

IN THE NAME OF THE FATHER: THE PATERNAL FUNCTION, SEXUALITY, LAW AND CITIZENSHIP

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The purpose of this article is to examine the notion of legal paternal responsibility from the perspective of psychoanalytic theory. In psychoanalysis, a privileged place is accorded to the father, both in the emergence of the subject and in the symbolic order itself. This privileged position, however, flows not from the person of the father but from the performance of what Lacan terms the "paternal function".

Taking up this idea, the article considers the recommendations relating to legal paternity contained in the recent New Zealand Law Commission Report New Issues in Legal Parenthood. In particular, the article challenges the proposition that legal paternity should automatically flow from genetic fathering. The article argues that the assumption that there is or should be an inherent and natural link between genetic fathering and the responsibilities of legal parenting is fundamentally misconceived; will often discriminate against women, and, in particular, lesbian parents; and may be in conflict with the best interests of the child.

If men still have a role as fathers, then it is time they explained what it is. And it is time they fulfilled this role. What is it that fathers do? What is it that fathers are? What is it that they bring to society that society cannot do without?¹

Of course, there is no need of a signifier to be a father, any more than to be dead, but without a signifier, no one would ever know anything about either state of being.²

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1 Anthony Clare *On Men: Masculinity in Crisis* (Arrow, London, 2001) 159.

2 Jacques Lacan *Ecrits: A Selection* (Alan Sheridan trans, WW Norton & Co, New York, 1977) 199.

I INTRODUCTION

In exploring the themes of sexuality, law and citizenship, this article is concerned with the issue of legal paternity. As the New Zealand Law Commission observed in its report *New Issues in Legal Parenthood* ("the Report"), the legal status of parent-child relationships has struggled to keep up with the increasing diversity of family forms arising from social change and new reproductive technologies.³ In particular, the law is faced with the problem of how to determine legal paternity: should social fathering or genetic fathering determine legal parenting responsibilities? The Report's response, whilst acknowledging the importance of social parenting and the legitimacy of family forms that do not have a father figure per se, was to recommend that legal paternity be determined by genetics, so that the genetic father is the father of a particular child.

The article examines the notion of legal paternal responsibility from the perspective of psychoanalytic theory. In psychoanalysis, a privileged place is accorded to the father, both in the emergence of the subject and in the symbolic order itself. This privileged position, however, flows not from the person of the father but from the performance of the "paternal function". This article thus challenges the proposition that legal paternity should automatically flow from genetic fathering. Relying on the work of Jacques Lacan,⁴ as elaborated on by the philosopher Žižek,⁵ the article argues that the assumption that there is or should be an inherent and natural link between genetic fathering and the responsibilities of legal parenting is fundamentally misconceived, will often discriminate against women, and, in particular, lesbian parents, and may be in conflict with the best interests of the child.

The article begins by considering the Report's findings as to paternity, before outlining the Lacanian notion of the "paternal function". It then turns to consider the issues which may arise from the confusion between literal and symbolic fatherhood evidenced by reliance upon genetic fathering as the determinant of legal rights and responsibilities.

II NEW ISSUES IN LEGAL PARENTHOOD

New Issues in Legal Parenthood was the Law Commission's response to a Government referral in 2003 to review the legal rules that determine parenthood. Specifically, the Law Commission was asked to consider: how parental status should be determined in law; whether the law should recognise that a child can have more than two legal parents or, conversely, whether the law should allow a child to have only one legal parent; whether the current statutory presumptions as to

3 New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC R 88, Wellington, 2005) xv.

4 The "paternal function" is also referred to by Lacan as the "Name of the Father" and the "father function". The idea can be found in Freud, as Bruce Fink points out, where the term "paternal agency" is used. See further Bruce Fink *A Clinical Introduction to Lacanian Psychoanalysis: Theory and Technique* (Harvard University Press, Cambridge (Mass), 1997) 244.

5 See in particular "Whither Oedipus" in Slavoj Žižek *The Ticklish Subject* (Verso, London, 1999) 313-400.

parenthood based on relationships with the child's birth mother be amended, and if so, how; the processes and evidence by which an adult can prove or disprove parenthood; the value the law should attach to agreements between adults as to parenthood and the legal effect of disproving a biological relationship with the child; and the legal effect of surrogacy agreements on legal parenting.⁶

In making its recommendations, the Law Commission explicitly focussed upon the responsibilities of legal parenting, rather than the rights of parents or the encouragement of particular family forms. Its five guiding principles were thus: the child's welfare and best interests; the importance of clarity and certainty of status at the earliest possible time and simplicity in court processes; the right of individuals to access information about their genetic and gestational parentage; the facilitation of collaborative and autonomous parenting; and the need to ensure that children are equal and their families not disadvantaged by the circumstances of their creation or their form.⁷

It is not the intention of this article to review the Law Commission's findings in detail. However, for the purposes of this discussion, its recommendations as to legal paternity include the following:

There should be specific statutory definitions of "father": Currently, there is no legislative definition of "father". The Report noted that New Zealand's parental status laws derive from the nuclear family model based on the genetic parents and their children.⁸ Thus, despite the lack of legislative definition, the effect of the law currently is that "father" means the genetic father. Where the family does not conform to the nuclear, two parent model, the law makes adjustments so that the "non-conforming" situation is made to fit within the standard model; for example, by adoption laws.⁹ Despite its acknowledgment that around one third of children live outside the nuclear family model, the Law Commission decided to reaffirm the current understanding of "father" as the genetic father and recommended that this understanding be entrenched in a statutory definition.¹⁰

The legal presumption of paternity should be extended: The legal presumption of "paternity" currently applies if the child's mother and father are married when it is born, or the child is born within 10 months of the marriage being dissolved.¹¹ The presumption can be rebutted if there is

6 New Zealand Law Commission *Terms of Reference: Status as Parents* (Wellington, 2003).

7 New Zealand Law Commission, above n 3, xv.

8 New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC PP 54, Wellington, 2004) xi.

9 New Zealand Law Commission, above n 8, 1.

10 New Zealand Law Commission, above n 3, Recommendation 1: "The general rules in the Status of Children Act 1969 should make explicit that, unless any other provision of that or any other enactment identifies another person as ... a father or parent, a legal father of a child is the genetic father of that child"

11 Status of Children Act 1969, s 5(1).

evidence that another man is the child's genetic parent. Where the presumption does not apply (either because it is rebutted or the child is born outside marriage), the court may make a declaration of paternity.¹² Given the significant number of children born into de facto relationships, the Law Commission recommended that the presumption of paternity be extended to children born within those relationships and to opposite sex civil unions.¹³

DNA testing should be regulated: The Report asserted that "[i]t is in the child's interests to have accurate knowledge of their genetic lineage and in the interests of justice that doubt about parentage can be conclusively resolved."¹⁴ On this basis it recommended that "efficient, accurate and ethical"¹⁵ DNA parentage testing, as the most reliable means of proving genetic parenthood, should be available where parentage issues arise. It recommended that providers of DNA parentage testing should be accredited, that an increased range of bodily samples be available for DNA parentage testing and that information about DNA parentage testing should be accessible to the public and professionals involved. It also recommended that the consent of both parents to DNA parentage testing be required, with protocols for verifying parties' consents and a court process for dealing with parental conflict about consent; and that the courts should be able to order, rather than just recommend, parentage testing and have powers to enforce that order.¹⁶

Known sperm donors to have legal parenting status: Currently donors have no legal parental status. The Law Commission recommended that legal parenthood be assigned to a "known donor", either as the child's second or third parent, where conception occurs on the basis that the donor will be a legal parent; that agreements between donors and parents under section 41 of the Care of Children Act 2004 (as to the involvement of a donor in the child's life), that are the subject of a court consent order, be enforceable (unless it is demonstrably in the child's best interests to vary the agreement); and that a "known donor" be declared liable for child support, if the donor has knowingly assumed some parental responsibility for the child.¹⁷

Although not specifically dealing with legal paternity, certain other recommendations of the Law Commission are relevant to the issues raised in this article. These include:

Counselling requirements: The Report recommended that fertility clinics be required to counsel all unpartnered women receiving donor gametes about the importance of appointing a second

12 New Zealand Law Commission, above n 8, 105.

13 New Zealand Law Commission, above n 3, Recommendation 3.

14 New Zealand Law Commission, above n 3, xviii.

15 New Zealand Law Commission, above n 3, xxii.

16 New Zealand Law Commission, above n 3, Recommendations 4-8.

17 New Zealand Law Commission, above n 3, Recommendations 9-13.

guardian for their child,¹⁸ and that mandatory screening and education for parents having a child through embryo donation be introduced. This education would relate to the challenges of parenting a child with no genetic connection.¹⁹

Information as to genetic origins: The Report made a number of recommendations to overcome gaps in the law which hamper or prevent access to genetic information.²⁰ Specifically, all birth certificates should include a statement that additional information to that on the birth certificate may be accessed by the named person; and parents should be able to have an annotation put on birth certificates stating that the child was born by "donor". Individuals wishing to conceive with donated gametes or through surrogacy arrangements should undertake education to assist in telling their children of their origins. The Report also recommended that there be subsidised counselling for individuals using the register and subsidised DNA testing for people where there is real doubt as to their paternity. Parents who have children conceived in private donor sperm or surrogacy arrangements should be required to pass on identifying information to the Registrar of Births, Deaths and Marriages when they register the birth.

