. They do not all apply as easily to the kinds of situation which I have described above.

[89] Ibid.

[90] *Johnson v Calvert* (1993) 5 Cal 4th 84.

[91] G Douglas 'The Intention to be a Parent and the Making of Mothers' (1994) 57 MLR 636 at p 641, emphasis in original.

[92] Lord Chancellor's Department, above n . The proposal with regard to parental responsibility is not to extend it to all genetic fathers, merely those who co-register the birth: this can also be located in terms of a trend towards recognising intention as paramount in allocating parental rights and obligations.

[93] See A Gillan 'Register Plan for Donor Births' *Guardian* (25 April 2000). My point here is merely to note a general trend whereby, in Bainham's terms, legal parentage becomes of greater significance in determining both legal parenthood and various parental rights and obligations such as parental responsibility, see Bainham, above n . Clearly the question of whether a child should have the right to information regarding her parentage raises different ethical considerations from those involved in the allocating various parenthood rights and obligations, such as parental responsibility.