Davis, L. (2020). Deconstructing tradition: Trans reproduction and the need to reform birth registration in England and Wales. *International Journal of Transgender Health*, 22(1-2), 179-190.
<https://doi.org/10.1080/26895269.2020.1838394>

Peer reviewed version

Link to published version (if available):
[10.1080/26895269.2020.1838394](https://doi.org/10.1080/26895269.2020.1838394)

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Routledge at <https://doi.org/10.1080/26895269.2020.1838394>. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Davis, L. (Accepted/In press). Deconstructing tradition: Trans reproduction and the need to reform birth registration in England and Wales. *International Journal of Transgender Health*.
<https://doi.org/10.1080/26895269.2020.1838394>

Peer reviewed version

Link to published version (if available):
<https://doi.org/10.1080/26895269.2020.1838394>

[Link to publication record in Explore Bristol Research](#)
PDF-document

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/pure/user-guides/explore-bristol-research/ebr-terms/>

**Deconstructing Tradition: Trans Reproduction and the Need to Reform Birth
Registration in England and Wales**

Liam Davis, PhD student, University of Bristol Law School, 8-10 Berkeley Square, Bristol,
BS8 1HH, UK. Email: liam.davis@bristol.ac.uk. Phone: 01179545357. Twitter:
@LiamJamesDavis. ORCID: 0000-0002-9601-6044.

Abstract

Background: Trans reproduction is often met with reproach when compared with the norm of the cisgender, heterosexual, nuclear family (referred to here as the ‘traditional’ family). This is notably seen in birth registration where a ‘traditional’ family is more likely to access, and agree with, the terms provided on the birth certificate (that is, ‘mother’ and ‘father’).

Aims: This study aimed to explore the differential treatment between ‘traditional’ and trans families in England and Wales within birth registration in case law, legislation, and primary research.

Methods: Case law and legislation were analysed to identify any differential treatment within birth registration, particularly how parental statuses are ascribed. An online survey (with 310 responses) was conducted, seeking views on constructions of ‘mothers’, respondents’ reactions to trans families, and understandings of sex/gender and parenthood generally.

Results: Themes developed from the survey data focused on the significance of the ‘traditional’ family as the optimal structure, manifesting in the need to ensure ‘coherency and certainty’ of the birth registration system regarding how parents should be registered. This need for coherency and certainty functioned to undermine trans families (who were presumed to be discreet about their child’s conception), and also raised concerns that the child might not be able to locate their (biogenetic) ‘origins’.

Discussion: The paper concludes by discussing the implications of the research for the acceptance of trans families in law and society, and suggests the need to unmoor the birth registration system from its (cis-hetero)normative underpinnings, allowing trans parents to be registered as they wish on the birth certificate.

Keywords: transgender; reproduction; birth certificates; birth registration; family law.

Introduction

Transgender ('trans') reproduction is disproportionately policed in law, specifically in terms of cases where trans parents are not able to have their own sex/gender or parenting role correctly recorded on their child's birth certificate. This limitation placed upon trans parents is a product of hegemonic ideas of family life as dictated by the 'traditional' standard.

Inspired by Fineman (1995), the 'traditional' family is the cisgender ('cis'), heterosexual, nuclear family (which usually procreates via sexual intercourse). Legal parenthood is currently tethered to binary (male/female) and cis-heteronormative understandings of what makes a 'mother', 'father', and 'family' (McCandless & Sheldon, 2010). Such understandings adopt what Sharpe (2002) calls a '(bio)logic', whereby the sex assigned at birth is treated as paramount.

Birth certificates in England and Wales have not seen much reform since their inception in the 1800s (McCandless, 2017; Higgs, 2018). They do now, however, enable two women to be registered on the birth certificate from the outset, but in two distinct roles. There can only ever be one mother (the person who gives birth - but this person may not (legally) be a woman), while the second woman is termed a 'second female parent'. Taken at face value, this seemingly widens parental recognition, but birth registration is still gendered as two men are unable to be initially registered on the birth certificate, and court intervention is required. In general, however, it is not entirely clear what the birth certificate is supposed to represent, or indeed what it should represent. Some presume its function is to document the child's biogenetic family (Bainham, 2008), but changes in family formations - given legal credence through the Human Fertilisation and Embryology Act 2008 ('HFEA 2008') - mean this is not always the case. Historically, the birth certificate was used to confer inheritance and succession rights and has only recently become subsumed within discussions surrounding the

child's welfare, incorporating the right to know their 'origins' and wider identity concerns (Higgs, 2018).

Accordingly, there is much to be said about the role of birth certificates in reflecting identity and social reality generally, and the impact reforming the birth registration system could have on such understandings. To demonstrate the incoherency and uncertainty the law perpetuates by relying on gendered language within birth registration, this paper first, briefly, considers recent case law and legislation concerning trans parents and birth registration. The cases are *R (JK) v. The Registrar General for England and Wales* (2015) EWHC 990 (Admin), involving a trans woman wanting to be registered as her child's 'parent' or 'father/parent' on the birth certificate ('*JK*'), and *R (Alfred McConnell) v. The Registrar General for England and Wales* (2020) EWCA Civ 559, involving a trans man who gave birth and wanted to be registered as his child's 'father' or 'parent' on the birth certificate ('*McConnell*'). Reference will also be made to an earlier High Court judgment known as *Re TT and YY* (2019) EWHC 2384 (Fam) (collectively, 'the *McConnell* judgments'). The trans parents in these cases were ultimately unsuccessful in their attempts to change the birth registration system, despite the judgments recognising interferences with their human rights. Nevertheless, the judgments epitomise how the law is wedded to, and assimilates trans parents into, cis-heteronormative ideals of 'family' (like the construction of 'male mothers' in the *McConnell* judgments), even if trans people have received, under the Gender Recognition Act 2004 ('GRA 2004'), legal recognition of their self-identified sex/gender (called "acquired" sex/gender in legislation: section 1, GRA 2004).