The Report's recommendations reflect the struggle to reconcile the law with significant and ongoing scientific advances in relation to assisted reproduction and DNA testing. Its response is to acknowledge increasingly diverse forms of "family",²¹ at least in so far as donors are involved with the conception of a child. At the same time, it explicitly links genetic fathering and legal paternity and places considerable significance upon the recording of, and access to, genetic information. The claim of this article is that the assumption that legal paternity is or should be linked primarily to genetic paternity is misconceived and may serve to reinforce the assumptions relating to the Western idea of the nuclear family. Before showing why this is the case, it is necessary to briefly outline the idea of the "paternal function" in psychoanalytic theory.

III THE PATERNAL FUNCTION AND THE OEDIPAL PROCESS

Lacanian psychoanalytic theory accords a privileged role to the father. It is this emphasis upon the father which, in many ways, marks Lacan's "return to Freud",²² as post-Freudian psychoanalytic

¹⁸ New Zealand Law Commission, above n 3, Recommendation 14.

¹⁹ New Zealand Law Commission, above n 3, Recommendation 17.

²⁰ New Zealand Law Commission, above n 3, Recommendations 18-27.

²¹ In this regard, the Report refers to the definition of family in the Family Commissions Act 2003, s 10(2): "family includes a group of people related by marriage, blood or adoption, an extended family, 2 or more persons living together as a family, and a whanau or other culturally recognised family group."

²² "The meaning of a return to Freud is a return to the meaning of Freud. And the meaning of what Freud said may be conveyed to anyone because, addressed as it is to all, it concerns each individual: to make this clear, one has only to remember that Freud's discovery puts truth into question, and there is no one who is not personally concerned by the truth": see "The Freudian Thing" in Lacan, above n 2, 117-118.

theory had tended to focus upon the relationship of mother and child.²³ Freud theorised that human subjectivity is governed by the driving force of the unconscious. This unconscious reveals itself in what Freud described as the "gaps" in the "data of consciousness:"²⁴ slips of the tongue, unintentional behaviour (parapraxis), symptoms and dreams.²⁵ In turn, the unconscious is the result of repression, which forms primarily around the experience of the Oedipus complex, a group of ideas and feelings related to incest and murder: the desire to possess the parent of the opposite sex and to eliminate the parent of the same sex.²⁶

In the Freudian Oedipal drama, the father plays a crucial role. For the male child, it is the father's threat of castration that causes him to sublimate his desire for his mother and to identify with the father. This occurs on the basis of a "deal"; that in return for sacrificing his desire for the mother, the male child will, in time, assume the status of the father, and receive satisfaction with a mother-substitute. For the female child, the process is more complex.²⁷ She must relinquish her desire for the mother in order to gain her own subjectivity, but must continue to identify with the mother in order to take up her sexed role within society. In her case, the threat of castration is not as significant because, effectively, she is already castrated. In separating from the mother, she must turn to the father without identifying with him, but ultimately relinquish her desire for him.²⁸ Thus in Freud's view, as a result of the Oedipus complex, the female resents the mother for not having a

23 This was particularly so in the case of the school of "object relations". Originally confined mainly to Britain, this movement derived originally from the work of Melanie Klein. This was not a focus confined to psychoanalytic theory. Richard Collier observes that by the 1920s the father's role had already become increasingly problematic as the role of the wife/mother was emphasised in a succession of child care manuals: see Richard Collier *Masculinity, Law and the Family* (Routledge, London, 1995) 189.

24 Sigmund Freud "The Unconscious" in Sigmund Freud (ed) *The Essentials of Psychoanalysis* (Penguin, Harmondsworth, 1986) 143.

25 See in particular Sigmund Freud *The Interpretation of Dreams* (Penguin, Harmondsworth, 1985); Sigmund Freud *Jokes and their Relation to the Unconscious* (WW Norton & Co, New York, 1963) and Sigmund Freud *The Psychopathology of Everyday Life* (Penguin, Harmondsworth, 1991).

26 This process, as discussed below, is never complete. Freud refers to a "complete Oedipus complex" which is one that takes into account the inherent bisexuality of all individuals: Sigmund Freud "The Ego and the Id" in Sigmund Freud (ed) *The Essential of Psychoanalysis* (Penguin, Harmondsworth, 1986) 456.

27 As Kaplin points out, in its very naming, the Oedipus complex is based on the male child's fantasies and can only provide us with a very limited appreciation of the female child's experience: Louise J Kaplan *Female Perversions* (Pandora, London, 1991) 61.

28 For an interesting clinical analysis of the different dynamics of the Oedipus process experienced depending upon the gender of the child: see Fink, above n 4, 257-258.

penis and envies the father for having one. Her satisfaction is gained by having a child, which operates as a penis substitute.²⁹

Lacan retained Freud's focus upon the unconscious and the Oedipal drama, but suggested that these are both derived from and in turn create cultural meaning.³⁰ Lacan postulated three orders of human experience: the Real, the Imaginary and the Symbolic. These concepts are complex and have been discussed elsewhere.³¹ In brief, the Real is a realm of unity, a world that lacks consciousness and subjectivity. The child is born into the Real but her experience is rapidly overlaid by the Imaginary. The child enters the Imaginary at the point at which she identifies with an image outside the self. In turn, the Imaginary is overlaid by the Symbolic. The Symbolic order is the world of language, law and culture. The triangulation of mother, the third party and child, emphasised by Freud, is essential in the child assuming its place in the Symbolic order.

In Lacan's rereading of the Oedipus drama, the child enters the Symbolic Order when he or she must first register that the mother is a separate being.³² That registration is linked to the realisation that the mother has her own desire; that is, she does not merely exist as the guarantor of the child's identity.³³ The moment of separation is both the genesis of separate identity for the child and the source of terror, because of the child's dependence upon the mother.³⁴

The attempt to navigate this loss and the beginnings of identity rely upon a third party, the one who is the site of the mother's desire. That is, the child realises that not it, but something or someone else, is what the mother wants (in the nuclear family that someone is often, though not always, the father). Once the child realises this, there is a second process by which the child tries to determine what it is about this third party which makes he, she or it desirable so the child can

29 Discussion of the Oedipus complex can be found throughout Freud's work but see in particular *The Interpretation of Dreams*, above n 25 and Sigmund Freud *Three Essays on Sexuality* (Avon, New York, 1962).

30 Elizabeth Grosz *Jacques Lacan: A Feminist Introduction* (Allen and Unwin, Sydney, 1990) 4.

31 See Paula D Baron "The Influence of Psychoanalysis on Jurisprudence" in Tim Murphy (ed) *Western Jurisprudence* (Thomson Round Hall, Dublin, 2004) 438, 446.

32 The terminology of mother is that used by Fink to denote both the primary care giver and the role of that care giver as the child's first experience of the Other, that is, the Symbolic order. Lacan writes that the child's first experience of the discourse of the Other is with the mother: "It is in so far as his desire is beyond or falls short of what she says, of what she hints at, of what she brings out as meaning, it is in so far as his desire is unknown, it is in this point of lack, that the desire of the subject is constituted." See Lacan *The Four Fundamental Concepts of Psycho-analysis* (Penguin, Harmondsworth, 1977) 218-219.

33 Drucilla Cornell "Rethinking the Beyond of the Real" in Peter Goodrich and David Carlson (eds) *Law and the Postmodern Mind: Essays in Psychoanalysis and Jurisprudence* (Michigan University Press, Ann Arbor, 1998) 243.

