



Parents, Children and the Porous Boundaries of the Sexual Family in Law and Popular Culture

DAVID GURNHAM

*Centre for Social Ethics and Policy,
School of Law, University of Manchester, United Kingdom*

ABSTRACT This article focuses on a perceived ideological overlap between popular cultural and judicial treatments of sex and conjugality that contributes to a discursive construction of parenthood and parenting. The author perceives that in both legal and popular cultural texts, there is a sense in which notions of 'natural' childhood are discursively constituted as being put at risk by those who reproduce outside of dominant sexual norms, and that signs of normative sexuality (typically in the form of heterosexual coupling) may be treated as a sign of safety. These ideas are rooted in ancient associations between fertility, sexuality and femininity that can also be traced in the historical development of the English language. With the help of commentators such as Martha Fineman, the article situates parents and children within a discourse of family which prioritises conjugality, with consequences for the ways in which the internal and external boundaries of families are delineated.

Introduction

Perceptions of where the boundary of a family lies will often differ between members of the same kin. For example, parents and children may report divergent views about whether a known sperm donor, a non-resident former partner of the primary carer or the birth mother after adoption is or is not part of the family (Sweeting & Seaman, 2005). Sociologists have remarked that, in an age of increasing incidence and acceptability of artificial reproductive technologies, divorce, single parenthood, unmarried cohabitation and same-sex families, the boundaries of family life are increasingly fluid, negotiable and provisional (Hill, 2005; Jamieson, 2005; Sheldon, 2005). Related to this, other commentators have argued that increasing demands for equalities of gender and sexuality have also led to significant social changes and challenges (Giddens, 1992), arguably evidenced in the legalisation of gay marriage and civil partnerships in various jurisdictions, as well as the recognition of lesbian partners as legal co-parents of children conceived artificially (e.g. in England and Wales by the Human Fertilisation and Embryology Act 2008). However, despite these developments, there remain certain traditional markers of normative families. For example, prevalent heteronormative beliefs about the relative intensity and significance of heterosexual coupling compared with homosexual coupling may still provoke concerns for lesbian and gay people, particularly with respect to parenthood disputes where a male donor is involved (Polikoff 2000-01; Kelly, 2008-09). This article examines some of these legal concerns in the light of popular cultural depictions of parenthood and parenting in the film *The Kids Are All Right* (dir. Cholodenko, 2010). While it may be tempting to regard law and film as mutually independent disciplines, they can share discursive qualities that allow for illuminating comparative analysis, particularly with regard to the production of cultural norms. As Khan (2009, p. 145) observes, 'Legal and cinematic narratives offer versions of events, whether "real" or "fictional", and attempt to persuade their readers/viewers of the causation of the represented conflict, the believability of the characters, and the rightness of the conclusion.' Through an interdisciplinary comparative analysis, it is possible to

discern an ideological overlap between popular cultural and legal cultural treatments of sex and conjugality that contributes to hegemonic constructions of parenthood and parenting. In both legal and popular cultural texts, there is a sense in which notions of 'natural' childhood are discursively constituted as being put at risk by those who reproduce outside of dominant sexual norms, and that normative sexuality (typically in the form of heterosexual coupling) may be treated as a sign of safety. These ideas are rooted in ancient associations between fertility, sexuality and femininity that can also be traced in the historical development of the English language. With the help of commentators such as Martha Fineman, the article situates parents and children within a discourse of family which prioritises sex and conjugality, with consequences for the ways in which the internal and external boundaries of families are delineated.

Conjugality and Parental Responsibility in the Family Courts

How are cultural beliefs about sex and sexuality relevant to the assessment of a child's 'best interests' with regards to parenting? Disputes over how parental responsibility should be allocated after the separation of a couple are often highly fractious, and where the child is conceived using donor gametes or surrogacy the issue is complicated further by the fact that there may be three or more people with a parental claim. Some commentators have claimed that courts making 'best interests' judgments on behalf of children have tended to be influenced by heterosexist stereotypes. These include the belief that a lesbian couple is less fit than a heterosexual couple to meet the child's welfare needs, and that in the interests of a purported 'natural' childhood, the boundary of a family is more likely to be drawn to ensure the legal recognition of a mother and a father even if the father in question has not played a significant role in the child's life after conception (O'Donnell, 1999; Dempsey, 2004; Boyd, 2007; Diduck, 2007; Millbank, 2008; Lind & Hewitt, 2009). While recognising these as ongoing concerns, I want to address a related but slightly different idea: that in considering the welfare interests of children, courts may be influenced by a cultural privileging of *sexual* families in the first instance, and also of sexual conception as more naturally giving rise to parental responsibility than artificial conception. The cases considered here involve judgments about children's welfare in the context of families for whom the male provider of sperm was considered by the lesbian parents as external to the nuclear family unit. If, as O'Donnell (1999) and others have suggested, courts are indeed concerned with promoting an ideal of 'natural' childhood, then the significance attached by the courts in these cases to the mode of conception may justify the drawing of certain implications. For example, if courts are so influenced, then traditional associations between 'natural' (i.e. heterosexual) conception and 'natural' parenthood will continue to shape norms about family life and parenting (Rich, 2007).