After considering the case law and legislation, this paper outlines findings from an online survey which focused on constructions of what makes a 'mother', if indeed respondents thought there was a 'mother', in various scenarios, and attempted to show the nuances present within trans families (which may be found in other 'modern' families - that

is, families deviating from the ‘traditional’ ideal). ‘Mother’ status was focused on as this is the only parental status which is ascribed automatically and irrefutably (due to giving birth). Various scenarios involving trans parents (and other types of ‘family’) were presented to respondents, aiming to test reactions to trans parents, and also to elicit what dominant social understandings of family life arose and how this can either help or hinder the acceptance of trans families in law and society. Overall, the research demonstrated the need for reform of how we currently conceptualise ‘family’, parenthood, and sex/gender if trans families are to be truly liberated from rigid gender norms. Finally, this paper discusses the main overarching theme of the case law, legislation, and primary research: the need for ‘coherency and certainty’ of the birth registration system in terms of how parents are registered and how this inherently undermines trans families, illustrating the need for reform.

Case law and legislation

There is a clear tension between trans people’s identity and their recognition in law regarding parenthood (White, 2018). This tension relates to an understanding of ‘official identity’ as distinct from identity generally - the former being a specific part of the latter (Ryan, 2020). ‘Official’ identity refers to the ways law categorically understands one’s identity, for example on birth certificates, meaning if trans people have not received a Gender Recognition Certificate (‘GRC’) under the GRA 2004, which legally recognises a trans person as their self-identified sex/gender, then they cannot receive an amended birth certificate.

The GRA 2004 is intrinsically regressive for a plethora of reasons, but especially so for the purposes of this paper because: i) it reverts trans people to what the law says they are, using (bio)logic, when determining parenthood, and ii) it only caters for binary sex/gender, meaning non-binary people are unable to receive legal acknowledgement of being non-binary. Owing to the latter, the analysis in this paper mostly focuses on trans

parents with a binary sex/gender, although reference will be made to non-binary parents where appropriate.

Section 9(1) of the GRA 2004 states, where a GRC has been issued, the person's "acquired" gender becomes their "acquired" sex "for all purposes", but subsection (3) states how this is subject to other sections or legislation. Section 12 of the GRA 2004 is supposedly one example, stating that a person's self-identified sex/gender "does not affect the status of the person as the father or mother of a child" which is tethered to the sex assigned at birth and the associated gendered language. This seemingly contradictory stance was most recently challenged in *McConnell*, discussed in more detail below.

In terms of birth registration, following the Births and Deaths Registration Act 1953 ('BDRA 1953') and The Registration of Births and Deaths Regulations 1987, every live birth in England and Wales *must* include details of the 'mother' and, *if relevant*, the 'father/parent'. The mother largely informs the status of others and is likely why the law places such emphasis on identifying a 'mother' (the person who gives birth - section 33(1), HFEA 2008). For example, mothers automatically acquire parental responsibility (section 2(2)(a), Children Act 1989) and, in a cis-heterosexual unmarried relationship, the mother has to consent to the father being registered on the birth certificate (section 4(1), Children Act 1989). Likewise, with assisted reproduction, the parties wanting to claim parental status are able to do so if the mother consents (sections 37 and 44, HFEA 2008). Even in surrogacy, the person who gives birth is initially registered as the mother and has to consent to a parental order to transfer legal parenthood to the intended parent(s) (sections 54 and 54A, HFEA 2008). This presumption of 'mother' status occurs despite going against the parties' intentions, and the fact it will, usually, be corrected via a court order (Horsey, 2010).

The Law Commission of England and Wales and the Scottish Law Commission are currently reviewing surrogacy laws, and the presumption in favour of the surrogate may

be reversed to favour the (intended) parents (providing specific criteria are met, under what they call the “new pathway” to parenthood (Law Commission of England and Wales & Scottish Law Commission, 2019)). The reversal of presumptions relates to a wider call by some for law to move to intention-based understandings of parenthood - that is, those who will care for, and actively initiate the creation of, the child should be recognised as legal parents from birth (Horsey, 2016). Such intention-based arguments can be transplanted to trans reproduction: trans men conceive mostly with the intention of becoming a father, as with trans women providing sperm intending to become a mother, and so they should be recognised accordingly on the birth certificate. Following this logic would be consonant with developments in marriage law which initially did not allow trans people to enter a valid marriage in their self-identified sex/gender, but which changed to correctly recognise trans people as the social role they will assume (McGuinness & Alghrani, 2008). Such developments emphasise the importance of a family’s social-factual reality being legitimated in law.