34 The child's fantasy of absolute security is linked to the fantasy of the "Phallic Mother", the all-powerful, unsexed mother.

become that. As Fink points out, the child realises that it cannot be the mother's jouissance,³⁵ but can be her desire by situating itself in the Symbolic. This is done by recognising what it is the mother wants symbolically – be that wealth, status or power – and attaining that.³⁶

The symbolic function of the third party is to break the dyad between mother and child by representing the law. The "Name of the Father" is posed against the all-consuming desire of the mother. As Oliver put it, "[t]he child's identification with the desire of the mother, its image of itself as her fulfilment, must be replaced by the father's name, words and symbols."³⁷ This is the role of the paternal function. The Name of the Father and the symbolic register of his potency (the phallus)³⁸ is the original means of separation of the child from the mother and thus the catalyst for individual identity.³⁹ It is only by means of the paternal function that the child becomes a "subject" in all senses of that word: the child experiences subjectivity at the same time as he or she becomes subject to law and to language.⁴⁰ Thus, the individual is not natural, but a legal and linguistic creation.⁴¹ As Legendre puts it:⁴²

35 This term is often stated as being incapable of being accurately transferred from French. It is often translated as enjoyment, but denotes something more. Judith Guervich writes: "Jouissance is a legal term — in latin usufructus — referring to the right to enjoy the use of a thing, as opposed to owning it. The jouissance of the Other, therefore, refers to the subject's experience of being for the Other an object of enjoyment, of use or abuse, in contrast to being the object of the Other's desire." Judith Feher Guervich "The Jouissance of the Other and The Prohibition of Incest: A Lacanian Perspective" (1999) 1(3) *Other Voices*.

36 Fink, above n 4, 249.

37 Kelly Oliver "Conflicted Love" (2000) 15(3) *Hypatia* 1, 13.

38 Where Freud literalised the desire of the mother for the penis, Lacan saw the phallus as the mark of human desire. The phallus is the master signifier, but it is the mark of absence. As Mitchell observes, "The phallus ... indicates the desire of the mother (the desire for the phallus) into which the child is born; it thus constitutes a different order of experience, it represents what the child, both boy and girl, is meant to be symbolically." Mitchell is keen to counter certain feminist reductions of paternal and phallic significance to merely male-dominated cultures: Juliette Mitchell *Psychoanalysis and Feminism* (Pantheon, New York, 1974) 397-8.

39 Cornell, above n 33, 245.

40 As Fink points out, the law of the Symbolic order is not the same as setting limits: see Fink, above n 4, 252-253. Limits can be arbitrarily set by parents or not adhered to by them. For instance, the parent telling the child not to steal while at the same time proceeding to steal small items from a hotel is not exercising the paternal function. The law of the Symbolic order applies to all parties – it is an authority outside the parent that binds the parent as well as the child.

41 Jeanne L Schroeder "The Stumbling Block: Freedom, Rationality, and Legal Scholarship" (2002) 44 *William & Mary L Rev* 263, 337.

42 Pierre Legendre "The Other Dimension of Law" in Peter Goodrich and David Carlson (eds) *Law and the Postmodern Mind: Essays in Psychoanalysis and Jurisprudence* (Michigan University Press, Ann Arbor, 1998) 181.

What psychoanalysis designates by general formulas such as the original or the law of the Father is nothing other than an original separation that inaugurates subjective life (in the sense of a separation of the infant from the maternal entity), as subject to the law of differentiation through speech.

For both Freud and Lacan, although the Oedipal conflict is universal,⁴³ it is exceedingly precarious. No one comes through the process "completely" (hence Freud's view that we are all, to some extent, bisexual) or unscathed (the traumas of the Oedipal conflict, and in particular, the inadequacies of the paternal function are the primary source of neurotic symptoms).⁴⁴ The resolution of the Oedipal process determines our gendered role in society and our sexual preferences,⁴⁵ and is the means by which the individual becomes a functioning member of the social order. As Fink observes, "[a] subject position, like a symptom, is fundamentally a solution to a problem."⁴⁶ Thus, according to psychoanalytic theory, law, sexuality and citizenship are inextricably linked and all hinge upon the resolution of Oedipus, and in particular, the role of the third party. I turn now to highlight certain significant features of Lacan's "paternal function".

IV THE NATURE OF THE PATERNAL FUNCTION

Having outlined the significance of the role of the third in the Oedipal triangle, I turn now to emphasise two aspects of Lacan's notion of the paternal function, as these aspects are important for an analysis of the Law Commission's Report recommendations as to paternity. The first is that the paternal function is symbolic rather than biological; the second is that the paternal function must be distinguished from its representative.

A The Paternal Function is Symbolic

Although Lacan accords a privileged place to the father in the Oedipal complex, this place is the result of the function ordinarily performed by the father in the Western heterosexual nuclear family. Genetic fatherhood may or may not coincide with the paternal function - Lacan's view that the father performed the paternal function is descriptive, rather than normative. This paternal function is Symbolic.⁴⁷

43 Although, as Mitchell points out, the specific context in which it occurs may change: see Mitchell, above n 38, 380. Thus at the time Freud and Lacan were writing, the nuclear heterosexual family was the specific context for the Oedipal complex. But that form is not essential.

44 "It has justly been said that the Oedipus complex is the nuclear complex of the neuroses, and constitutes the essential part of their content": Freud *Three Essays on Sexuality*, above n 29, 130.

45 Freud *Three Essays on Sexuality*, above n 29, 130-132. Adult sexuality always reflects lingering aspects of the Oedipus complex.

46 Fink, above n 4, 271.

47 Lacan, Seminar of March-April 1957, quoted by Mitchell, above n 38, 394.

The Symbolic father is to be distinguished from the Imaginary father (often ... surprisingly distant from the real father) to whom is related the whole dialectic of aggressivity and identification. In all strictness, the Symbolic father is to be conceived as 'transcendent', as an irreducible given of the signifier. The Symbolic father – he who is ultimately capable of saying 'I am who I am' – can only be imperfectly incarnate in the real father. He is nowhere ... The real father takes over from the Symbolic father.

Thus, as Fink points out, "[t]he father is someone who plays a specific role in his child's life, not someone whose name appears on a piece of paper, no matter how official that may be."⁴⁸ The paternal function, as we have seen, is to protect the child from the desire of the mother. This includes both the child's desire for the mother and the mother's desire to achieve certain satisfactions with her child that she cannot obtain elsewhere.⁴⁹

Because the paternal function is a purely symbolic function, it can be as effective when the father is absent as when present.⁵⁰ Lacan observes that:⁵¹

... if the symbolic context requires it, paternity will nonetheless be attributed to the fact that the woman met a spirit at some fountain or some rock in which he is supposed to live.

It is certainly this that demonstrates that the attribution of procreation to the father can only be the effect of a pure signifier, of a recognition, not of a real father, but of what religion has taught us to refer to as the Name-of-the-Father.

The paternal function is linked to authority, but not in the sense of the stereotype of the authoritarian heterosexual father. Rather, is an element in the mother's discourse, a rhetorical strategy,⁵² and is present when the mother refers to an authority beyond herself.⁵³ This does not

48 Fink, above n 4, 103.

49 Fink, above n 4, 80. As Fink points out, Lacan did not claim that all mothers are smothering or devouring. Rather, the child perceives the mother's desire as dangerous or threatening. This perception may be the result of the child's wish to be the mother's satisfaction; or it may be the reaction to the mother's desire to find satisfaction in the child.

50 See Oliver, above n 37, 3, who observes that "[t]he absent father is fundamental to our image of fatherhood and paternity" and notes that the necessity of the father's absence is to be found in recent rhetoric of family values. See also Collier, above n 23, 202 for his discussion of the way in which father presence is constructed in the contemporary legal environment as desirable and father absence is constructed as problematic in law. Father presence, however, is built around capitalist imperatives, so that the father's "presence" assumes absence for most of the working day.

51 Lacan, above n 22, 199.

52 In explanation of this proposition, Fink observes that in psychoanalysis, as in other disciplines, it is common to use the device of "argument from authority". Thus, one does not appeal to Freud and Lacan as "living, breathing individuals", but rather, one appeals to their names, which lend the weight of authority: see Fink, above n 4, 80.

have to be the father in a nuclear family structure. As we shall see, it does not have to be a person at all. Thus Mitchell observes that the dead father of the law is always present, however weak or absent the real father may be, and regardless of how apparently matriarchal is a particular family situation.⁵⁴

B The Paternal Function Must be Distinguished from its Representative

The second notable point about the paternal function is that Lacan was adamant that the father is only a representative of the paternal function and we must be very careful to distinguish the function from the person who performs it:⁵⁵

[T]he father is the representative, the incarnation, of a symbolic function which concentrates in itself those things most essential in other cultural structures: namely, the tranquil, or rather, symbolic, enjoyment, culturally determined and established, of the mother's love, that is to say, of the pole to which the subject is linked by a bond that is irrefutably natural.

The father does not own the symbolic order, nor does he completely embody it.⁵⁶ He is only a representative of it.⁵⁷ Nor is he the *only* representative of the symbolic.⁵⁸ The father's role in playing the paternal function is to further the social order by subjecting the child to the law. Thus, it is important to distinguish the paternal function from the real or imagined father who is its representative. This is why the paternal function is often referred to by Lacan as the Name of the Father,⁵⁹ which stresses its symbolic aspect:⁶⁰

53 Fink, above n 4, 81. Thus, authority is an aspect of the paternal function, but this is a rather different idea to the notions of paternal authority (with the inherent links to heterosexual masculine privilege and middle class values) constructed in case law. For a discussion of such construction see Collier, above n 23, 199.

