

Adoption Matters

PHILOSOPHICAL AND
FEMINIST ESSAYS

Edited by
SALLY HASLANGER
AND
CHARLOTTE WITT

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CHAPTER THREE

Methods of Adoption: Eliminating Genetic Privilege

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This essay questions the legitimacy of a linguistic, legal, and social convention that seems so ordinary as to be beyond any serious critique: the contrast between the “natural” or “biological” family, on the one hand—referred to here as the “genetic family”—and the “adoptive family,” on the other. This dichotomy, pervasive in adoption policies and widespread in intuitions about how families are formed, actually makes little sense in light of historical and present facts about child development, reproduction, genetics, and court decisions when custody is in dispute. Custodial relations for children based on anything except pregnancy are all rooted in legal and social conventions, not biology. Today any parent other than the pregnant mother has custodial prerogatives through legal sanction. Because the present idiomatic dichotomy between “genetic” and “adoptive” families causes many harms, it should be changed by revisiting legal definitions that at present serve men’s egos and genetic iconography but do not advance the only state goal relevant to parenting laws: the end of raising healthy children with emotional, physical, and intellectual skills sufficient for them eventually to make their way on their own.

Such a claim as to the irrelevance of genetics for determining legal custody may strike some as odd in light of new techniques to test for paternal DNA. That is, until the last two decades, courts could easily exercise their prerogative to name legal familial statuses—in particular, that of pater-

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nity—with little worry that their pronouncements would be undermined by other authorities. However, the widespread use of DNA tests in custody and paternal support cases is creating a parallel epistemological institution, a bioscientific knowledge that, it seems, demands to be recognized by courts. In situations where genetic fathers and mothers are not married, the courts are not moving en masse from the standard “best interest of the child” criterion to awarding custody based on DNA (Anderlik and Rothstein 2002).¹ Still, the very proliferation of paternal-rights claims based strictly on DNA, and the success of these in some cases, threatens not only maternal rights, but also adoptive families. If the “fathers’ rights movement” successfully institutionalizes its goal of presumptive custodial rights, based on DNA,² the dichotomy between genetic and adoptive families will be even more stark, and hence the adoptive family will be further stigmatized.

The epistemology of states entails their prerogative to establish criteria, such as genetics, for defining the family and establishing terms for child custody.³ The resulting contrast between biological or natural families and adoptive ones is a legal distinction and therefore a construction, one with the same power and effects as other myths whose acceptance shapes reality, even if they do not simply reflect underlying truths. The norm of a different-sexed genetic-parent family maintaining kinship ties through the adolescence of a child is not a fact of nature, a predominant practice, nor an obviously beneficent one. In light of this, we need to think about institutionalizing standards more consistent with and kind to our lived kinship experiences. The first part of this essay reviews tacit themes in prevailing adoption policy; the second part outlines alternative approaches.

1. A study of paternity testing in Canada from 1992 to 1998 “finds no significant increase in either the number of cases brought to court or the percentage of cases in which genetic testing was ordered. However, the author’s analysis suggests that courts are placing a growing value on the importance of genetic evidence, and that they justify its use by reference to the importance of complete medical information for the future health of the child, to the state’s interest in ensuring that a child receives financial support, and to the certainty which genetic evidence affords” (Caulfield 2000, 67).

2. Melanie G. McCulley argues that if women have the right to abortion, then genetic fathers should have the right to terminate their interests in unborn children, based on the notion of obligations imposed by not doing so. However, McCulley does not believe that women should have the right to abortions: “The author’s purpose in writing this article is to demonstrate the inequities in the abortion decision and to propose legislation promoting male equality in the procreative decision. This article should not be construed to promote or advocate the women’s right to abortion” (1999, 517).

3. For an excellent discussion of the constitutive role of law in creating behaviors it claims only to restrain, see Hunt (1993).

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TENSIONS IN INTUITIONS, THEORIES, AND LAWS
ABOUT PARENTAL CUSTODY

Definitions

In contrast with “adoptive parents,” this essay refers to “genetic parents”—not the more idiomatic “birth parents,” “natural parents,” or “biological parents,” as these latter categories are over-inclusive with respect to the practices they seek to name. “Genetic parents” is more accurate than the other labels because men never give birth, but they are often parents, and sometimes even claim that parental status, informally and legally, on the strict basis of genetics and no other more general biological or natural attribute. Excluding fathers from the category of a “birth parent” may appear pedantic, but it is necessary for the purpose of clarifying prevailing intuitions underlying longstanding patterns in adoption law. Birth is an activity yielding a bond to the fetus not present in a purely genetic tie, and hence it is necessary to consider a claim to parental status based on birth separately from claims based on genetics.