Despite the law’s perpetuation of (bio)logic preventing adequate birth registration for trans parents, which may be counter to the child’s best interests (the courts’ paramount concern under section 1(1) of the Children Act 1989), the social attributes of (trans) parenthood do not disappear. The importance that birth certificates reflect a family’s social reality was recognised in *Re TT and YY* as benefitting the child’s welfare, while research also illustrates that families with trans parents may sometimes struggle to maintain “family relationships conducive to positive child development” (Imrie et al., 2020, p. 3), especially because of the wider stigma faced by trans people. Therefore, any changes which could help foster more positive experiences for trans parents have to be welcomed as this will be in the child’s best interests. The European Court of Human Rights also sometimes references the importance of recognising a family’s ‘social reality’, as in *Goodwin v. UK* (2002)

(‘*Goodwin*’), which instigated the introduction of the GRA 2004, saying that discords between social reality and law for trans people is likely to result in “feelings of vulnerability, humiliation and anxiety” (para. 77). Therefore, when a trans family’s social reality is not adequately acknowledged, explored in *JK* and the *McConnell* judgments, below, trans families are met with a system which is “confused, unclear, and incapable of catering for their specific family needs” (Dunne, 2017, p. 569) which is clearly not in anyone’s best interests. Hence, the law should adopt the terms used by trans people, if the law is to continue using gendered language at all (Dunne, 2015; Imrie et al., 2020).

Discretion and (bio)logic

Judges consistently adopt a (bio)logic approach to determine the ‘true’ status of (trans) parents (Sharpe, 2002). In *JK*, counsel for JK highlighted that the birth certificate required a ‘father/parent’ to be registered. Counsel argued that registrars could exercise discretion and delete ‘father’, enabling trans women like JK to be registered as ‘parent’ (or, alternatively, leave ‘father/parent’ intact), which would somewhat deconstruct the emphasis placed on (re)producing (bio)logic to determine parental status. Hickinbottom J disagreed stating that, on a birth certificate, ‘father’ and ‘parent’ are mutually exclusive, and ‘parent’ is restricted to a ‘second female parent’ under section 43 of the HFEA 2008 (which ensures a child cannot have two ‘mothers’). Similar reasoning was adopted in the *McConnell* judgments, holding that McConnell is a ‘male mother’. ‘Mother’ is supposedly not *legally* gender-specific, but rather relates solely to the biological process of giving birth. Therefore, while it is accepted that men can give birth - meaning pregnancy is not restricted to cis women, and so ‘motherhood’ is not necessarily synonymous with ‘womanhood’ (even if most pregnancies are undertaken by cis women) - men who give birth must be termed ‘mothers’.

Identifying a ‘mother’ is (supposedly) important to maintain a coherent birth registration system and uphold the rights of third parties. Despite this, there is an undeniably gendered view of what a ‘mother’ is (seen in the survey results below), and so attributing that term to men is likely to be inappropriate. Simply stating ‘mother’ is gender-neutral, as the *McConnell* judgments seem to do, does not make it so. As McGuinness and Alghrani (2008) state, by forcing definitions to stretch to assimilate modern families within the traditional ideal, as with ‘male mothers’ (*McConnell*) and ‘female fathers’ (*JK*), “we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations” (p. 279). Male pregnancy accordingly provides a unique opportunity to reconceive the idea that one’s sex/gender is determined by physiology; that pregnancy is solely reserved for (cis) women; and, that mother/father status aligns neatly with one’s identification as female/male (Karaian, 2013).

(Re-)Registering births according to a parents’ self-identified label would also be symbolic and simultaneously legitimise a family’s social-factual presentation (Dunne, 2015). While, in *JK*, Hickinbottom J seemed concerned that re-registration would remould the children’s identities without their knowledge or consent, it is debatable how much an impact this would have (the same applies to the *McConnell* judgments). Indeed, by not adequately registering a family on the birth certificate, the law is refusing to acknowledge the family’s social-factual reality. While there may be some hesitancy to updating/changing one’s birth certificate, as it could be seen as changing the ‘natural order’ of things (Currah & Moore, 2009), there is something to be said about the legal requirement for a child’s birth to be re-registered if the parents were not married at the time of birth (section 9, Legitimacy Act 1976). A common consequence of this re-registration would be a change of surname for the child, so one has to question whether this would have any more of a detrimental impact on the child than allowing a trans parent to be registered with their (non-)gendered pronouns.

Both concern a remoulding of the child's identity to an extent, so it is dubious why one is a legal requirement and the other is expressly legally disallowed.

By adhering to (bio)logical notions of what constitutes a 'mother' and 'father', then, JK and McConnell were not only remitted back to their sex assigned at birth, but were rendered betwixt both. In *Goodwin*, it was stated that the "unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable" (para. 90). The 'intermediate zone' for trans parents is the fact that trans people (who have a GRC) are legally recognised as their self-identified sex/gender (section 9, GRA 2004), but they are registered on the birth certificate using (bio)logic (section 12, GRA 2004). Crucially, the importance placed on a GRC should not be construed as implying that trans people need a GRC to receive correct legal recognition. Since the GRA 2004 came into force, only around 5,000 people have received a GRC (Government Equalities Office, 2018), meaning making trans parental statuses contingent upon a GRC would leave the vast majority unprotected. Also, despite *Goodwin* restricting its message to "post-operative transsexuals", the GRA 2004 went further in not (explicitly) requiring surgery to acquire legal recognition, so, presumably, the 'intermediate zone' applies to every trans person. This position would be cognisant with section 7 of the Equality Act 2010 and the protected characteristic of gender reassignment which protects those "proposing to undergo, is undergoing or has undergone" gender reassignment, and so trans parents should be able to self-identify their parental status on the birth certificate.