Consider two recent cases on the legal determination of parental responsibility for children conceived through informal donor insemination to come before the Family Division of the High Court of England & Wales, *Re D (contact and parental responsibility: lesbian mothers and known father)* (2006) and *Re B (role of biological father)* (2008). In both cases the dispute centred on whether a known sperm donor (and hence a legal father) should be entitled to parental responsibility for the child in opposition to the stated preferences of the mother and her lesbian partner, the child's primary carers. The two cases produced different decisions despite the facts being alike in almost all relevant details. In both cases the parties disputed the intentions underlying the original agreement over the role of the donor regarding involvement in the child's life ([2006], p. 557; [2008], pp. 1020-1021); in both cases the lesbian parents argued that to accord parental responsibility on the sperm donor would be detrimental to their homonuclear family and thus to the stability of the child's young life ([2006], pp. 561, 574, 578-579; [2008], p. 1020); and in both cases the court accepted that the donor's asserted willingness to respect and to abide by restrictive conditions was genuine ([2006], p. 582; [2008], p. 1022). What differed between the two cases was the means by which the mother in question conceived. In *Re D* it was undisputed that the mother conceived through sexual intercourse with the donor and the court judged that the donor should have parental responsibility. In *Re B*, the method of conception was contested and ultimately unresolved. The mother insisted that it was by artificial means; the donor denied this, and the court ruled that the sperm donor should *not* be entitled to parental responsibility. The judgments' concern with the

method of conception and the incongruent decisions indicate the significant role that sex and sexuality can play in legal determinations regarding parenting and child welfare.

In both cases the sperm donor was the legal father, since under English law when a child is born to an unmarried woman who conceived – whether sexually or artificially – outside of a clinic regulated by the Human Fertilisation and Embryology Authority, paternity is determined biologically. Parental *responsibility*, by contrast, may be conferred independently of legal parenthood. It may be accorded to anyone (whether a biological parent, a carer, a relative or none of these) by a court under the Children Act 1989, according to its assessment of the child's 'best interests'. However, the best-interests test can include anything that the court decides is relevant to the child's welfare, including facts that the child may one day feel are important. These two cases did not treat the particular fact of the donor's legal paternity alike. In *Re D*, Black J makes it clear that she finds the question of legal paternity particularly relevant:

He is D's father. Rather technical terms such as 'sperm donor' which depersonalise him and minimise his standing in D's life are, in my view, unhelpful. I suspect that Ms A and Ms C's use of such a term is a feature of their anxiety about establishing the status of their family... I hope that the term will drop out of currency in this sort of context. ([2006], p. 570)

In that case, Black J did award both contact and parental responsibility to the man whose role she felt would be demeaned by the 'rather technical' label of 'sperm donor', albeit with corresponding restrictions on his parental rights in order to assuage the anxieties of the mother and co-parent about undue interference. Black J steered what she felt to be a middle path, asserting that it was important to recognise both 'the reality that Mr B is D's father' but also that 'D's home is with Ms A and Ms C [who are] her immediate family' (pp. 582, 583). In the judgment of *Re B*, by contrast (in which the mode of conception was not established and parental responsibility not conferred), we find no such emphasis on legal paternity. The closest that the judge in that case (Hedley J in this case) would come to acknowledging the status of the donor/biological father was to make the equivocal observation that there was 'no escape... [from]... some general consideration... of the continuing role (if any) of the biological progenitors, male or female, in the life of that child' ([2008], p. 1018), and also that the donor's 'unique biological position... commands attention' (p. 1023). Coming to the conclusion that there was no sufficient reason to accord the donor parental responsibility, Hedley J found instead that this would be 'a direct threat to [the mother and her partner's] autonomy as a family unit' and hence 'wholly contrary to the best interests of [the child]' (pp. 1022-1023). Although he did allow contact between the donor and the child, Hedley J was concerned that referring to the sperm donor as 'father' had 'contentious overtones', and ruled that rather than being allowed to misuse his allowed contact by 'seeking to advance his paternal status', the donor/biological father may only be referred to by his 'unadorned first name' (pp. 1021, 1024). This is a markedly different description of how the donor/biological father relates to the homonuclear family from that given by Black J.

We might use a reading of these differences of approach to draw out certain inferences about sex, sexuality and the supposed interests of young children. In English law, the judgment of a child's best interests as applied by the court is an objective one, taking all relevant matters into consideration, including any known wishes or feelings of the children themselves. However, in these cases there is no information about the children's own feelings, the means by which conception took place being the only discernible difference between them in terms of the facts. In *Re D*, in which the Court did grant parental responsibility, Black J directly addressed the fact of sexual conception as an issue for particular consideration. The judge stated that the 'act of conception generated feelings between the three adults that played a significant part in throwing the plan substantially off course at an early stage ...' ([2006], p. 557). In thinking about how significant this might have been for the decision, we should note that it was the mode of conception itself and not simply the breakdown of trust between the parties that gave rise to the trouble. By contrast, in *Re B*, in which parental responsibility was not conferred on the donor, the mode of conception was disputed and declared by Hedley J to be a private matter and of no relevance to the matter in question. In that case, the dispute between the lesbian family and the sperm donor was held to arise instead from the 'artificial or unconventional means of creating a family' ([2008], p. 1020). Unlike Black J's judgment in *Re D*, Hedley J in *Re B* found that the already existing sexual (lesbian) relationship that formed the basis of the family was quite sufficient to

provide for the child's parenting needs. Reading the different approaches to attributing parental responsibility here, then, we might infer that two lesbian parents are deemed to be sufficient to satisfy the 'best interests' of the child only when there is no evidence of an intervening heterosexuality.