There are a variety of criteria that governments reasonably may consider for awarding the title “parent” to further the state’s goal of raising healthy children. However, ejaculation of semen as an act that conveys DNA to an egg cannot be deemed to be a pertinent consideration. Nor do many courts tend to think so presently, as genetics alone largely is not a compelling *de facto* basis for parental rights. According to Stacia Gawronski, “the courts have not settled the problem of what to call these men” who impregnate women and then have no further relation with her or her child. Gawronski continues, “Courts generally refer to them as putative fathers or unwed fathers, but appellations such as ‘fleeting impregnator’ are not unknown” (2000, 554).

The term “genetic parent” for such men—and for women who are egg donors—as well as for parents who raise their genetic progeny, is useful because it highlights popular attitudes about the status of genetic ties. That is, the chief taxonomic difference between families is not “supportive families” and “mean families”; or “rich families” and “poor families”; or even just “good families” and “bad families,” though these are revealing of important family practices and dynamics, much more so than the “genetic family” versus “adoptive family” distinction. In popular discourse and sometimes in law the sheer status of genetic relations is what drives the most overriding distinction, so that the absent genetic parent and the present genetic parent are both regarded as the “real” or “natural” parent, as opposed to the adoptive parent who is, well, adoptive. “Biological parent” is another phrase used to connote the real parent, but I find it unsatisfactory. It is not biological narratives but specifically genetic ones that

prompt women to want their own eggs, inseminated by their husbands' sperm, to be carried by others. After all, what could be more "biological" than carrying a fetus in one's womb for nine months and then giving birth? Yet these are considered "surrogate" and also not "real" mothers. And even though the children of such interventions may still have genetic ties to their parents, when procreation depends on technologies other than the penis and uterus, "natural" is simply confusing.

That American courts could even contemplate awarding custody based only on a sex act—an activity that in itself is more likely to be considered "dirty" or taboo than sacred in this Puritanical country—can be explained only by the disposition privileging genetics over other human connections, despite the fact that DNA is conveyed in what some might consider an unseemly manner. That rights may be contemplated—despite sex it seems, and only because of genes—is a habit of thought not captured by the vaguer references to a "biological" or "natural" parent. In other words, the preferred status of these categories is parasitic on acts thought "genetic," and hence this is the term that will be used and scrutinized.

Finally, I define a "family" as *a custodial group facilitated by the state for the purpose of providing care across generations*, a situation that may also require mutual financial and other support among caregiving members of the group. While it is currently colloquial to regard only two-generation households with genetic or legal ties as "family," this version is a subset of the more general definition offered above. Such a family can be construed as one attempt at family, one that has failed so frequently as to prompt a serious investigation into its continued desirability and even utility.

Common Intuitions about Adoption

Adoption seems to occur through three major routes in the United States. Some of us are adopted at or near birth by nongenetic parents. Many of us are adopted by the spouse of a genetic parent. Others of us are adopted later, often after spending significant time in foster care situations.⁴ The reason it is imperative to question the dichotomy between adoptive and genetic families is not simply to correct poor taxonomic work in the past, but because the division marginalizes and stigmatizes those families, relations, and relatives called "adoptive."

The thinking—rarely articulated—leading to such a double standard is confused and unfair. Overtly or implicitly all families are adoptive, as all families depend on the legal institutionalization of rules that put children

4. For statistics on these different routes to adoption, see the well-documented web page for the National Adoption Information Clearinghouse (2003).

in relation to parents that the children themselves do not choose. That is, from the point of view of a newborn, the kinship practices resulting in her care by any particular individual or group are arbitrary. This is not horrible or even undesirable, but a necessary consequence of infant dependence, a biological fact limiting the range of family choice for all children. Nonetheless, strictly speaking, the only genetics influencing the necessity to be in a family are the ones we all share: we are mammals who as children have a long stage of dependency on adults. That any particular adult performs these tasks is not, however, a consequence of a genome particular to that person but, legally or informally, occurs when one or more adults take care of, or, we could say, adopt, a helpless creature who has no say in the matter. From the point of view of the dependent infant, the existence of a few mutations in DNA that she may or may not share with her caregiver is completely irrelevant. To survive, she needs at least nutrition, shelter, and emotional intimacy, none of which lead to requirements for a narrative distinguishing genetic parents from any others.