A reason why the law may prevent self-identification of parental statuses for trans parents is because, like cis parents, their reproduction is tethered to gendered terms because it *can* be achieved through sexual intercourse. Parents through other means - like adoption or surrogacy - are ultimately left with a birth certificate stating them as a 'parent', that is, with no gendered terms. While adoption and surrogacy are also *initially* tethered to (bio)logic (on

the initial birth certificate), they *cannot* be (legally) achieved without intervention of some kind, meaning the law ostracises some families which require legal intervention, particularly trans parents (Davis, 2019; McCandless & Sheldon, 2010). For example, if a trans couple attempted to register the birth according to the social role they will play, it may amount to an offence under section 4 of the Perjury Act 1911 (concerning “false statements” as to births and deaths).

Given the prioritisation of a certain type of ‘family’, it is important to interrogate the concept of ‘naturalness’ perpetuated by law which is seen both subtly through the emphasis placed on cis-heteronormative constructions of the ‘family’ and trans families’ assimilation into such norms, or more overtly by referring to “natural” parents in case law and legislation (*Re G* (2006) UKHL 43, para. 33; section 41, BDRA 1953). The language associated with such concepts (‘normal’, ‘traditional’, ‘real (mother/father/parent)’, and so forth) is inevitably used by society. But, because the language is dictated by, and benefits, the (cis-heterosexual) majority, what is ‘natural’ for them becomes the golden standard to which others should aspire (Fineman, 1995). A key component to de-naturalising the privilege placed on the ‘traditional’ family must include deconstructing the language used to describe it, which marginalises modern families generally, although there is a vastly limited vocabulary with which to describe modern families (Diduck, 2007; Soloman, 2017).

Generally, it is peculiar how much emphasis is placed on the birth certificate as a record of one’s identity as it expressly says it is not to be used as evidence of identification by itself. As such, it is debatable why the birth certificate has become so entrenched with concerns about the child’s welfare and their ‘origins’ in recent years, and whether these concerns should remain as this was not a primary concern when birth registration was first initiated (Higgs, 2018). This paper now analyses some primary research, the results and

analysis of which aim to elucidate why such emphasis is placed on ‘mothers’, and how trans families are perceived generally.

Method

Ethics and Study Design

Ethically approved primary research, by way of an online survey (helpful in eliciting attitudinal information (McIntyre, 1999)), was conducted into family structures which deviated from the ‘traditional’ ideal, and which sought to ascertain who the ‘mother’ was, if anyone, in various scenarios. The research aimed to ascertain respondents’ reason(s) as to why they identified someone as a ‘mother’ or not, and how this relates to the wider prioritisation - or decline - of the ‘traditional’ family, and its impact on the acceptance of modern families generally. The analysis below, however, is restricted to trans parents, although reference is made to other (cis) scenarios to make comparisons. The survey was operated via SurveyMonkey between Thursday 25 April 2019 to Thursday 23 May 2019 and was responded to by 310 people. It was disseminated primarily through social media and was open to anyone, anywhere, aged 16 years or older.

Materials

An introductory page detailed the relevant (legal) information needed to make an informed view to participate and give an educated response, which had to be read and signed to indicate informed consent, before accessing the questions. Responses were anonymous, but respondents were asked to input a unique identifier to be used if they wanted to withdraw from the study before the deadline. There were 19 questions in total, the first four of which dealt with demographics (below). The remaining 15 were all closed-ended, the majority of which ended with “Who should be viewed as the mother?”. In these questions, respondents

could choose one answer from a range of possible answers, or respondents could choose either ‘unsure’/‘other’, upon which they were required to expand on their views (meaning it was not possible to ascertain the reasoning of those who gave a definitive answer). Other questions either asked respondents to rank their answer on a Likert scale (see results for details), or simply required a ‘yes’, ‘no’, or ‘other/unsure’ response.

Analytic Approach

Thematic analysis, as outlined by Braun & Clarke (2006), was used to analyse and categorise the data to identify patterned responses. The data was then extracted into a single file and the written responses were read once, noting any common themes, before re-reading with those themes in mind looking for supportive examples. As such, the themes expressed below are not intended to be exhaustive, and, the results are inevitably informed by a constructionist theoretical lens meaning the interpretation(s) below are but one possible interpretation (Braun & Clarke, 2006).

The findings must also be put into context of the fact that they are not intended to be representative of the entire population - a common limitation with surveys as a research method (Salant & Dillman, 1994) - especially as the majority of respondents came from the United Kingdom (‘UK’). Also, because the survey was shared via social media, and by others with similar views, it is possible that the survey attracted particular demographics with similar opinions.

Results

Participants

Of the 310 who responded, 81.94% were female; 16.77% were male; and 1.29% were non-binary. The most common age range was 16-24, comprising 58.06% of the sample. Those

aged 25-34 constituted 15.48% of the sample; those aged 35-44 constituted 14.19%; those aged 45-60 constituted 11.94%; and those aged over 60 constituted 0.32%.

Respondents were asked to select the country in which they “permanently live”. The most common was the UK, constituting 89.35% of the responses, followed by the USA with 1.94%. Germany and Ireland constituted 0.97% each; while Canada, Cyprus, Mauritius and Norway constituted 0.65% each. The following countries constituted 0.32% each: Austria, Australia, Belgium, Bulgaria, China, Curacao, Denmark, France, Italy, Japan, Kenya, Pakistan and Uganda.

Quantitative responses

Attitudes toward trans parents

Q5 concerned a single trans man, Raymond, who had not undergone any surgery. Raymond was in receipt of a GRC and used anonymous donor sperm to become pregnant and give birth. Of the 310 respondents, 46.45% said there was no mother; 43.55% said Raymond was the mother; and 10% said ‘other’.