It is not difficult to appreciate ways in which this association of sex and sexuality with children's parenting needs might be developed as a rhetorical strategy for the disputing parties themselves, and indeed this has been observed in other cases. In her critique of *Re Patrick (an application concerning contact)* (2002) (an Australian dispute between a lesbian couple and their known sperm donor over the latter's claim to access rights to the child), Deborah Dempsey notes that the lesbian family involved seemed to be arguing that *because* their child was conceived artificially, *therefore* the man who agreed to provide the sperm could be no more than a mere donor. The mother in that case testified that the biological father/donor 'showed little initiative in researching the practical, emotional and legal implications of his role as a donor' ([2002], para. [124]), and furthermore, that her son should not have a right to know his biological father/donor 'because he's got lesos for parents' ([2002], para [77]). For Dempsey (2004, pp. 94-95), what is being argued by the mother here is that the 'role' of the donor is something 'ascribed rather than subject to negotiation'. Dempsey criticises the mothers' logic in *Re Patrick* as reaffirming the essentialist assumption that to become a parent one must conceive through heterosexual intercourse. Although the substance of the litigation focused on untangling the intentions of the parties and forecasting the consequences of any decision for the child, the position of the mother and co-parent is underscored by an assumption that a conception that lacks heterosexual contact by definition negates the sperm donor's parenthood claim. In fact, although the judge Guest J did not accept that the artificiality of Patrick's conception ruled out a more significant role than that of mere donor (a decision criticised by Eekelaar [2006] as an unjust imposition on the homonuclear family), he ruled that Australian law debarred the donor from being recognised as a legal parent precisely for the reason of the artificial (rather than sexual) insemination (Australian Family Law Act 1975 s.60H; *Re Patrick* [2002], para. [285]-[385]).

Culture and Conjuality

While an analysis of three cases is not sufficient to base a strong empirical claim on about the connection between sexuality and parental responsibility in legal discourse, it does raise questions that are worthy of further exploration. Whether and when parental responsibility may be afforded to a gamete donor speaks to the issue of the boundaries of family, and in particular what boundaries are to be understood to close around the homonuclear family comprising two lesbian co-parents and their children. Despite the attested irrelevance of gender and sexuality by the courts in recent times (e.g. *Re B (a child) (residence order)* [2008] per Lord Kerr SCJ, para [35]), the extent to which differences in the modes of conception may lead to different assessments of where these boundaries might be drawn lends weight to critical commentaries that have argued that dominant cultural notions of family tend to assume a traditional sexual relationship as its basis. For example, Martha Fineman's critique of the 'sexual family' (i.e. the 'natural' presumption that family as built on a sexual relationship and 'ordained by divine prescription') positions the institutional character of sexuality as essentially *heterosexual*. This 'institutional' sexuality exerts a normative force on culture and society as a whole, which blunts possibilities for reinvigorating our 'concept of motherhood' (Fineman, 1995, p. 143). My own purpose here is to argue that the cultural significance of sexuality for parenting is broader than simply a hegemony of heterosexuality, and Fineman herself dismisses the legal embrace and practice of gay and lesbian marriage (e.g. in the Civil Partnerships Act 2004) as merely 'affirm[ing] the centrality of sexuality to the fundamental ordering of society' (p. 143). Legal reforms to the legal recognition of legal parenthood *status* (as opposed to parental responsibility) that accommodate gay and lesbian relationships can be shown to prioritise the 'sexual family' in other ways too. For example, the Human Fertilisation and Embryology Act 2008 extended to civil partners the right to be recognised as the second legal parent of a child born after HFE Authority-regulated fertility treatment that had previously been reserved for husbands (s. 35). This right of husbands had itself derived from the much earlier common law legitimacy presumption of *Pater est quem nuptiae demonstrant* within marriage (*Father is*

he whom the marriage vows indicate). The legislation of 2008 also maintains the existing prohibition (under the Marriage Act 1949) on two people who are incapable of a lawful sexual relationship from both being recognised as legal parents together. McCandless & Sheldon (2010) build on Fineman's scepticism to argue that the current law represents an 'assimilation to (and extension of) this marriage ideal' (p. 189) and shows that 'the sexual family model continues here to frame our understanding in so far as the couple at the heart of the family remains a sexual one' (p. 198).