54 Mitchell, above n 38, 395.

55 Jacques Lacan "The Neurotic's Individual Myth" (1979) 48(3) *The Psychoanalytic Quarterly* 422-23, quoted in Oliver, above n 37, 14.

56 Nor is he omnipotent. As Francois Sauvagnat points out, he is fundamentally impotent as he is confronted by the enigma of feminine jouissance. Francois Sauvagnat "Fatherhood and Naming in J Lacan's Works" (2002) 3 *The Symptom*.

57 See also Sauvagnat, above n 56, who provides an interesting analysis of the father function, in which she argues that the father function relies on the existence of the woman – the incompleteness of the woman is what allows the father function to exist. This makes logical sense in that the desire of the mother is for the phallus.

58 See Sauvagnat, above n 56, who writes of the "symbolic mother".

59 The "Nom-du-Pere" is a play on words, echoing the "Non-du-pere", the "no" of the symbolic father, the prohibition of the child's incestuous desire for its mother.

60 Lacan, above n 2, 67.

It is in the *name of the father* that we must recognize the support of the symbolic function which, from the dawn of history, has identified his person with the figure of the law. This conception enables us to distinguish clearly, in the analysis of a case, the unconscious effects of this function from the narcissistic relations, or even from the real relations that the subject sustains with the image and action of the person who embodies it.

This distinction between the symbolic and the real or imagined father is crucial and has a number of important implications.

First, the real or imagined father will always, to some degree, be inadequate to fulfil the paternal function. As Žižek points out, "the fact [is] that the real father always turns out to be an imposter, unable actually to live up to his symbolic mandate."⁶¹ Those fathers who are very poor at fulfilling the paternal function will have a significant and lasting impact on their children. Indeed, as Oliver points out, "[t]he greater the discrepancy between the role of the real father and the ideal father, the more powerful the ideal father becomes in psychic development."⁶² Those fathers who fail to perform the paternal function at all, however, condemn the child to psychosis:⁶³

It is the lack of the Name of the Father in that place which, by the hole that it opens up in the signified, sets off the cascade of reshapings of the signifier from which the increasing disaster of the imaginary proceeds, to the point at which the level is reached at which signifier and signified are stabilized in a delusional metaphor.

This proposition relates to Lacan's view as to the importance of language in the Symbolic order. The paternal function is Lacan's *point de capiton*, what has been called the "quilting point" or "button tie" that anchors specific meaning to particular words without recourse to an absolute referent.⁶⁴ It is the paternal function that stabilizes the endless chains of signifiers in the Symbolic order; without that stabilisation, psychosis results.⁶⁵ As Bruce Fink observes:⁶⁶

61 Žižek, above n 5, 334.

62 Oliver, above n 37, 13.

63 Lacan, above n 2, 217.

64 Fink, above n 4, 94. This is the idea that the subject "is stitched to a particular signifying chain and is thereby constructed, understood through the sense of a particular signifying order": Dennis Atkinson and Alex Moore "How particular Lacanian notions might be helpful for evaluating profiles of teacher competences and supervising students on their teaching practice" <<http://partnership.mmu.ac.uk>> (last accessed 23 June 2006).

65 Thus Lacan theorised that the various language problems experienced by psychotics are symptomatic of the psychotic personality structure.

66 Fink, above n 4, 93.

Assuming ... that the father has been assiduous (or simply lucky) enough to drive home to the child what is prohibited, a link is established between language and meaning (reality as socially constructed), between signifier and signified, that will never break.

Secondly, Lacan points to the extremely important distinction between the paternal function and narcissistic relations. Psychoanalysis is notable for its decidedly unsentimental view of parental love. Freud characterised parental love as a "revival and reproduction" of the parents' own narcissism, long since abandoned: "Parental love, which is so moving and at bottom so childish, is nothing but the parents' narcissism born again, which, transformed into object-love, unmistakably reveals its former nature."⁶⁷ The paternal function, as a symbolic function, must be distinguished from the narcissism of its representative, a point that becomes important in considering the consequences of relationship breakdown (as demonstrated in the next part of this article).

Thirdly, because the father acts as representative of the Symbolic order and is at the same time not the possessor of that order, it is clear that the paternal function is not only distinct from biological fatherhood *but it need not be played by a man at all*. As Fink points out:⁶⁸

The paternal function is not the function played by the individual's father, regardless of his particular style and personality, the role he plays in the family circle, and so on. A flesh-and-blood father does not immediately and automatically fulfil the paternal function, nor does the absence of a real, live father in any way automatically ensure the non-existence of the paternal function. This function may be fulfilled despite the early death or disappearance of the father due to war or divorce; it may be fulfilled by another man who becomes a 'father figure'; and it may be fulfilled in other ways as well.

V THE IMPLICATIONS OF THE PATERNAL FUNCTION

I turn now to apply these ideas of the distinction between the paternal function and genetic fatherhood to the Report's recommendations. Lacan's concept of the paternal function suggests that the Law Commission's explicit linkage between genetic and legal paternity is fundamentally misconceived. Most importantly, the linkage confuses the symbolic role of the father with the absence or presence of an actual person.

A "Best Interests of the Child"? The Retreat into the Literalism of the Real

The Law Commission is not alone in its view that there is a natural link between genetic fathering and legal parenting. In other jurisdictions, the increasing emphasis upon genetic identity,⁶⁹ the ready availability of DNA paternity testing,⁷⁰ the failure of marriage as a securer of

67 Sigmund Freud "On Narcissism: An Introduction" in Sigmund Freud (ed) *On Metapsychology: The Theory of Psychoanalysis* (Harmondsworth, Penguin, 1984) 84–85.

68 Fink, above 4, 79.

69 Mary R Anderlik "Disestablishment Suits: What Hath Science Wrought?" (2003) CFCC Journal 4.

paternity⁷¹ and the rhetoric of "family values"⁷² have reinforced the idea of family as genetically determined.⁷³ As Fogarty J in the Australian case of *G v H* observed:⁷⁴

Paternity is now a medical and not a legal issue. Society is entitled, through the legislature and the Courts, to an inexpensive, prompt and virtually certain procedure to decide this question. Paternity is no mere *inter partes* issue. The child and society have a vested interest in the correct outcome. The reasons for that are many, including heredity, the sense of identity and the private and public obligation of financial support directly relevant in this case and so emphasized by the legislature over the past decade.

On this view, genetic relationship and parental status are closely linked⁷⁵ and children either have a right or a need to be raised by their genetic mother and father.⁷⁶ Thus, the rights and duties of fatherhood are primarily reserved for the genetic father of the child⁷⁷ (in some jurisdictions, and as

70 DNA identity testing became possible in 1984: Michael Gilding "DNA paternity testing without the knowledge or consent of the mother: new technology, new choices, new debates" (2004) *Family Matters* 68, 68. As Anderlik observes, the Human Genome Project has accelerated the development of techniques for cheap, efficient analysis of DNA and comparison of genetic profiles. Many laboratories now offer testing with sample collection by mail using cheek swabs. Testing of hair and other materials easily collected without the knowledge or cooperation of the subject is increasingly available. Anderlik, above n 69, 3.

71 See Collier, above n 23, 205, who points to the considerable growth of non-marital births, in which half to two thirds are born in stable partnerships.

72 Mitchell suggests that this is caused by the fact that within the majority of the population, it is no longer necessary for women to be exchange objects. Thus the dominant class must insist on their remaining so, hence what she terms "bourgeois hypocrisies" about the value of the family. Mitchell, above n 38, 380.

73 As Niccol Kording notes, the biological approach to paternity determination is not new: "Since the days of Carthage, tribunals, councilmen, courts and legislatures have relied on perceived biological relationships to establish paternity." And as relatively early as 1930, it was possible to exclude a man as a child's father by blood tests. See Niccol D Kording "Little White Lies that Destroy Children's Lives – Recreating Paternity Fraud Laws to Protect Children's Interests" (2004) 6 *JLFS* 241, 247.

74 *G v H* (1993) 16 *Fam LR* 525, 534 (FCA) Fogarty J.

75 See further Linda D Elrod and Robert G Spector "A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction and Refining Support Issues" (2001) 34 *Fam LQ* 607; Elizabeth R Scott and Robert E Scott "Parents as Fiduciaries" (1995) 81 *Va L Rev* 2401; Katherine T Bartlett "Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of a Nuclear Family has Failed" (1984) 70 *Va L Rev* 879.