Respondents’ answers did not change significantly in Q6 when Raymond was represented as in a relationship with a partner, Titus. Respondents were then asked, in Q7, whether their answer(s) would change if Raymond was not in receipt of a GRC. The majority, 72.26%, said it would not change their answer; 21.94% said it would; and 5.81% were unsure. In Q8, respondents were asked if their answer(s) would change if Raymond gave birth as a woman, but subsequently transitioned (legally under the GRA) to male. Just over half of respondents, 57.74%, said there was no mother; 28.71% said there was; and 13.55% were unsure.

In Qs 5 and 6, the results were fairly evenly-split, although the results slightly favoured there being no 'mother'. Respondents sometimes emphasised cis-heteronormative ideals, meaning they assimilated trans families within the 'traditional' norm rather than acknowledging and embracing a trans family's structure. This presumption of cis-heteronormativity becomes especially stark when considering the results of Q12 which concerned a cis-heterosexual couple (Jake and Amy) who used surrogacy. The presumption that Amy was the 'mother' was the second highest across all answers (78.39%), despite Amy not giving birth herself. This is presumably because Amy is one half of the paradigmatic family upon which the law is based, meaning society will largely see her as the 'mother' (with which the law disagrees due to not giving birth - she would legally be a 'parent' on a parental order following surrogacy) and Jake as the 'father' (which the law endorses through the common law presumption of legitimacy, but, again, technically 'parent' on the parental order). The highest percentage of 'mother' status (79.35%) was given to both women in a lesbian couple (Q9), but this is arguably because they were both women - even if one is not legally the mother due to not giving birth, society will largely deem them both 'mothers'. It is important to consider here the responses to Q18 which asked whether a man could be a 'mother'. The majority, 47.10%, said 'no'; 30.65% said 'yes'; and 22.26% were 'unsure'. Within the 69 'unsure' answers, some said a man could be a 'mother' if they identified as such (but questioned why a man would want to be a 'mother'), while others made definitive connections between being a woman/female and being a 'mother'. Hence, 'mother' is clearly a highly gendered term, illustrating that 'male mothers', following the *McConnell* judgments, is a poorly constructed legal fallacy likely to be unwanted by many trans men, and was created to obstruct full legal/social validation.

Qualities of 'mothers' and views on gender-neutral language

These questions were more generalised. Q17 asked respondents to rank from 1 (*most important*) to 4 (*least important*) the qualities they saw as being most important to 'mother'. The options were: genetic link; gestation/childbirth; psychological connection and caring/child-rearing; and intention to create the child. The highest (and therefore most important) factor with an average score of 3.49 was the psychological connection/care-giver role; second was one's intention with 2.32; third was a genetic link with 2.15; and fourth was gestation with 2.04.

Clearly, a psychological connection is most important when qualifying 'mother' characteristics. The relatively less importance placed on gestation may support arguments that 'mother' status should not be ascribed automatically following birth - unlike the *McConnell* judgments - especially as some who give birth may also not have the requisite 'psychological connection' of a 'mother'. For example, many trans men's constructions of pregnancy is contingent on viewing themselves as fathers (Charter et al., 2018), like seeing childbirth as being "born into fatherhood" (Light et al., 2014, p. 1123).

Finally, Q19 explored whether law should default gender-neutral language in describing parents and families. The majority, 61.94%, agreed; 30.65% disagreed; and 7.42% were unsure.

Qualitative responses

Gender-neutral language and symbolic erasure

One respondent noted that gender-neutral language should only be an option to, essentially, families that are not cis-heterosexual. However, this would present another kind of 'othering' of modern families, while ignoring how some cis-heterosexual couples may prefer to be a 'parent' as opposed to a mother/father. Indeed, gender-neutral language is already the default

in jurisdictions such as Malta and Ontario. Another respondent said that defaulting gender-neutral language could raise similar issues as having mother/father in that it would create the issue of how to define ‘parent’; hence, all possible terms should be adequately defined. This, coupled with the criticism of gender-neutral language potentially symbolically erasing (white, cis) women from discussions surrounding reproductive justice (Strangio, 2016; Olufemi, 2020), does highlight some justified concerns. However, if law and society move to intention-based understandings of parenthood (as explained above), it becomes clear that definitions are not the problem per se; it is how they are interpreted and actioned (Horsey, 2010).

Different labels of ‘mother’

Distinctions were sometimes made between different types of ‘mother’. This ranged from simply “mother”, but also extended to “surrogate mother” (three times), “adoptive mother” (five times), “birth mother” (eight times), and “biological mother” (18 times).

In keeping with the prioritisation of the ‘traditional’ family, in Raymond’s scenarios, some respondents introduced the term “birth parent” to describe Raymond’s relationship with his child. Most said the terminology used should be based on Raymond’s preference, but the fact ‘birth father’ or simply ‘father’ was not used is perhaps indicative of a reluctance to depart from cis-heteronormative understandings of parenthood, as also seen in case law and legislation, shrouded in a veneer to protect the status quo. Previous research indicates that trans men use words such as “dad”, “carrier” and “gestational parent” to negotiate their identity and describe their parenting role (Light et al., 2014, p. 1123), supporting those who gave similar responses, but again this does little to challenge underlying hegemonic constructions of parenthood. In contrast, when considering Amy in Q12, one respondent said they would view Amy as the mother “completely”, but that Lynette (the surrogate) is the “biological mum”, although, if needed, they would choose Amy in

recognition of “doing” parenthood. For many, the performance of parenthood, and the label(s) used by the person concerned, were determinative of who was ascribed ‘mother’ status.