Although Fineman's observation about the cultural priority of the sexual, conjugal family finds support amongst commentators such as McCandless & Sheldon, her pessimism about the consequences of this perspective is more readily contested. For example, Diduck (2003) argues that gay and lesbian families are better equipped to address and renegotiate power imbalances arising in the sexual relationship and 'create their identities outside the [gender] norm' (p. 30). Calhoun (1997) insists that the experience of sexism and patriarchal hegemony by women in heterosexual relationships should not deter lesbians – who have interests and desires separate from heterosexuals – from forming families. Meanwhile, Giddens (1992, pp. 2-3) finds great emancipatory potential in the 'pure' sexual relationship based on a commitment to equality, of which both heterosexuals and homosexuals are increasingly capable. Furthermore, children of both heterosexual and lesbian families may themselves have divergent perceptions of the relationship between modes of conception and the boundaries of the family (see Hill, 2005; Jamieson, 2005; Sweeting & Seaman, 2005). There is insufficient space here to fully work through the durability of Fineman's arguments in the light of these responses – to test them either as empirical claims or as an ethical or cultural theory about the dynamic of 'sexual' families. However, the broad thrust of Fineman's idea of the sexual family as an entity prioritised over alternative forms nevertheless makes for a useful frame of reference for an interdisciplinary perspective on legal and cultural questions about parenting and the boundaries of family life, which I now want to demonstrate.

Sexuality, Parenting and Family Boundaries in The Kids Are All Right

That sex and conjugality are central to our notions of family is arguably evidenced in popular cultural depictions. I propose to develop the line of thought pursued so far through an analysis of the film *The Kids Are All Right* (dir. Lisa Cholodenko, 2010). I focus on this film in particular because it purports to represent in a serious and convincing way (though not without humour) the experience of a lesbian family and their sperm donor. For this reason I find Cholodenko's film more useful for reflecting on cultural and legal norms than the more popular romantic comedies that deal with similar and related themes. The film depicts a middle-class Californian American family, at the head of which are two middle-aged, white, university-educated married lesbian women (Jules and Nic, played by Julianne Moore and Annette Bening, respectively), who have two teenage donor-conceived children, Joni (18) and Laser (15). The 'kids' are curious to discover the identity of (and meet) their sperm donor Paul (Mark Ruffalo), and after some discussion Paul is invited to meet the family. During their first meeting, Paul agrees to hire Jules to landscape his garden, during which the pair have a brief affair until it is discovered by Nic. Paul is then banished from the family to allow them to recover and redraw the boundaries around their homonuclear arrangement. Like other really interesting productions, *TKAAR* is a polysemic text that may elicit different responses and interpretations. Previous readings of this film have often tended to focus on the way it tackles familiar family themes such as the struggle to maintain a sexual relationship after twenty years of marriage, and relations between parents and their teenage children (see e.g. Halberstam, 2010; Tookey, 2010). I want to focus on a particular aspect of the film, however – namely, the coding of sexuality and sexual desire in relation to the idea of parenthood and how these codes impact on the 'boundaries' of the family. I argue here that the question of how porous or moveable these boundaries are is intimately connected to assumptions about sex and (as Fineman observed) the cultural hegemony of the idea of the 'sexual family'. Through this reading I demonstrate a conspicuous alliance between cultural and legal ideas about family and parenting roles.

In *TKAAR*, we can observe a correlation between two sets of relationships. On the one hand there are the relationships within the family – that is, the marriage of Nic and Jules and their relationships with their teenage kids Joni and Laser. On the other hand, there is the relationship between all of the family members and sperm donor Paul, who at first becomes increasingly part of

the family until he is finally and absolutely banished from it. What I want to emphasise in this reading is the sense in which, as in the legal judgments, an idea of 'natural' childhood is discursively presented as being compromised by the conspicuous lack of sexual conjugality between the lesbian parents, and how the role of heterosexual coupling, by intruding on the homonuclear family unit, reinvigorates it and refits it for parenthood. At the beginning of the film we meet Nic and Jules twenty years into their marriage, struggling to maintain a sex life that is far from hot – a theme common to a number of 'family crisis' films (the list is practically endless, but see e.g. *American Beauty* [dir. Sam Mendes, 1999]). When we see the couple in bed together early on, the sex is painfully unsexy, with Jules (under the bed sheets) trying unsuccessfully to stimulate Nic through cunnilingus, while the latter watches a gay male porn film. Cholodenko plays the scene as comedy, when the accidental de-muting of the sound of the porn film brings an abrupt and embarrassing end to the sex (see Halberstam, 2010). After that, there are brief glimpses of sexual intimacy between the couple, but these tend to show either a couple failing to connect or, once the affair between Jules and Paul has begun, a couple whose sex life is but a dim and distant echo of the much stronger heterosexual (and extra-marital) desire depicted. For example, there is a should-have-been-romantic episode involving Nic and Jules that is sandwiched between scenes involving, on the one hand, Paul giving quasi-fatherly advice to Laser and on the other, Paul and Jules sharing their first passionate stolen kiss. To a classical guitar soundtrack, Nic runs a hot bath for Jules. The expectation seems to be that the couple will share the bath, but this never happens because Nic takes a work-related telephone call, leaving Jules to soak by herself. Insofar as conjugality is depicted in the film, the focus is on the stalling of desire in middle age as opposed to the lesbian erotic ideal of mutual 'destruction' described in Jeanette Winterson's novel *Oranges Are Not the Only Fruit* (Winterson, 2001; see Waldby, 1995, p. 267).