76 Deborah Dempsey "Donor, Father or Parent? Conceiving Paternity in the Australian Family Court" (2004) 18 *Int J Law Policy Family* 76, 79. See also Jayna Morse Cacioppo "Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining who Can be a Legal Father" (2005) 38 *Indiana L Rev* 479, 493.

77 A number of commentators have also acknowledged the political and economic imperatives for this development. See, for instance, Collier, above n 23, 182-183, for a discussion of the economic reasons for the law's determination of paternity. He also notes the way in which men's relation to work informs the notion of men's paternal responsibilities. Men's paternal responsibilities should not disturb the man/work bond: Collier, above n 23, 192.

the Report recommends, regardless of whether there is a marriage between the parents).⁷⁸ This trend is also reflected in case law in the use of the word "natural" parent,⁷⁹ which occurs frequently to denote the genetic parent,⁸⁰ implying the "unnatural" nature of the social parent. It can also be seen in the Report's recommendation that parents having children through embryo donation be counselled as to the "challenges" of raising a child with no genetic connection.

As the discussion of Lacanian theory suggests, however, the symbolic role of fathers should be carefully distinguished from the person who is "literally" the father. This confusion can have significant consequences for the best interests of the child, in at least three ways: by allowing men who are not genetic fathers to relinquish responsibility, financial and emotional, for children for whom they have performed the paternal function; by elevating the literal "truth" of genetic heritage over other considerations; and by prioritising genetic fathering over social fathering. It may also serve to disadvantage single women and lesbian families.

B The Relinquishment of Responsibility

Commentators have observed that the latest round of paternity disputes in the United States involving DNA testing⁸¹ has been driven not by a desire to accept responsibility for the paternal function, but by a desire to relinquish responsibility.⁸² As Cacioppo notes: "It is crucial to remember that the usual post-paternity acknowledgement case is not about who gets to be a legal father, but who gets *out* of being the legal father."⁸³ Anderlik observes of the American experience

78 Collier notes the trend to uphold the rights of unmarried fathers, arguing that the "extra-familial" domestic relationship has been embraced within a reconstituted familial domain. There has been a "reconstitution of unmarried fatherhood": Collier, above n 23, 206.

79 See for instance New Zealand Law Commission, above n 8, 74.

80 For an early example of this view see *Agar-Ellis v Lascelles* (1883) 24 Ch D 317, 327-328, discussed at some length by Collier, above n 23, 186-187. Although this case revolved around a dispute between father and mother, rather than in relation to social parenting, the father right in this case was considered to be primarily natural and based on the reciprocity of obligation and paternal prerogative. The father's rights were sacred and beyond interference by the courts.

81 Anderlik points out that the first wave of such tests in the United States coincided with an aggressive program of paternity establishment for non marital children receiving federal welfare benefits (this was also the case in other jurisdictions, such as New Zealand). The second wave "is driven by private interests, the rules for testing are unclear and the results increasingly used to disrupt or 'disestablish' parent child relationships in the interests of eliminating a man's financial responsibility for a child": Anderlik, above n 69, 3.

82 See also Cacioppo, above n 76, 492, who writes of the increase in the number of actions in the United States seeking to disestablish paternity.

83 Cacioppo, above n 76, 501 (emphasis added).

that rejection of paternity obligations often occurs when a request is lodged for increased child support or when a man starts a new family.⁸⁴

The cynical interpretation is that fatherhood is embraced unless and until it becomes inconvenient. More charitably, financial or other competing interests fuel resentment against the mother and the legal system for its imposition of responsibilities. The result is a readiness to file an action to disavow paternity, with its implicit rejection of the child, and, if need be, to end the relationship altogether. Men who experience some trigger event will find a 'cultural script' to guide response to their predicament that gives little or no place for empathy, care and caution.

This trend of allowing men to relinquish parental responsibilities because they are not the genetic father of the child goes against the views of mental health professionals who maintain that relationships children form with social parents are vital to the children's future mental, emotional and physical health.⁸⁵

The drive to relinquish responsibility is facilitated when the law upholds genetic paternity as the primary determinant of responsibility. The desire to avoid responsibility for children is not new.⁸⁶ Clare notes that in "disentangling" himself from his role as spouse, a man too often seeks to disentangle himself from the role of parent as well.⁸⁷ He goes on to observe the "uncomfortable facts" that many men are "noteworthy for their indifference rather than commitment to their responsibilities as fathers."⁸⁸ One aspect of this indifference is that many men make a meagre financial contribution to their children's care, a factor he argues weakens the claims of many men to have their parental roles and responsibilities taken seriously.⁸⁹

The recommendations of the Report would further a trend apparent in other jurisdictions whereby it is increasingly commonplace to challenge paternity on relationship breakdown. In some United States jurisdictions, for instance, a defendant declared a legal father in a paternity proceeding may reopen the case at any time with "scientific evidence" of paternity.⁹⁰ Similarly, in Australia, recent amendments to the Family Law Act 1975 (Cth) enable a person who has been determined not

84 Anderlik, above n 69, 13.

85 See *The Bureau of National Affairs, Inc, Opinion of the Hawaii Circuit Court* (1996) 23 Fam L Rep 2001, 2003-09 (1st Cir).

86 In particular, as Collier observes, changes to the law that occurred in the last quarter of the twentieth century meant that "childcare changed from a valuable family burden men wished to control to a costly family asset that men wished to avoid." See Collier, above n 23, 189.

87 Clare, above n 1, 149.

88 Clare, above n 1, 159.

89 Clare, above n 1, 156.

90 Anderlik, above n 69, 6.

to be the parent of a child to recover monies paid or property transferred under maintenance orders for the benefit of the child.⁹¹ And biological proof that a man is not the father of a child has lead courts to find that, in the absence of adoption, a child is not a child of the marriage⁹² or to rebut the marital presumption.⁹³ This may lead not only to the abandonment of financial responsibilities, but commonly, emotional responsibilities as well. In United States cases such as *Miscovich v Miscovich*⁹⁴ and *BEB v RLB*⁹⁵ the men in question abandoned the children emotionally as well as financially upon the discovery that there was not a genetic bond between father and child. And in some cases, a man will be proved to be the genetic father of one or more siblings in a family, retaining emotional and financial support for those children, and effectively abandoning the others, even though the children understood him to be father to them all.⁹⁶ It is difficult to see how this can be in the best interests of the children concerned.

The new emphasis upon genetic parenting and DNA paternity testing has provided an apparent justification for the relinquishment of legal paternal responsibility. The issue of genetic paternity is frequently framed as one of "justice" or "fairness"⁹⁷ to the father. That is to say, if the state expects genetic fathers to support their families, then it is only fair to exonerate non-genetic fathers from their financial responsibilities. Indeed, as Collier points out, it is difficult to refute the claims of such groups without "denying the fundamental premise of liberal legal order."⁹⁸ Such a view is implicit in the argument put forward by a father in the Australian case of *OP v HM*.⁹⁹ He sought to challenge the paternity of his youngest child and argued (erroneously, in the Court's view) that previous Australian authority established that,¹⁰⁰ save in the cases of adoption and artificial

91 Family Law Amendment Act 2005 (Cth).

92 *Cochran v Cochran* (1999) 717 NE 2d 892 (Ind CA).

93 *Gann v Gann* (1997) 705 So 2d 509 (Ala CA).

94 *Miscovich v Miscovich* (1997) 688 A 2d 726 (Pa SC).

95 *BEB v RLB* (1999) 979 P 2d 514 (Ala SC).

96 This was the situation in the celebrated paternity fraud case of *Magill v Magill* [2005] VSCA 51 in Australia. Magill was the biological father of only two of the three children.

97 Kording, above n 73, 263.

98 Collier, above n 23, 191. At 209 he writes: "Without legal rights, put crudely, why should men be financially responsible at all?"

99 *OP v HM* (2002) 29 Fam LR 201 (FCA).

100 The authority relied upon was *Tobin and Tobin* (1999) 24 Fam LR 635 (FCA). However, the Court pointed out that the issue in this case was whether the foster mother of a child could obtain an order for child maintenance or child support against her husband who was not the biological father of the child. In that context the court stated that there was no power under the Child Support (Assessment) Act 1989 for a court to require the payment of child support by a person other than a natural parent of a child, an adoptive parent

conception, a man can only be liable for a child support assessment if he is the biological parent of the child that is the subject matter of the assessment. Fathers' rights groups have been vociferous in their claims that non-biological fathers are victims of women who defraud them as to paternity and have been highly critical of courts for failing to exonerate them of financial obligations.¹⁰¹ Interestingly, there is little or no acknowledgement of the benefits of an ongoing relationship with the child for the father, despite a lack of a genetic relationship.