That the narrative that results in placing a child in one home and not another eludes genetics and depends on politics seems clear when we consider that some of the most resonant stories of Western civilization turn on discrepancies between heritage and identity, or the gulf between genetics and emotional affinities. The iconography of a genetic family is not overflowing with images of sentimental affection, but a conceit that works overtime to achieve this in the face of a canon brimming with fathers like King Lear and sons like Oedipus, or husbands like Henry VIII and wives like Loretta Bobbitt. That a human being would happen to be born into a particular family, much less a world populated with narratives about the meaning and shape of families, is not a choice or a necessary event—ask Anne Boleyn—but a discursive fact promoted and disavowed in a variety of texts and laws. Although much of sociobiology is devoted to convincing us that the patriarchal heterosexual family is adaptive, the actual historical and natural record suggests something quite the opposite.⁵ Reproduction requires sperm and eggs, one may point out. Therefore, one might infer, it is nature, not laws, that determine parental status. The law, on this rendition of reproduction, is merely recognizing a natural, genetic imperative. That it does so inconsistently by sometimes awarding custody based on genetics and sometimes ignoring genetics does not obviate genetics but highlights the tomfoolery of courts, according to this view.

Such a story depends on assuming that whenever a biological event occurs, this event should produce the correct narrative for accommodating its obvious facts. In this narrative, genetic ties demand the utmost legal at-

5. For a review of claims about the family made by sociobiologists and the data refuting these, see Stevens, introduction (2004).

tention because they are there and it would just be strange to ignore such important biological truths.

Yet numerous biological cause-effect relations powerfully regulate our existence without demanding any legal or even social attention to our social status. We may notice, if it is pointed out, that oxygen has a huge influence on human survival. No human exists without the stuff. If legal and social attention follow from the importance of a biological need alone, then we would expect to see an abundance of oxygen cults or perhaps a hierarchy based on lung capacity, maybe a large think-tank devoted to discerning the social differences between those who easily metabolize oxygen and those whose oxygen use is not optimal—with the expectation we would find a strong prejudice against those who were bad metabolizers of oxygen, along the lines of those dedicated to glorifying the patriarchal family for supposedly achieving natural ends. Obviously there are numerous places where the analogy between parent-child relations and oxygen breathing breaks down, and, tellingly, it is hard to imagine such a study not eventually making its way around to implicating genetics. Still, the example teaches us that a biological fact, even one whose importance is signaled by public policies to protect or improve this function, e.g., to limit pollution, cannot explain the existence of a narrative whereby this function entails status differences among individuals.

That this myth of genetic families is at least as powerful in influencing our lives as the material conditions it implicates is clear once we recognize that most of us do not live in conformity with the norm putatively extrapolated from observations of how most of us live. As an empirical matter, it would actually be false to say most children are raised by two genetic parents who only reproduce other children in that family through monogamous sexual relations with each other. Nonetheless, despite the mythological quality of such a family, when it comes to adoption law, the state favors the genetic family, treating it as a norm, while the adoptive one is the deviant one demanding of special government regulation and scrutiny. Table 1 highlights some of the key differences in criteria used to recognize adoptive as opposed genetic parenthood.

Current Rules

Some U.S. states offer detailed adoption rules, while others, such as Minnesota, require simply the “Protection of the child’s best interests” (Minnesota 2001). However, even this vague injunction goes beyond the requirements for genetic parents, who are legally prohibited only from negligence and abuse and are not affirmatively required to protect the child’s best interests. With the exception of the statutes referring to same-

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Table 1. Sample requirements for eligibility to be a genetic or adoptive parent in the United States