In contrast to the stilted coupling between Jules and Nic, sperm donor Paul is presented as if he were a pagan fertility god who, by virtue of his much more energetic sexuality, exposes and exacerbates the lines of fissure both in the marital bond and in the parent-child relationships within the family. Paul's business is running a successful organic market-garden and restaurant (a handy metaphor for his own fecundity, to which we will return below), and we quickly learn that he is a man of considerable charisma and sex appeal for the women who come into contact with him. Paul first arrives at the homonuclear household in leafy suburban southern California on his classic BMW motorcycle, to the tune of a David Bowie soundtrack, where Jules and Nic treat him with a mixture of good-humoured hospitality, curiosity and a touch of middle-class condescension. Paul is unfazed by Nic and Jules' questioning and mild disapproval of some of his life choices and attitudes (in contrast to Nic and Jules, he is single, dropped out of college and describes himself as a 'doer' rather than an intellectual). He exudes natural self-assurance and laid-back charm, and everything he achieves with respect to developing relationships with the family members, as well as the relationships within the family that he affects, seems to stem from this fact. Such a reading of the characters takes as its point of reference critical literature in sociology and cultural theory that points to the traditional positioning of male heterosexuality as penetrating and naturally passionate, with femininity as soft and permeable (Waldby, 1995; Rich, 2007). In this respect I would place Cholodenko's film alongside a handful of previous treatments of the penetrability and impermanency of lesbian sexuality, notably *Chasing Amy* (dir. Kevin Smith, 1997), in which heterosexual Ben Affleck saves Joey Lauren Adams from a group of lesbian friends depicted as a coven of sexless, spiteful witches. Notably, as in *TKAAR*, the heterosexual relationship does not ultimately last, with the central female character returning to a lesbian relationship. Yet despite the tidy lesbian closure of such films, most of the narrative establishes how the boundaries of a lesbian family are movable or porous when challenged by a more dominant sexuality (i.e. *heterosexuality*), which is something that I earlier suggested may also be inferred from legal judgments on family disputes.

An important aspect of boundary-setting with respect to the family is the way in which *TKAAR* presents a binary relationship of opposition between nature and authority. Nic is the breadwinner and the rule-maker of the family, and the setter of boundaries, both for her partner Jules and for their children. By contrast, Paul is the rule-breaker who undermines Nic's authority by encouraging Joni to assert her independence from her parents (Joni only begins to use the expression 'I'm eighteen!' after this encouragement from Paul), taking her for a ride on his motorcycle (which Nic had expressly forbidden) and embarking on the affair with Jules. What Paul

effortlessly manages to do by his natural confidence and charm – namely, to excite the passion of Jules and to be an inspiration to the children – Nic struggles to do by setting boundaries. Nic as mother and partner reacts furiously to the realisation of Paul's influence on her partner and children, seeking to reinforce her position by asserting authority. Nic says of Paul, 'I feel like he's taking over my family', and directly to Paul, 'I need your suggestions [about parenting] like I need a dick up my ass!' Her efforts to enforce the external boundary of her family in this way are demonstrably vain and impotent: the scenes in which Nic delivers these remarks are both immediately followed by Jules and Paul engaging in energetic sex at his house, and immediately preceded by scenes in which Paul happily and naturally 'plays dad' with the kids.

It is not until Paul has been finally driven away (first by being rejected by Jules, who returns to the homonuclear family, and then by Nic, who shuts him out of the house, calling him a 'fucking interloper') that harmony is finally established. Crucially, it is by subtly affirming in the very final scenes that the kids themselves have decided that their real parents are Jules and Nic (and *not* Jules, Nic and Paul together) that the film reaches its happy ending for everyone except Paul. The time having come finally for Joni to leave home for university, Nic, Jules and Joni share an emotional three-way hug; then, in the car on the way home, Laser smiles approvingly as Jules and Nic clutch each other's hand. This positive affirmation by the children of the homonuclear relationship – brought closer (emotionally and by implication sexually) – allows for the boundaries of the family to close safely at last around the lesbian conjugal relationship. Of course, the family has been shaken up by the heterosexual affair, but the combination of Jules' rejection of Paul, Nic's forgiveness of Jules and the children's blessing on the reunion means that the impact of the heterosexual intrusion is ultimately a positive one, bringing the family to new life and intimacy. In these final scenes, the family begins to overcome its dysfunctions and becomes a truly *sexual* family in the sense of the nuclear ideal that Fineman (considered above) critiques. There are, as I have said, various ways to read the way Cholodenko presents the family and the meaning of Paul's disruptive influence for the marital and parenting relationships within it. However, my own view is that in the light of Fineman's critical comments, it is significant that the heterosexual donor who tried to 'play dad' and came close to breaking up the homonuclear family must be utterly excluded in order for the family to have a chance to re-establish itself, in terms of both lesbian conjugal relations and also the parent-child relationships.

Metaphors of Fertility and Sexuality and the Parent

We can develop this discussion about a relationship between sexuality and parenthood a little further by way of a close reading of one particular scene that takes place involving Jules and Paul shortly before beginning their affair. Jules and Paul stand in a bare garden, discussing ways of developing the space. Invited by Paul to say what she feels would be the best approach, Jules first states a preference for 'Aisiany, *minimal*, like rocks, kind of all *clean*', but then, after a moment's reflection, she rejects that and begins to enthuse about a multitude of flowers and plants: 'You know what, I'm not feeling minimal. I'm really liking "more is more", you know? Let's not try and tame this space, okay? Let's just let it be, like, lush, overgrown... *fecund*.'