A number of commentators have voiced concern about these developments as advancing men's economic rights over the best interests of the child.¹⁰² They argue if laws allow the disestablishment of paternity on the basis of DNA testing at any time, a child can never "rely on the man who calls himself father to maintain that relationship beyond the father's whim."¹⁰³ Further, such laws fail to address the interests of the child in either maintaining or developing a relationship with the father.¹⁰⁴ Even where courts purport to act in the best interests of the child, many commentators agree that this standard is vague and subjective and often serves as a thinly-disguised method of preserving the traditional nuclear family.¹⁰⁵ This may be seen in the prioritisation of the genetic father over the social father¹⁰⁶ and in the emphasis placed upon the importance of establishing a child's genetic heritage.

Further, one of the unfortunate consequences of emphasising genetic fathering is that it provides some justification for acts that result from narcissism, rather than acts that are directed to the best

or a person deemed to be a parent because of an artificial conception procedure. A foster parent of a child could not be held liable.

101 See for instance in New Zealand, MENZ Issues "Law Commission Recommendations on Paternity Testing Unacceptable to Parents and Children" <<http://www.menz.org.nz>> (last accessed 23 June 2006); New Zealand Child Support Reform Network, reported at Scoop "Lack Of DNA Paternity testing abuses Dads and Kids" <<http://www.scoop.co.nz>> (last accessed 23 June 2006); and in Australia the Mens Rights Agency <<http://www.mensrights.com.au>> (last accessed 23 June 2006); Mens Confraternity WA (Inc) <<http://www.mensconfraternity.org.au>> (last accessed 23 June 2006). Fathers' rights groups often suggest that up to 30 per cent of paternity tests showed that the nominated father was not the parent of the child. However, in Australia, this figure has been disputed by Michael Gilding who argues that it is generally around 1-3%. See further "Paternity fraud an urban myth: study" (25 June 2005) *Sydney Morning Herald*.

102 Kording, above n 73. See also Theresa Glennon "Expendable Children: Defining Belonging in a Broken World" (2001) 8 *Duke J of Gender L & Pol'y* 269.

103 Kording, above n 73, 272.

104 Kording, above n 73, 264.

105 See Dempsey, above n 76, citing Mumford, Millbank, Franklin and Dolgin. Cacioppo also notes that although most courts apply a best interest analysis at some point in their discussions, "there is no rhyme or reason to such considerations": Cacioppo, above n 76, 499. Collier observes that, despite the movement from the language of "sacred" fathers' rights to the "best interests of the child", the law has continued to reproduce "a naturalist discourse of masculinity in seeking to protect fatherhood": Collier above n 23, 190.

106 See Part V D The Prioritisation of Genetic Fathering over Social Fathering.

interests of the child. As noted above, the symbolic function must be carefully distinguished from its individual representative. A number of commentators have noted that anger and the desire to strike back at the women involved have been significant factors in the men's rights movements in disputing legal paternity.¹⁰⁷ A psychoanalytic reading suggests that much of a father's desire to relinquish responsibility for children, upon the discovery that they are not his biological offspring, can be attributed to the narcissistic blow this discovery causes.¹⁰⁸ This may also account for the rise in paternal grandparents requesting paternity tests.¹⁰⁹ As Blum points out, "to present a natural grandchild to one's parents symbolically renews their procreation, perpetuation, and phallic-oedipal gratification."¹¹⁰

C The Significance of "Truth"

Much emphasis is placed, in linking genetic fathering and legal parenting, on "truth" as to genetic heritage being in the best interests of the child. The Law Commission acknowledged that social parents may have a better claim to the title of parent than genetic parents, but stressed the "critical importance of genetic lineage to a child's sense of identity."¹¹¹ Elsewhere, the Law Commission observed that:¹¹²

If a fiction is allowed to be maintained on a public birth certificate it could be buying into the qualities of shame and secrecy. When true details are disclosed on a birth certificate, parents do not have the easy option of not telling their child the truth. Disclosure assists parents to tell the truth and so facilitates healthy family relationships.

In other jurisdictions, however, there has been some challenge to the somewhat sweeping generalisation that truth is always going to be in the interests of the child. Thus, in *Susan H v Jack S*, a Californian court said it was "questionable whether it is to the child's benefit, emotionally and

107 See Anderlik, above n 69, 12. Indeed, the extent of this can be seen in the desire to litigate for "paternity fraud". Courts generally have been wary of this development. See *In re Paternity of Cheryl* (2001) 746 NE 2d 488, 500 n 23 (Mass), where the Massachusetts Supreme Court held that even though a mother knows at the time a man signs a paternity acknowledgment that he is not the biological father, her failure to disclose that information to the court would not amount to fraud on the court. See also Kording, above n 73, who argues that paternity fraud cases do not consider the best interests of the child.

108 See further S Leclair *A Child is Being Killed: On Primary Narcissism and the Death Drive* (Stanford University Press, Stanford, 1998).

109 Anderlik, above n 69, 16-17, notes the rise in this phenomenon and observes that some United States laboratories now advertise "grandparent tests".

110 Harold P Blum "Adoptive Parents: Generative Conflict and Generational Continuity" in Albert J Solnit, Ruth S Eissler and Peter B Neubauer (eds) *The Psychoanalytic Study of the Child* (New Haven, Yale University Press, 1983) vol 38, 151.

111 New Zealand Law Commission, above n 8, 5.

112 New Zealand Law Commission, above n 8, 70.

developmentally, to establish biological parenthood for some abstract interest in truthfulness.¹¹³ In *Merkel v Doe*, an Ohio court was of the view that the state's interest in determining paternity strictly on the basis of genetics is "at most insubstantial, if not completely non-existent."¹¹⁴ Others, however, have emphasised the importance of "truth". For instance, in *Re H and A (c)*, the Court affirmed that the principles espoused in English cases in relation to granting court orders for paternity testing are that (1) the interests of justice are best served by the ascertainment of truth; and (2) that the Court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences.¹¹⁵ Similarly, the Report places much emphasis upon the importance of information as to one's genetic origins.

A psychoanalytic understanding of the paternal function would suggest that the retreat into the "literalism of the Real" (that is the emphasis upon genetic fathering rather than the father's social role) will be unlikely to be in the best interests of the child. Although much emphasis is placed by the Report on the importance of knowing the "truth" of one's genetic heritage, as Zizek has pointed out, the "real" of genetics provides no answer and, indeed, is likely to generate, not allay, anxiety.¹¹⁶

Far from resulting in total predictability and certainty, however, this very radical self-objectization (the situation in which, in the guise of the genetic formula, I will be able to confront what I 'objectively am') will generate even more radical uncertainties about what the actual psychosocial effects of such knowledge and its applications will be. (What will become of the notions of freedom and responsibility? What will be the unforeseen consequences of meddling with genes?).

Stability within the social order is provided by the Name of the Father, rather than knowing the "truth" of genetic origins. Indeed, as the Report itself points out, the important consequences of assigning legal parenting are in the order of the Symbolic: the rules regulating succession on intestacy, family protection, citizenship and child support.¹¹⁷

Critics of the genetic approach support alternatives that would give priority to the child's interests in stable, ongoing relationships over men's rights to disestablish paternity. Kording, for instance, argues that whenever a paternity issue comes to the court, the court should determine whether a social father-child relationship has been established, and, if so, the established parent should be determined to be the child's father and genetic testing should be illegal. If no such relationship exists, genetic testing should be mandatory. And if a voluntary acknowledgment of

113 *Susan H v Jack S* (1994) 37 Cal Rptr 2d 120, 123 (Cal CA) Boren PJ.

114 *Merkel v Doe* (1993) 63 Ohio Misc 2d 490, 493 (Ohio Ct Com Pl) Rocco J.

115 *Re H and A (children)* (2002) 1 FLR 1145, para 29 (CA) Thorpe LJ.

116 Zizek, above n 5, 335.

117 New Zealand Law Commission, above n 3, 18.

paternity is made, genetic testing should be mandated to avoid future challenges.¹¹⁸ Others support a broad view of parenting by estoppel and the upholding of voluntary acknowledgments of paternity, despite discovery that a man is not the genetic father of a child.¹¹⁹ Such solutions would appear to better understand the distinction between genetic fathering and the symbolic function of fathers.