Discussion

This paper has explored the differential treatment between ‘traditional’ and trans families throughout case law, legislation, and primary research. It reaffirms some previous research, like pregnancy as “feminine” being only a “social mandate” (Ryan, 2013, p. 125), and the idea that trans men who give birth are viewed as “part-man” (Lind, 1997, p. 408), all of which prioritise a certain portrayal of family life (McCandless & Sheldon, 2010).

Findings from other studies, in conjunction with this paper, allow for the inference that more inclusive birth registration practices (such as trans parents registering in accordance with their social role) will have a positive impact on trans people’s constructions of their identity (Charter et al., 2018) and will be in the child’s best interests (Dunne, 2015; Imrie et al., 2020). The overarching reason for the differential treatment between ‘traditional’ and trans families was the need for ‘coherency and certainty’ when registering a child’s birth, explored below.

Coherency and certainty

The most common rationale underlying case law, legislation, and primary research as to why trans men should be registered as the ‘mother’ is a desire for coherency and certainty within the birth registration system, and how this relates to ensuring a child can uncover their (biogenetic) ‘origins’. Various respondents to the survey highlighted the need for records surrounding the birth to be kept for ‘official’ purposes, addressed in more detail below. Nevertheless, it is important to question why the inevitable consequence of ‘non-normative’

reproduction is interrogation of the child's parents. If interrogation of trans families stems from a concern that the child may lose sight of their biogenetic lineage, this may be a warranted concern, but it does not follow that trans parents should lose their autonomy in deciding how, and whether, to approach the topic of disclosure.

Research suggests a clear trend toward parental disclosure in the context of assisted reproductive technology, although some factors, such as lacking a biogenetic link, could result in the child not being told despite the parents intending otherwise (Tallandini et al., 2016). This research did not include trans parents, but there is nothing to suggest that trans parents would not be transparent about their child's birth and/or their gender identity, especially as children with trans parents report positive relationships and good psychological adjustment (Imrie et al., 2020). A potential consequence of mandating that parents tell their children of their 'origins' is that the primacy of biogenetics is subtly reinforced in recognising claims to parenthood, which dictates how parents should be registered on the birth certificate. The subtle need by law and society for coherency and certainty thus undermines families outside the 'traditional' ideal. Hence, trans families continually struggle to be validated within structures heavily dominated by cis-heteronormativity, and this will continue until understandings of 'family' expand or until 'family' as we know it is abolished entirely (Lewis, 2019).

While the Court of Appeal in *McConnell* found Article 8 of the European Convention on Human Rights (the right to a private and family life) was engaged, it said that the interference was proportionate and justified because of the need to ensure a clear and coherent birth registration scheme, particularly one which documents the 'mother'. As Fenton-Glynn (2020) points out, however, neither of these justifications require use of the term 'mother', nor does the child's right to access their 'origins' provide such a mandate. The Court was clearly concerned that any changes to the birth registration system would prevent

children from locating their progenitors. However, this concern is unwarranted as registering the person who gives birth as a ‘father’ does not mean children lose sight of their biogenetic identity - it just means one parent is registered as they wish on the birth certificate. Framing the situation otherwise suggests that trans parents are inherently deceitful and will be dishonest about their child’s conception and birth. Similarly, the presumed dishonesty of trans people has been documented in other contexts, such as marriage (Renz, 2015), alongside the legal and ethical issues relating to gender identity ‘fraud’ and sexual intimacy (Sharpe, 2018).

More generally, on parental orders and adoption certificates, there is no designation for ‘mother’ and ‘father’ - only ‘parent’ - which could one way to reform the birth registration system (Fenton-Glynn, 2020). This idea was referenced in *McConnell*, but the Court of Appeal said it had no evidence “as to how other members of society would feel if they were no longer to be referred on their child’s birth certificate as a mother or a father but simply as ‘parent 1’ and ‘parent 2’” (para. 81). The Government argued (in the *McConnell* judgments and *JK*) that the birth certificate is different from a parental order or adoption certificate because the birth certificate is supposedly designed to capture a single event - birth - while parental orders and adoption certificates are designed to ‘update’ parenthood by overlaying the original birth certificate. Even if the birth certificate was designed solely to capture births, this does not mean that gendered language is a prerequisite, nor that such language should be dictated by (bio)logic. Framing the birth certificate in this way still reflects a prioritisation for the ‘traditional’ family because such a family formation is likely the only one capable of meeting the criteria to be labelled a ‘mother’ and ‘father’ (and, crucially, agree with those terms), leaving other families to fall within legislative gaps and to be treated as second-class families. Hence, the reasoning in all three cases espouses a retention of the traditional family model (McCandless & Sheldon, 2010), to the detriment of

trans families, by expressing reservations at (cis-heterosexual) society having to be termed a 'parent', despite this being the reality for other families.

To combat arguments around coherency and certainty, the birth registration system should be reformed, but there are competing views on how this should be approached. Crawshaw et al. (2017) suggest that the current system be abolished, favouring instead a "certificate of legal parentage" which makes clear that the certificate only documents the legal parents, and that additional information about one's "genetic and/or gestational parentage" is available upon request (p. 3). This model, however, does not sufficiently engage with the normative underpinnings of the birth registration system, particularly how the importance of biogenetics - and, with it, a particular 'ideal' of family life - can be subtly reinforced (McCandless, 2017). Any reform must critically engage with the birth registration system's normative underpinnings, especially the language used to describe 'traditional' families, to address the damage it can cause to families deviating from the traditional ideal, rather than simply allow the damage to manifest in more subtle ways (which, under Crawshaw et al. (2017), would be the ability to easily apply for additional information). Such critiques should not be construed as wanting to bar children from accessing their 'origins' or progenitors, however, but a more nuanced and critical framework is required.