Hitting on this word 'fecund' is important, and as the scene progresses it becomes clear that it signals that something more than a landscaping conversation is going on. There is a short silence; Paul smiles and repeats the word. Jules tries to help with a definition: 'Like fertile, yeah?' but Paul declares that he 'love[s] that word', only, 'you don't hear people use it very often'. Jules is embarrassed at this reminder that she is an 'intellectual' while Paul is a 'doer', but it soon becomes clear that the purpose of the scene is not simply to highlight differences in the two characters' education or vocabularies. In what at first seems like a sudden switch of conversation topic, Jules then remarks, 'I'm sorry – I keep seeing my kids' expressions in your face!' But of course there has in fact been no change of topic, because the conversation about the fecundity of the garden of Jules' imagination and the similarity between Paul and the kids are connected metaphorically. In the extended awkward silence that follows Jules' last remark, the viewer becomes acutely aware both of a building sexual chemistry, and of the metaphor being alluded to. The parallel we are invited to draw is not merely between this potentially fecund garden, Paul's own fecundity as sperm donor and his fecund heterosexuality to which Jules is becoming increasingly attracted. We are also

invited to connect these factors with the idea of a natural parent. The scene underlines the importance of nature, with the natural fecundity of the garden representing Jules' dawning awareness of her natural femininity and the status of Paul as the natural father of her kids. Like Black J in her assessment of the status of the donor/father in *Re D* quoted in the first part of this article, the film is asking us to think about Paul not 'merely' as a donor, but as a long-lost father to the kids he helped create. The ease with which Paul sexually attracts Jules may also be read alongside the ways in which he gets the children to begin to relate to him as a 'fatherly' figure. Not only is the lover/parent duality explicitly referred to by his friend/casual-sex partner and co-worker Tanya ('It was really cute seeing you in dad mode... [it] made me want to fuck you'), the scenes in which he bonds with Joni on his motorcycle and with Laser on the basketball court punctuate a swift progress that Paul and Jules make from strangers to lovers. The idea seems to be that 'natural' parents are adults for whom a sex life and child rearing are not separable notions, and that 'natural' childhood for the fruits of that sexual union follows.

By depicting Paul as becoming increasingly both attractive to Jules and also 'father-like' to the kids, *TKAAR* speaks to a deeply ingrained and dominant idea of the healthy family as presupposing a sexual relationship, and of the challenges of parenting going together with the challenges of conjugality. There are of course certain differences between the particular texts examined here that should be acknowledged. In *Re D* the fact of sexual conception strengthened the donor/genetic father's claim for parental responsibility; in the film the conception was artificial, but the subsequent sexual coupling of Jules with Paul served to strengthen retroactively his connection to the kids. However, these are not differences to negate our perception of a cultural overlap between *TKAAR* and the legal judgments considered above in the sense of sexual coupling serving as a signifier of natural parenting, and of the coupling between natural parents underlying a 'natural' childhood. This overlap has very deep roots, and the associations between fertility, sexuality and parenthood can be demonstrated in the historical development of Latin-derived languages. The word *fecund* that Jules uses in that important garden scene means 'fruitful' and comes from the Latin *fēcundus* (Barnhart, 2010). The base of this Latin word (*fē*) also eventually gave rise to the English word *feminine*. The reason *fē* can give us both fecundity and feminine is that *fē* itself means 'to suck' or 'suckle', and in time it has produced the language both of nurturing and of the giving of sexual pleasure. For example, in associating femininity with child rearing, the same base gives us *fetus* as well as the Latin *filius* and *filia* (son and daughter). Associating femininity with sexuality, it also gives us *fellatio* – a sexual act allied closely to a distinctly male pornographic imagination. Furthermore, the word 'fruition', with which our modern 'fecundity' is associated, itself originates not from the notion of bearing fruit (although it later evolved in this way thanks to a late-nineteenth-century mistaken association of 'fruition' with 'fruit'), but from the Latin *fruitionem*, meaning enjoyment, the base *frui* meaning to 'use' or 'enjoy' (Barnhart, 2010).

This etymological narrative of the association between fecundity, femininity and child rearing further illuminates our reading of attitudes about parenting arrangements and ideas about sex and sexuality. The implication of this narrative is that it is heterosexuality that is prioritised in language, with femininity being defined in relation to heterosexually delineated sexual and mothering roles. While the primary aim of this article is to trace the significance of sexuality more broadly than heterosexuality, to the extent that the historical development of language supports a view that there is a dominant sexual character to the cultural production of family, this is consistent with our discussion so far. There is a degree of agreement between a number of commentators that a heterosexual relationship between parents has traditionally tended to represent the normative basis for a family, in which fulfilment (enjoyment) comes through conjugal relations and consequent procreation (see Bradford & Sartwell, 1997, pp. 117-118; Calhoun, 1997, pp. 137-146; Roseneil, 2005; Rich, 2007). It is a representation of family built on a conjugal relationship that also creates 'others' whose parenting arrangements are at variance to this ideal, and whom sociological critics argue have traditionally been excluded from it (Calhoun, 1997; Collier, 1999, p. 39; O'Donnell, 1999, p. 87; Wright & Jagger, 1999, pp. 19-30; Boyf, 2007, p. 71). If these 'others' include lesbian families (as O'Donnell argues), then the presentation in *TKAAR* of a lesbian marriage and family as ordinary and unremarkable is a step in the right direction, and is perhaps a positive answer to Calhoun's call to resist the historical marginalisation of lesbians as 'familial outlaws' (1997, p. 137). However, the way in which the impact of 'donor dad' Paul on Nic and Jules' family is depicted suggests to me that, similarly to the lesbian mother in the Australian case of *Re Patrick*, Cholodenko ends up