D The Prioritisation of Genetic Fathering over Social Fathering

Even where proof of paternity is sought to establish and/or maintain a relationship between a genetic father and his child, this may be at the expense of existing, socially-constructed family relationships. Thus in the United States case of *Witso v Overby*,¹²⁰ a wife's lover obtained a genetic test in support of a paternity claim against the wishes of the mother and the non-genetic father. The appellate court upheld his claim on the basis that the genetic father is entitled to the status of the child's legal father, despite the marital presumption.¹²¹

In New Zealand to date, even where courts have been prepared to ascribe fatherhood on the basis of a combination of genetic and social parenting, the results have tended to be grounded in an assumption that genetic parenting should be privileged.¹²² For instance, in *BPS v MNS*,¹²³ a couple, unable to conceive a child, agreed that the wife would conceive a child by a friend. The resulting child was accepted by the husband as his own. The parties separated when the child was 10 months old, one of the factors being the wife's interest in having another child by the same man. There were ongoing access difficulties and the husband gave up trying to access the child when the child was 16 months old. The mother later sought a declaration that he was the stepfather of the child. The Court found that the husband had made an immediate commitment to the child as if he were his natural father, and had assumed responsibility for him before and after separation and up to the time access terminated. In the circumstances, the man should be declared the stepfather except for two factors that made this unjust: firstly, the attempts made by the wife to make access difficult to the point the husband eventually gave up; and secondly, the fact that there was continuing contact between the wife and the child's biological father. Goddard J found, amongst other things, that in the circumstances the argument that the step parent relationship was "unnatural and a disadvantage to

118 Kording, above n 73, 266.

119 See for instance Leslie Joan Harris "Reconsidering the Criteria for Legal Fatherhood" (1996) Utah L Rev 461, who advocates legal recognition of "functional fatherhood".

120 *Witso v Overby* (2000) 609 NW 2d 618 (Minn Ct App).

121 A similar result was found in *TL ex Rel TL v CS* (1999) 975 P 2d 1065 (Wyo).

122 A phenomenon also noted in the United States by Susan E Dalton "From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood" (2003) 9 Mich J Gender & L 261, 290.

123 *BPS v MNS* [1998] NZFLR 289 (HC).

the child"¹²⁴ led to the conclusion that step parenting would not be granted. In this case, the man had been largely prevented, by the mother, from acting as a father to the child, so the mother's action to have him declared a step-parent seemed unfair. Nevertheless, the Court placed considerable significance on the fact that the child had ongoing contact with the genetic father, which reflects a prioritisation of and privileging of the "natural" relationship between a genetic father and child.

Similarly, the devaluing of social fathering can be seen in *Gough v Brittin*.¹²⁵ In this case, the applicant had a de facto relationship with the respondent between 1995 and 1998. After the relationship broke down, he applied for access to the respondent's two children, arguing he was the only father the children had ever known. However, the application was dismissed. The Court found that it was essential for the purposes of the Guardianship Act 1968¹²⁶ that a marriage relationship exists before a step parent relationship arises.¹²⁷ It was not sufficient that the parties live in a relationship in the nature of a marriage. The applicant was neither a parent nor a step parent so had no right to access. In this case, social fathering, in the absence of marriage, was devalued completely.

These cases reveal an unfortunate tendency in the law to prioritise genetic fathering over social fathering.¹²⁸ The Report's recommendations, however, despite extending the presumption of paternity to unmarried fathers, may serve to exacerbate the view that genetic fathering is to be privileged over social fathering.

E "Father Absence": Single Mothers and Lesbian Families

Although the Report was keen to acknowledge the diversity of family forms, prioritising the link between genetic fathering and legal parenthood may serve to reinforce assumptions engendered by the Western notion of the heterosexual, nuclear family. This is suggested by at least two of the Report's recommendations: that fertility clinics be required to counsel all unpartnered women receiving donor gametes about the importance of appointing a second guardian for their child; and that legal parenthood be assigned to a known donor. Both of these recommendations may suggest a fear of the so-called "fatherless family".

124 T v T [1998] NZFLR 776, 781 Brown J: "Having considered ... the argument of counsel for the child that the establishment of a step-parent relationship in such circumstances was unnatural and a disadvantage for the child, Goddard J dismissed the appeal."

125 *Gough v Brittin* [1999] NZFLR 529 (FC).

126 The Guardianship Act 1968 has since been repealed and replaced by the Care of Children Act 2005.

127 *Gough v Brittin*, above n 125, 531 Judge Moss.

128 This prioritisation is not the case in all cultures. Anderlik, for instance, points to the fact that the Romans used the term "alumnus" to designate an abandoned child taken and raised by a biological stranger. Such children were cherished and the sort of love this required was held in high regard. Anderlik, above n 69, 9.

For many years, much moral panic has been associated with the absence of a father figure in families. For some time, this absence was primarily because of the relationship breakdown of a heterosexual nuclear family and the increasing numbers of children born to unmarried mothers.¹²⁹ More recently, however, the fatherless family has also been a matter of choice: for instance, a woman may choose to remain single and conceive her children by donor sperm.¹³⁰ Alternatively, lesbian couples may obscure biological paternity, often in order to express a radical feminist critique of the patriarchal nuclear family.¹³¹ As Dempsey observes:¹³²

In refusing the importance traditionally attributed to knowledge of paternity in conferring legitimacy (ie naming, inheritance and ownership rights of children) within the confines of the traditional nuclear family, motherhood [can] be constructed as an empowering institution to which men [are] instrumental rather than central.

Despite the work of numerous commentators who have shown that the nuclear heterosexual family is historically and culturally specific¹³³ (and indeed, even in the heyday of paternal authority in nineteenth century England, the "sacramental bourgeois family" was not unproblematically diffused throughout the social order)¹³⁴ the law has tended to view father absence as undesirable.

129 See further Theresa Glennon "Somebody's child: evaluating the erosion of the marital presumption of maternity" (2000) 102 W Va L Rev 547, 548.

130 The New Zealand Law Commission noted that in New Zealand the single parent family is now a major family model, 18.9% of families having only one parent and 75% containing dependent children. Of these single parent families, just over 80% were headed by a female parent. See New Zealand Law Commission, above n 8, 2, fn 3. In the United States the number is said to have increased from less than 10 million in 1960 to 24 million in 2002: Wade F Horn, Assistant Secretary for Children and Families, US Department of Health and Human Services "Responsible Fatherhood and the Role of the Family" (Paper presented at the Serious and Violent Offender Re-entry Initiative Grantee Conference, Washington DC, 2002) <<http://www.ojp.usdoj.gov>> (last accessed 23 June 2006).

131 See for instance *M v C* [2004] NZFLR 695 (DC), discussed below. In New Zealand, same sex families increased from 684 in the 1996 census to 1356 in the 2001 one: New Zealand Law Commission, above n 8, 2, fn 3.

132 Dempsey, above n 76, 81.

133 Judith Butler, for instance, observes that the origin narrative of the biologically-based family is built upon "an authoritative account about an irrecoverable past", making the constitution of the law appear as a historical inevitability": Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York, 1990) 36. Collier traces the development of rights and obligations which married men have traditionally had over their children to the eighteenth and nineteenth centuries and the changes wrought by the agricultural and industrial revolutions: Collier, above n 23, 185. Mitchell observes that the dominant role of the nuclear heterosexual family can be attributed to the complexity of a class society that forces the kinship system to recede: Mitchell, above n 38, 378-379. See also Dalton, who observes that the assumption that family should be limited to a male/female pair "serves to mask the socially constructed nature of the legal family, casting the nuclear family as a biological imperative and all other family forms as naturally/legally suspect": Dalton, above n 122, 322.

134 Collier, above n 23, 188.

Collier points out that the absence of paternal authority becomes "bound up with a perceived threat to the familial and social order itself."¹³⁵ These ideas find expression in hostility to autonomous motherhood, based on a belief that families need fathers "for the social, psychological and economic well-being of all the members of the family unit."¹³⁶ Father absence then becomes a signifier of instability, abnormality and the unhealthy adjustment of children¹³⁷ and families in which an appropriate paternal masculinity is absent are characterised as dysfunctional.¹³⁸ Thus, despite a lack of consensus amongst psychological theories as to the effects of father absence.¹³⁹

What judges have tended to do in child custody cases, therefore (with no objective proof of the universal effects of father-absence to turn to), is to resort to a simplistic and popularised version of sex role theory and sex-typing through which to legitimise their decisions about which parent a child should live with on divorce. What this means, of course, is that they then have considerable discretion to reproduce their own beliefs about 'appropriate' parental practices.

Collier concludes that father absence in law really signifies something else, that is, the desirability of an authoritarian, economically-responsible, heterosexual masculine presence.¹⁴⁰ The psychoanalytic view accords with Collier's view, explaining this desirability of the authoritarian father figure as confusion between the symbolic role of the father and the "real" person who represents this role.

Many illustrations of the fear of the fatherless family can be given. In relation to single mothers, much "moral panic" regarding the prospect of fatherless families accompanied recent public debates about access to assisted reproduction for Australian lesbian couples and single heterosexual women,¹⁴¹ after the decision in *McBain v the State of Victoria*.¹⁴² In this case, the Federal Court held that women are not required to be married or in a de facto relationship in order to be eligible for infertility treatment.