Limitations

Most responses to the survey are likely to have come from laypeople who had no prior knowledge of the law. However, this may not be entirely negative in that it allows one to see how laypeople construe the law and trans families. Some interesting semantic points were raised in talking about trans parents (such as choosing to refer to Raymond as a 'birth parent'), with which future research could look to explicitly engage, alongside the relatively

small vocabulary to describe modern families - both of which could further inform birth registration practices.

Conclusion

The persistence of, and assimilation into, cis-heteronormativity means trans families are met with an unworkable and regressive birth registration framework. This is most notably seen in acknowledging a child's 'mother', and the fact trans men who give birth, living the reality of ('modern') family life, are unlikely to identify with this label. Birth certificates are clearly a contentious area, and prioritising biogenetics and gendered terms on the birth certificate means that 'traditional' understandings of 'family' are reinforced, but, equally, not enabling a child's progenitors to be registered could lead to the child losing sight of their biogenetic lineage. In the case of trans men who give birth, however, this should not be as much of a concern (unless a donor egg was used), so the law's insistence that trans men be termed a 'mother' is a clear refusal to acknowledge the social reality of families outside the 'traditional' ideal. These competing interests can be balanced by reforming the birth registration system to make clearer what we expect from the birth certificate, which should be to document a family's social-factual reality. In doing this, we can begin to unmoor the birth registration system from its cis-heteronormative underpinnings, paving the way to inclusive birth registration practices.

There is also a prevailing fixation, endorsed through (bio)logic, of only one 'right' way to be a 'family' and 'parent' which manifests in the need to ensure coherency and certainty of the birth registration system. Case law, legislation, and the primary research illustrated that people think about 'family', parenthood, and sex/gender in ambiguous and multifaceted ways, and so law, society, and policy must invariably take account of such divergent views rather than cling to 'tradition'. Trans families, in any event, should be

recognised as per their social reality without having to jump through various legal hoops or societal interrogation, which would inevitably aid *all* families in combatting rigid norms about any ‘right’ way to exist. Allowing this would not only promote the existence and unwitting acceptance of trans families, which inherently includes the terminology to be used on the birth certificate, but would also harmonise the law surrounding birth registration with other areas (such as marriage law). Had the court in either *JK* or the *McConnell* judgments issued a declaration of incompatibility under section 4 of the Human Rights Act 1998, some much-needed headway may already have been made. In any event, it is clear that both Government and Parliament need to engage meaningfully with the injustice(s) arising from birth registration.

Acknowledgments

Thank you to the two anonymous reviewers for their constructive comments. Thanks also to the survey respondents, and to Peter Dunne, Kirsty Horsey, Julie McCandless, and Andrew Powell for your help and guidance.

Declaration of conflict of interest

No potential conflict of interest was reported by the author.

Ethics

The research was approved by Kent Law School Ethics Committee. All procedures performed were in accordance with the ethical standards of the institution and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards.

Funding

No funding was acquired.

References

- Bainham, A. (2008). What is the point of birth registration? *Child and Family Law Quarterly*, 20(4), 449-474.
- Births and Deaths Registration Act, 1 & 2 Eliz. 2 c. 20 (1953). (Eng. & W.).
<https://www.legislation.gov.uk/ukpga/Eliz2/1-2/20/contents>
- Braun, V., & Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology*, 3(2), 77-101.
- Charter, R., Ussher, J., Perz, J., & Robinson, K. (2018). The transgender parent: Experiences and constructions of pregnancy and parenthood for transgender men in Australia. *International Journal of Transgenderism*, 19, 64-77.
- Children Act, c. 41 (1989). (U.K.). <https://www.legislation.gov.uk/ukpga/1989/41/contents>
- Crawshaw, M., Blyth, E., & Feast, J. (2017). Can the UK's birth registration system better serve the interests of those born following collaborative assisted reproduction? *Reproductive BioMedicine & Society Online*, 4, 1-4.
- Currah P., & Moore, L. (2009). "We won't know who you are": contesting sex designations in New York City birth certificates. *Hypatia*, 24(3), 113-135.
- Davis, L. (2019, October 7). Re *TT and YY: when a "father" is a "mother"*. BioNews.
https://www.bionews.org.uk/page_145481
- 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), 458-480.
- Dunne, P. (2015). Recognising transgender parenthood on birth certificates: *R (JK) v Secretary of State for the Home Department*. *International Family Law*, 3, 230-235.

Dunne, P. (2017). Transgender sterilisation requirements in Europe. *Medical Law Review*, 25(4), 554-581.

Equality Act, c. 15 (2010). (U.K.) <http://www.legislation.gov.uk/ukpga/2010/15/contents>

Fenton-Glynn, C. (2020). Deconstructing parenthood: What makes a “mother”? *The Cambridge Law Journal*, 79, 34-37

Fineman, M. (1995). *The neutered mother, the sexual family, and other twentieth century tragedies*. Psychology Press.

Gender Recognition Act, c. 7 (2004). (U.K.)
<http://www.legislation.gov.uk/ukpga/2004/7/contents>

Goodwin v. UK, E.C.H.R. 588 (2002). (E.U.).
<https://www.bailii.org/eu/cases/ECHR/2002/588.html>

Government Equalities Office. (2018). *Trans people in the UK*. Crown. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf

Higgs, E. (2018). UK birth registration and its present discontents. *Reproductive BioMedicine & Society Online*, 5, 35-37.