	<i>Genetic</i>	<i>Adoptive</i>
Age for mother	None	May be 21 for domestic adoptions in some states; 25 for some international adoptions; and no more than 45 in some cases; age often object of inquiry in home study.
Age for father	None	At least 21 for domestic adoptions in some states; no more than 45 for some international adoptions; father-daughter age difference may be required in international adoptions by single fathers, age often object of inquiry in home study.
Housing quality standards and inspections	None	Various safety provisions required. Home is inspected.
Income	If on welfare, mothers must name genetic fathers	Household finances reviewed.
Criminal record	None	Reviewed and shall or may eliminate one from eligibility, depending on state.
Religion	None	Reviewed and often required by religious denominational agencies. Massachusetts requires adoptive parents to have the religion requested by the parent surrendering the child.
Marital status	None	Married status increases likelihood of adoption. Utah and Nevada require this of couples cohabiting.
Citizenship	None	U.S. citizenship required of at least one parent if child is foreign born.
Health status	None	Health status reviewed.
Sexuality	None	In Mississippi "[a]doption by couples of the same gender is prohibited"; in Florida a "homosexual" may not adopt; and other states prevent second-parent adoptions in same-sex couples.
Race	None	Not a legally permissible consideration under federal adoption law; private agencies continue to facilitate racial preferences.
Presence of other children	None	Taken into account when reviewing suitability for placement.

sex prohibitions, the laws cited above are exemplary and not exhaustive. State laws differ, and they are somewhat of a moving target, both in terms of their substance (they are revised) and how they are interpreted. The table and notes merely illustrate some of the more obvious and common disparities between genetic and adoptive families, the point being that re-

ardless of differences in the details, potential and actual adoptive families are subject to regulations and expectations that do not hold for genetic families.

*Why Adoptive Parents Receive Special Scrutiny
Genetic Parents Avoid*

The obvious reasons for the different standards seem to be largely pragmatic. One follows from the difficulty of enforcing particular rules for genetic parents, and the second concerns whether they seem necessary. Even if society had an interest in allowing only certain types of people to raise children, it appears as though it would be as difficult to implement such rules as it would be to allow sleep only to people who use their time well. Because conception is something that occurs as a largely private activity, the government can prevent this, for the most part, no more easily than it can prevent us from taking naps.⁶ When such interventions are attempted—for instance, when the state and the medical profession have legally and informally attempted to constrain reproduction by putatively irresponsible mothers—not only ethical but also practical problems ensue. Women can always violate court orders not to have more children and can even reverse tubal ligations. The more obvious exception to this thinking can be seen in something like China's "one child policy," though this has faced major hurdles in enforcement. Moreover, a flat rule such as this is far more easily implemented than one assessing the character of those who may reproduce.

A second reason for the disparity is that, in addition to pragmatic worries, prominent ideologies about heredity invite the belief that genetic parents have instinctual desires to do well by their children, rendering state interventions superfluous. Why force people to sleep or stay awake if you believe they will naturally do so as needed?

Finally, a related pragmatic reason for adoption rules that go above and beyond those for genetic parents comes from adoption's broader institutional context. For adoptions to be agreed to, birth mothers must have confidence that their infants will be adequately cared for by adoptive parents. (Unless married to the mother, the genetic father's consent to an adoption is required only under certain limited conditions.)⁷ Guaranteeing certain attributes among adoptive parents should enhance the willingness of

6. For analyses and a review of state regulations of "unfit mothers," see Roberts (1991) and Gomez (1997).

7. According to the California Family Code: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions: (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by

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birth mothers to part in good conscience from their newborns. Legal criteria for anonymous adoptions and informal considerations in open adoptions tend toward scrutiny of adoptive parents that does not occur for genetic ones, and hence enhances the birth mothers' trust.

The above, apparently commonsensical formulations, are not false statements about the adoption practices in this country, but they comprise a partial story that reinforces practices at the level of individual families that lead to broader social harms. The notion of a "real family"—nurtured in the interstices of custody law—renders some families and ties authentic and others as copies that, as such, perform the superiority of the original. Judith Butler makes the point that homosexuality as even a convincing copy of heterosexuality does not destabilize heterosexuality. Although the ease of mimicry might be seen as a way to dislodge essentialist assumptions about sexual desire—if a "butch" or "femme" subject position follows from one's imagination and not specific genitalia, then anatomy seems not to be destiny—in fact the "copy" only serves to bolster the authority of the "original" (Butler 1991). Likewise for adoption practices: the variety and ubiquity of families that jumble the forms of being for subject positions in the U.S.-American family seem only to strengthen injunctions tending toward a single, correct fundamental family structure. The reproduction of a two-tier family structure, with one seemingly authentic and the other a copy, illogically and unfairly stigmatizes the latter families while affording irrational protections to genetic parents who may mistreat their children. Moreover, ideologies of the natural family underlie a spectrum of other irrational forms of oppression and hierarchies among ethnic and racial groups in this country. And, the biologized heterosexual reproductive family marginalizes those raising children with same-sex partners. Just as the

death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) With his consent, he is named as the child's father on the child's birth certificate. (2) He is obligated to support the child under a written voluntary promise or by court order. (d) He receives the child into his home and openly holds out the child as his natural child." A widely cited exception to the application of this law is *re Adoption of Kelsey S.* (1992) 1 Cal. 4th 816. For a discussion of the divided rulings in the aftermath of this case, see Alton (2000). For elaborations of continued legal liabilities of unmarried genetic fathers, see Wambaugh (1999), note 145.