In relation to lesbian families, the prospect of the "fatherless" child has often been painted as problematic in case law. In the tragic Australian case of *Re Patrick*,¹⁴³ Guest J of the Family Court

135 Collier, above n 23, 187-188.

136 Collier, above n 23, 201.

137 Collier, above n 23, 201.

138 Collier, above n 23, 202.

139 Collier, above n 23, 203.

140 Collier, above n 23, 204.

141 Dempsey, above n 76, 80.

142 *McBain v the State of Victoria* (2000) 99 FCR 116.

143 *Re Patrick* (2002) 28 Fam LR 579 (FC).

of Australia held that a sperm donor had a right under Australian law to regular contact with the child, to the extent that this was in the child's best interests. This was despite the fact that the lesbian mother of the child and her partner had no desire for the donor to play the role of father. His Honour found that the genetic father was entitled to four-hour fortnightly contact visits with Patrick, which would increase gradually as Patrick grew older. The "best interests of the child" analysis prevailed even though Guest J was of the opinion that, due to the way in which the relevant provisions of the Family Law Act 1975 (Cth) are drafted, a sperm donor cannot be regarded as the "parent" of the child. Guest J called for legislative reform to recognise the rights of known sperm donors wanting involvement with the child.¹⁴⁴

In a case similar to Australia's *Re Patrick*, a sperm donor's right to an ongoing relationship with the child born to a lesbian couple was recognised in *P v K*.¹⁴⁵ The court observed that:¹⁴⁶

The child is the result of a carefully negotiated agreement between four adults, two of whom for psychological or sexual-political reasons wished to use the father's sperm instead of resorting to sexual intercourse. Hypothetically, had the child's conception resulted from a single act of sexual intercourse or a transitory heterosexual relationship, his father's rights would have been unimpaired.

Further, it was noted that the fact that the child's conception resulted from AI was "not a compelling reason for *distorting totally* his family relationships."¹⁴⁷

Although the decision in that case was influenced by the agreement made by the parties prior to the child's birth, the decision in *M v C* provides a more extreme example of the privileging of genetic fathering.¹⁴⁸ In that case, the applicant mother sought an order under section 8 of the Guardianship Act 1968 appointing the respondent as an additional guardian for her child. The applicant and respondent lived in a stable, long term lesbian relationship. Each had conceived by anonymous artificial donor insemination (from the same donor). The applicant had been appointed an additional guardian of the respondent's child. The applicant regarded the respondent as parent of her child and the respondent was fully involved in every aspect of the child's life.¹⁴⁹ The issue for the Court was whether the sperm donor should be served with the proceedings. Ultimately, the Court decided that he should, despite the fact that the donor had signed an agreement with the third

144 There has been some support for this view. See for example James McConvill and Eithne Mills "Re Patrick and the Rights and Responsibilities of Sperm Donor Fathers in Australian Family Law" (2003) 3(2) QUT L & Justice J.

145 *P v K* [2003] 2 NZLR 787 (HC).

146 *P v K*, above n 145, para 94 Priestley J.

147 *P v K*, above n 145, para 139 Priestley J (emphasis added).

148 *M v C*, above n 131.

149 *M v C*, above n 131, para 2 Judge M D Robinson.

party who arranged the AI preserving anonymity and confidentiality.¹⁵⁰ The Court justified this decision on two bases: first, the donor could have a right to be heard and it was in the child's best interests to have a record of the donor's identity so as to satisfy the child's "natural desire" to know more about the family background, particularly when providing adequate medical treatment for the child; secondly, a donor who wished to be involved in the child's life could persuade a Court that conditions for access to the child should be included as a condition of custody and should have the right to be heard on any application for guardianship.¹⁵¹

Although the Report acknowledges the diversity of family forms, its prioritisation of genetic fathering continues to reflect the bias against father absence in its recommendation that single women receiving donor gametes be counselled to appoint a second guardian for the child;¹⁵² and the recommendation that donors receive legal parenting status. Both recommendations may work against women who, as a matter of choice, wish to raise a child alone or in partnership with another woman. The Lacanian view that the paternal function should not be confused with a "real" person would suggest that a bias against women raising children alone, or in partnership with another woman, is misplaced.¹⁵³

Lacan does not claim that the paternal or father function – the instatement of a father figure in a role of authority beyond the mother – is the *nec plus ultra* of family structure. His discourse is not that of 'family values', pitting Dan Quayle against Murphy Brown. Lacan does not assert that the father should be propped up in our society. Rather, he issues a warning: to reject the father's role, to undermine the father's current symbolic function, will lead to no good; the consequences are likely to be worse than those of the father function itself, increasing the incidence of psychosis.

F A Radical Reconfiguration of the Father?

Although it may seem radical of the Report to recommend that a child may have three legal parents, it may be suggested that the notion that legal paternity should primarily accord with genetic paternity is far more radical. Traditionally, because of the difficulty of establishing literal paternity, the attribution of legal paternity relied upon the institution of marriage. It was not possible to know with any degree of certainty that one's father was, in fact, one's genetic parent¹⁵⁴ until the

150 *M v C*, above n 131, para 4 Judge M D Robinson.

151 This view has been reinforced by the Human Assisted Reproduction Technology Act 2004 which creates an information regime in relation to donors. I am indebted to Professor Bill Atkin for this observation.

152 Although the recommendation is not that this second guardian should be a man, it reflects the view that the "proper" form of family is the two parent model.

153 Fink, above n 4, 111. Fink also explicitly observes at 253 that love and law can be provided by single mothers, single fathers and gay couples.

154 Lacan suggested that there are two things that can never really be known, but are always recognised: death and the father's role in procreation. See further Juliette Mitchell, above n 38, 391.

development of paternity blood testing.¹⁵⁵ Even then, blood types cannot determine who the father is although they can be used to determine the biological possibility of fatherhood. In order to deal with this uncertainty, the law developed a series of rebuttable presumptions which served to protect children from the stigma of illegitimacy.¹⁵⁶ In New Zealand, for example, a husband is presumed to be the father of a child born to his wife during their marriage or within 10 months after their marriage is dissolved;¹⁵⁷ and a man named as a child's father on a birth certificate is presumed to be the child's father.¹⁵⁸ Thus, historically, the symbolic institution of marriage, rather than biological reproduction, was the basis for legal parental status for men.¹⁵⁹ This was not without its difficulties, of course: children born outside marriage carried the stigma of illegitimacy. However, the problems caused by recognition of the Symbolic nature of paternity do not lead to the conclusion that genetic paternity should be the primary determinant of legal paternal obligations. The difficulties can be overcome, as the Report's own extension of the presumption to de facto and civil union relationships would suggest. The problem lies in allowing proof of "real" (that is, genetic) paternity to overturn the presumption where father/child relationships have been established and are ongoing. The high degree of importance that the Report places upon genetic origins seems likely to encourage individuals to place increased significance upon genetic paternity and encourage men to act on suspicions that they are not the genetic father of their children. In such a climate, the likelihood of presumptions of paternity protecting children's interests seems poor.

VI CONCLUSION

This article has considered the recommendations of the Law Commission's Report *New Issues in Legal Parenting*, through the lens of psychoanalytic theory. It has argued that the link made in the Report between genetic fathering and legal parenting is fundamentally misconceived, overlooking the significance of the symbolic role of the paternal function. Although the Law Commission seeks to acknowledge and uphold the diversity of families, its retreat into the "real" of genetic fathering may serve to reinforce negative assumptions against "fatherless" families and undermine the best

155 Paternity blood testing was first performed in the mid-twentieth century. In the 1970s a more powerful test using white blood cell antigens (Human Leukocyte Antigens or HLA) was developed: *Encyclopedia of Everyday Law* <<http://law.enotes.com/everyday-law-encyclopedia>> (last accessed 23 June 2006).

156 See further Anderlik, 69; Kording, above n 73; Cacioppo, above n 76, 268-269.

157 See the Status of Children Act 1969, s 5.

158 Nor do birth certificates, of course, provide any certainty. The New Zealand Law Commission noted that in NZ, 6% of children have no father recorded on their birth certificates, and others have persons named as parents who are not their gestational or genetic parents, although this is not disclosed. It refers to research that suggests that a significant proportion of the population, perhaps as many as up to 10%, are unrelated to presumed genetic fathers. See New Zealand Law Commission, above n 8, 3 and 63.

159 Dalton, above n 122, 273. See also Collier, above n 23, 183, who contends that: "...the entire process of establishing paternity has depended on recourse to law and the status of both child and father has depended on the existence of a marital link between the father and mother."

interests of the child. In many cases, genetic fathering will coincide with the paternal function and the issue will not arise. But it is a mistake to assume that genetic fathering and the paternal function will always coincide and it is thus misconceived to accord legal parenting responsibilities primarily on the basis of genetic paternity.