affirming what radical feminists characterise as the myth of heterosexuality as the ‘presumed ... “sexual preference” of “most women”’ (Rich, 2007, pp. 210-213). Regarded in isolation, the intense passion of the sex scenes between Jules and Paul as compared with those between Jules and Nic might be explained simply by the novelty and excitement of embarking on an extra-marital experience. However, my own view is that, in the light of the legal and cultural discussion above, this distinction also reinforces the tradition of the sexual family. In this light we read Jules’ shouts of ‘Oh! Well! Hello!’ (having wrestled Paul’s penis from his gardening trousers), and the furious manner in which she has sex with this man in whose face she continually sees her children’s expressions, as speaking to our concerns. It is difficult (at least for this viewer) to avoid reading the scene as rehearsing traditional cultural associations between sexuality and the parent, and between motherhood and heterosexual pleasure.

Conclusion

This article began by highlighting a particular difference between two ‘best interests’ decisions made by the court on behalf of the young donor-conceived children of lesbian couples. Through an analysis of Lisa Cholodenko’s *The Kids Are All Right* I have tried to offer a critical response that examines the broad significance of sexuality for our notions of parenting and the continuing normative force of the ‘sexual family’. In the publicity interviews for the film, Julian Moore insisted that it had no ‘message’ or agenda; that it was simply a snapshot of modern family life. Presumably Moore intended by this comment to persuade conservative viewers, unused to their Hollywood films featuring a lesbian nuclear family drama, to recognise the struggles and strife depicted therein as their own. Certainly the film makes no particularly radical claims about lesbian experience of family or sexual life. However, as I have tried to show in this article, the film is valuable and instructive for interdisciplinary legal and cultural studies precisely because of the way it reflects the continuing significance of ‘sexual family’ values. Why should a natural (sexual) conception be treated by the courts as more naturally giving rise to a parental relationship than an artificial one? Likewise, why do we find it difficult to consider, say, three siblings as parents with the same degree of legitimacy as a heterosexual or a lesbian couple (McCandless & Sheldon, 2010, pp. 198-199)? Like many questions about legal arrangements that stem from deeply ingrained cultural beliefs and assumptions, we may feel that the answers are on the one hand intuitively obvious, but on the other hand frustratingly unexplainable.

Acknowledgements

Grateful thanks are due to the two anonymous reviewers, as well as to Ummni Khan, Alison Diduck, participants of the Law & Literature stream of the Socio-Legal Studies Association 2011 and its convenor Julia Shaw.

References

- Barnhart, R.K. (2010) *Chambers Dictionary of Etymology*. London: Chambers.
- Boyd, S.B. (2007) Gendering Legal Parenthood: bio-genetic ties, intentionality and responsibility, *Windsor Year Book of Access to Justice*, 25, 63-94.
- Bradford, J. & Sartwell, C. (1997) Addiction and Knowledge: epistemic disease and the hegemonic family, in H.L. Nelson (Ed.) *Feminism and Families*. New York and London: Routledge.
- Calhoun, C. (1997) Family Outlaws: rethinking the connections between feminism, lesbianism and the family, in H.L. Nelson (Ed.) *Feminism and Families*. New York and London: Routledge.
- Collier, R. (1999) Men, Heterosexuality and the Changing Family, in C. Wright & G. Jagger (Eds) *Changing Family Values*. Abingdon: Routledge.
- Dempsey, D. (2004) Donor, Father or Parent? Conceiving Paternity in the Australian Family Court, *International Journal of Law, Policy and the Family*, 18, 76-102. <http://dx.doi.org/10.1093/lawfam/18.1.76>
- Diduck, A. (2003) *Law’s Families - Law in Context*. London: Lexis Nexis UK.
- Diduck, A. (2007) ‘If only we can find the appropriate terms to use the issue will be solved’: law, identity and parenthood, *Child and Family Law Quarterly*, 19(4), 458.