copy of heterosexuality narrates and performs an authentic, original heterosexuality, the "adoptive" family creates the "real" one of genetics.

Hence by distinguishing between adoptive and genetic families, the laws outlined in table 1 falsely instantiate the view that the family is pre-political. That is, these differences imply that a legal order only formally ratifies a natural family that has long predated it, when the truth of the matter is that families have never existed without a political society providing the rules for what counts as a family, with patterns of endogamy and exogamy that vary across societies and within the same society over time (Levi-Strauss 1969; Stevens 1999, chapter 5). These rules, constructed by all political societies, ranging from tribes in New Guinea to the state marriage court in New York City, exist for two reasons alone. The first is to bring men into relation with children, which, absent kinship rules, would occur only at the whims of the mother. Significantly, these kinship rules do not require a genetic premise for a paternal relation to a child, only a formal relation to the mother.⁸ And the second purpose of kinship rules is to allow societies to maintain their distinction as an intergenerational community. Membership in a particular family typically provides the route for membership in a larger tribe, nation, ethnicity, race, and so forth (Stevens 1999). Once we review the various ways that the state constructs the ostensibly natural family, we shall see how it is immanently reasonable to consider radically different alternative family rules that do not take myths about the genetic family as their starting point.

The U.S.-American Family

Perhaps the most salient fact about today's families in this country is that they do not conform to a common intuition that underlies ideas about what counts as natural, generally thought to include what is normal or common. If genetic families are natural, then one would expect to see them not only in a numerically hefty majority but ubiquitous, as are other behaviors called natural, e.g., eating, sleeping, drinking—natural behaviors that everyone, not just a majority, practice. Yet as the pie charts in figure 1 and other data indicate, only half the children in the United States will be raised by their two genetic parents.

While 71 percent of children are now living with two parents, not all of these parents are genetic parents. Eight percent are stepfamily situations and of the remaining 63 percent, about 3 percent of these will be adoptive parents, leaving a snapshot portrait of only 60 percent of children in two-

8. For an analysis of the contradictory claims in the political anthropology of paternity, see Stevens (1999), 224–26.

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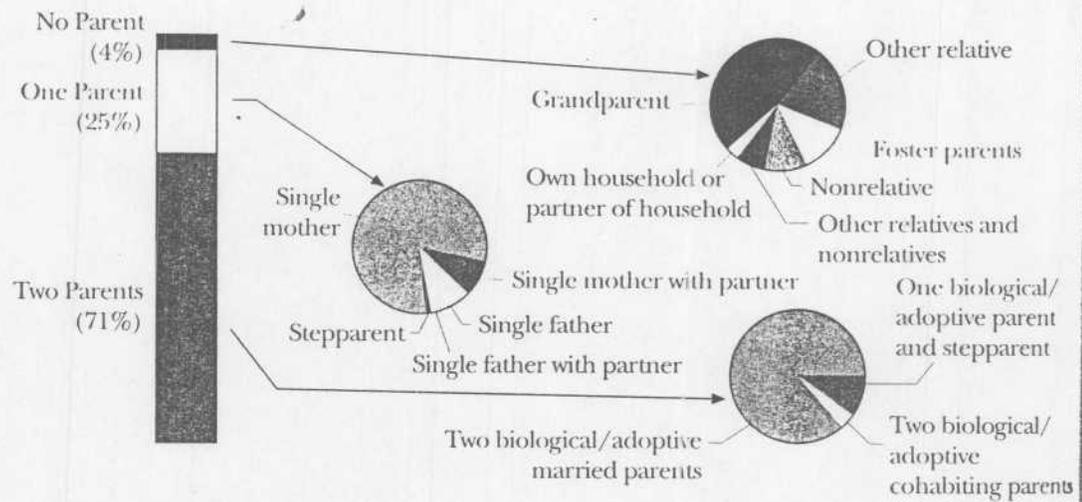