Horsey, K. (2010). Challenging presumptions: legal parenthood and surrogacy arrangements. *Child and Family Law Quarterly*, 4(22), 449-474.

Horsey, K. (2016). Not withered on the vine: The need for surrogacy law reform. *Journal of Medical Law and Ethics*, 4(3), 181-196.

Human Fertilisation and Embryology Act, c 22 (2008). (U.K.).
<https://www.legislation.gov.uk/ukpga/2008/22/contents>

Human Rights Act, c. 42 (1998). (U.K.).
<https://www.legislation.gov.uk/ukpga/1998/42/contents>

- Imrie, S., Zadeh, S., Wylie, K., & Golombok, S. (2020). Children with trans parents: Parent-child relationship quality and psychological well-being. *Parenting*. Advance online publication. <https://doi.org/10.1080/15295192.2020.1792194>
- Karaian, L. (2013). Pregnant men: Repronormativity, critical trans theory and the re(conceive)ing of sex and pregnancy in law. *Social Legal Studies*, 22(2), 211-230.
- Law Commission of England and Wales & Scottish Law Commission. (2019). *Building families through surrogacy: A new law* (Law Commission Consultation Paper 244; Scottish Law Commission Discussion Paper 167). Crown.
- Legitimacy Act, c. 31 (1976). (Eng. & W.).
<https://www.legislation.gov.uk/ukpga/1976/31/contents>
- Lewis, S. (2019). *Full surrogacy now*. Verso.
- Light, G., Obdein-Maliver, J., Sevelius, J., & Kerns, J. (2014). Transgender men who experienced pregnancy after female-to-male gender transitioning. *Obstetrics & Gynaecology*, 124(6), 1120-1127.
- Lind, C. (1997). Perceptions of sex in the legal determination of fatherhood - *X, Y and Z v UK*. *Child and Family Law Quarterly*, 9(4), 401-408.
- McCandless, S., & 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.
- McCandless, J. (2017). Reforming birth registration law in England and Wales. *Reproductive BioMedicine & Society Online*, 4, 52-58.
- McGuinness, S., & Alghrani, A. (2008). Gender and parenthood: The case for realignment. *Medical Law Review*, 16(2), 261-283.
- McIntyre, L. (1999). *The practical skeptic: Core concepts in sociology*. Mayfield Publishing.
- Olufemi, L. (2020). *Feminism, interrupted: Disrupting power*. Pluto Press.

Perjury Act, 1 & 2 Geo. 5 c. 6 (1911). (Eng. & W.).

<https://www.legislation.gov.uk/ukpga/Geo5/1-2/6/contents>

R (Alfred McConnell) v. The Registrar General for England and Wales, E.W.C.A. (Civ.) 559

(2020). (Eng. & W.). <https://www.bailii.org/ew/cases/EWCA/Civ/2020/559.html>

R (JK) v. The Registrar General for England and Wales, E.W.H.C. (Q.B.) 990 (2015). (Eng.

& W.). <https://www.bailii.org/ew/cases/EWHC/Admin/2015/990.html>

Re G, U.K.H.L. 43 (2006). (U.K.). <https://www.bailii.org/cgi->

[bin/format.cgi?doc=/uk/cases/UKHL/2006/43.html&query=\(.2006.\)+AND+\(UKHL\)+AND+\(43\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2006/43.html&query=(.2006.)+AND+(UKHL)+AND+(43))

Re TT and YY, E.W.H.C. (Q.B.) 1823 (2019). (Eng. & W.).

<https://www.bailii.org/ew/cases/EWHC/Fam/2019/1823.html>

Renz, F. (2015). Consenting to gender? Trans spouses after same-sex marriage. In D. Monk

& N. Barker (Eds.), *From civil partnership to same-sex marriage 2004-2014: Interdisciplinary reflections* (pp. 83-97). Routledge.

Ryan, J. (2020). Born again?: (non-) motivations to alter sex/gender identity markers on birth certificates. *Journal of Gender Studies*, 29(3), 269-281.

Ryan, S. (2013). The gender of pregnancy: Masculine lesbians talk about reproduction.

Journal of Lesbian Studies, 17(2), 119-133.

Salant, P., & Dillman, D. (1994). *How to conduct your own survey*. Wiley.

Sharpe, A. (2002). *Transgender jurisprudence: Dysphoric bodies of law*. Cavendish.

Sharpe, A. (2018). *Sexual intimacy and gender identity 'fraud': Reframing the legal and ethical debate* Routledge.

Soloman, A. (2017, April 24). *Families have evolved. Now language must too*. The Guardian.

<https://www.theguardian.com/commentisfree/2017/apr/24/families-evolved-language-words-relatedness-traditional>

Strangio, C. (2016). Can reproductive trans bodies exist? *City University of New York Law Review*, 19(2), 223-245.

Tallandini, M., Zanchettin, L., Gronchi, G., & Morsan, V. (2016). Parental disclosure of assisted reproductive technology (ART) conception to their children: A systematic and meta-analytic review. *Human Reproduction*, 31(6), 1275-1287.

The Registration of Births and Deaths Regulations, No. 2088 (1987). (Eng. & W.)

<https://www.legislation.gov.uk/uksi/1987/2088/contents/made>

White, F. (2018, April). *Trans pregnancy: Law and policy review: United Kingdom*.

Transpregnancy. <https://transpregnancy.leeds.ac.uk/wp-content/uploads/sites/70/2018/05/Trans-Pregnancy-policy-review-UK.pdf>