- Eekelaar, J. (2006) *Family Law and Personal Life*. Oxford: Oxford University Press.
- Fineman, M.A. (1995) *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*. New York and London: Routledge.
- Giddens, A. (1992) *The Transformation of Intimacy: sexuality, love and eroticism in modern societies*. Stanford: Stanford University Press.
- Halberstam, J. (2010) The Kids Aren't Alright. Bully Bloggers, 15 July.
<http://bullybloggers.wordpress.com/2010/07/15/the-kids-arent-alright/>
- Hill, M. (2005) Children's Boundaries: within and beyond families, in S. Cunninham-Burley & L. McKie (Eds) *Families in Society: boundaries and relationships*. Bristol: Polity Press.
- Jamieson, L. (2005) Boundaries of Intimacy, in S. Cunninham-Burley & L. McKie (Eds) *Families in Society: boundaries and relationships*. Bristol: Polity Press.
- Kelly, F. (2008-09) (Re)forming Parenthood: the assignment of legal parentage within planned lesbian families, *Ottawa Law Review*, 40, 185-223.
- Khan, U. (2009) Putting a Dominatrix in Her Place: the representation and regulation of female dom/ male sub sexuality, *Canadian Journal of Women and the Law*, 21(1), 143-175.
<http://dx.doi.org/10.3138/cjwl.21.1.143>
- Lind, C. & Hewitt, T. (2009) Law and the Complexities of Parenting: parental status and parental function, *Journal of Social Welfare & Family Law*, 31(4), 391-406. <http://dx.doi.org/10.1080/09649060903430249>
- McCandless, J. & Sheldon, S. (2010) The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form, *Modern Law Review*, 73(2), 175-207.
<http://dx.doi.org/10.1111/j.1468-2230.2010.00790.x>
- Millbank, J. (2008) The Limits of Functional Family: lesbian mother litigation in the era of the eternal biological family, *Internal Journal of Law, Policy and the Family*, 22(2), 149.
<http://dx.doi.org/10.1093/lawfam/ebn001>
- O'Donnell, K. (1999) Lesbian and Gay Families, in C. Wright & G. Jagger (Eds) *Changing Family Values*. Abingdon: Routledge.
- Polikoff, N. (2000-01) Breaking the Link between Biology and Parental Rights in Planned Lesbian Families: when semen donors are not fathers, *Georgetown Journal of Gender and Law*, 2, 57-90.
- Rich, A. (2007) Compulsory Heterosexuality and Lesbian Existence (1982/1986), in R. Parker & P. Aggleton (Eds) *Culture, Society and Sexuality: a reader*. London and New York: Routledge.
- Rosenil, S. (2005) Living and Loving Beyond the Boundaries of the Heteronorm: personal relationships in the twenty-first century, in S. Cunningham-Burley & L. McKie (Eds) *Families in Society: boundaries and relationships*. Bristol: Polity.
- Sheldon, S. (2005) Fragmenting Fatherhood: the regulation of reproductive technologies, *Modern Law Review*, 68(4) 523-553. <http://dx.doi.org/10.1111/j.1468-2230.2005.00550.x>
- Sweeting H. & Seaman, P. (2005) Families Within and Beyond the Household Boundary: children's constructions of who they live with, in S. Cunninham-Burley & L. McKie (Eds) *Families in Society: boundaries and relationships*. Bristol: Polity Press.
- Tooke, C. (2010) Mum's Word: The Kids Are All Right is a VERY moral comedy about family values, *Daily Mail*, 29 October. <http://www.dailymail.co.uk/tvshowbiz/reviews/article-1324644/>
- Waldby, C. (1995) Destruction: boundary erotics and refigurations of the heterosexual male body, in E. Grosz & E. Probyn (Eds) *Sexy Bodies: the strange carnalities of feminism*. London & New York: Routledge.
- Winterson, J. (2001) *Oranges Are Not the Only Fruit*. London and New York: Vintage.
- Wright, C. & Jagger, G. (Eds) (1999) *Changing Family Values*. Abingdon: Routledge.

Films

- American Beauty* (dir. Sam Mendes, 1999). USA: Dreamworks SKD.
- Chasing Amy* (dir. Kevin Smith, 1997). USA: Too Askew Prod. Inc.
- The Kids Are All Right* (dir. Lisa Cholodenko, 2010). USA: Focus Features.

Legal Sources

Re B (a child) (residence order) (2008) EWCA Civ 867

Re B (role of biological father) (2008) 1 FLR 1015

Re D (contact and parental responsibility: lesbian mothers and known father) (2006) 1 FCR 556

Re Patrick (an application concerning contact) (2002) 28 Fam LR 579

Civil Partnerships Act 2004

Human Fertilisation and Embryology Acts 1990 and 2008

Marriage Act 1949

DAVID GURNHAM is currently Lecturer in Healthcare Ethics and Law in the School of Law, at the University of Manchester, United Kingdom (until September 1 2012, when he takes up a new position as Reader in Law at the University of Southampton). David is Assistant Editor of the journal *Contemporary Issues in Law* (since May 2011), and also a member of the international editorial board of the *International Journal of Law in Context* (January 2012 - December 2014). His second monograph *Justice as Purification: infections of criminal law* (Routledge) is due to appear in 2014. Recent published articles include 'Bioethics as Science-Fiction: making sense of Habermas's *The Future of Human Nature*' in the *Cambridge Quarterly of Healthcare Ethics* (April 2012, forthcoming), and 'Plato's Fertility Clinic: status and identity rhetoric in parenthood disputes', in M. Freeman & F. Smith (Eds) *Law and Language, Current Legal Issues Vol. 15* (Oxford University Press, forthcoming 2012). His first research monograph was *Memory, Imagination, Justice: intersections of law and literature* (Ashgate, 2009). *Correspondence:* David Gurnham, Lecturer in Healthcare Law and Ethics, Centre for Social Ethics and Policy, School of Law, University of Manchester, Oxford Road, Manchester M13 9PL, United Kingdom (david.gurnham@manchester.ac.uk).