Figure 1. The U.S.-American Family. U.S. Census Bureau, Survey of Income and Program Participation (1999).

parent genetic households. Assuming divorce rates stay constant, the chances such a household will survive can only decline over time, a point borne out by snapshot data on children who are 15–17 years of age, among whom under 50 percent are living with two genetic parents.⁹

One important implication of the statistical normalcy of nongenetic childrearing arrangements—widely experienced but apparently still little known—is that studies showing high numbers of children “at risk” because they are not from households with two genetic parents regularly overlook that these numbers are approximately proportionate to the high numbers of children living in such households. For instance, much has been made of the fact that about half of sexual assaults are at the hands of men who live in households in which they are not genetic fathers (Gomes-Schwartz, Horowitz, and Cardarelli 1990), but since about half of all children will live in such households, the focus on stepfathers produces misleading evolutionary biological inferences (Stevens 2003, introduction).

9. In 1996, 50.3 percent of children ages 15–17 were living with “two biological or adoptive parents.” The above is based on data gathered by the U.S. Census Bureau’s Survey of Income and Program Participation: “Implemented by the U.S. Census Bureau since 1984, the Survey of Income and Program Participation (SIPP) is a continuous series of national longitudinal panels, with a sample size ranging from approximately 14,000 to 36,700 interviewed households. The duration of each panel ranges from 2 years to 4 years, with household interviews every 4 months” (U.S. Census Bureau, 2001, SIPPS Data Source Description). Indeed because the study is longitudinal, the data will more likely overstate the level of longstanding ties within genetic families, since those families that do not stay together are more likely to fall out of the survey and be underrepresented. Also, these tables collapse “adoptive” and “biological” parents into one category, rather than break out the approximately 3 percent of all families that are adoptive as I had done above.

For the past two decades forerunners of the socio-evolutionary method, Martin Daly and Margo Wilson, have urged readers to accept “(i) that genetic relationship is associated with the mitigation of conflict and violence in people, as in other creatures; and (ii) that evolutionary models predict and explain patterns of differential risk of family violence” (Daly and Wilson 1988). While able to offer some findings consistent with this in their research of homicide rates by genetic versus stepparents in Canada (Daly and Wilson 1988), their results have been widely disputed on methodological grounds as well as for their lack of generalizability. Similar, more recent studies with much better data sets in Sweden and Finland yielded different results. In Sweden, authors found that the main risk factor for children was not living with a stepparent, but living with just one parent: “Children with one stepparent and one genetic parent do not run a greater risk [of homicide] when compared with children living with two genetic parents” (Temrin, Buchmayer, and Enquist 2000, 944). And a study in Finland found that of the filicides between 1975 and 1994, 62 percent were committed by the genetic mother, 33 percent by the genetic father, and four percent by a stepfather (Vanamo et al. 2001, 202). Wilson and Daly are running into trouble not only in the literature on human families but also in the literature on nonhuman reproduction. For instance, a study co-authored by Daly acknowledges that quite frequently birds will be raised by adult birds who are not genetically related in species that can distinguish among its own versus other progeny (Rohwer, Heron, and Daly 1999).

Of course, there is an equally large literature in the social sciences purporting to show less violent but still adverse outcomes associated with single-parent families. A classic in this genre is McLanahan and Sandefur (1994). This research is fundamentally misguided and unhelpful. No researcher can “control for” the situations that render some dual genetic parent families intolerable and hence lead to their dissolution. Looking at these post-traumatic situations and comparing the results with those that stay together should take account of the underlying discord and its effects. If one does not consider the potential harm to children remaining in a conflict-ridden situation, one does no more than predict that it is better to be happy and stay together than it is to be miserable and end a custodial arrangement—a nice thought, but useless for making policy.

In fact, the Adoption and Safe Families Act of 1997¹⁰ can be seen as a symptom of the problems attendant on the false belief that biological families are safe havens. According to Elizabeth Bartholet, the law was “designed to undo some of the damage that Congress perceived had been done by a 1980 federal law that required states to make reasonable efforts to preserve families before removing children on a temporary or perma-

10. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in sections of 42 U.S.C.).

nent basis" (1999).¹¹ Prior to this law, the ideology of families as warm fuzzy spaces that should be preserved meant children were legally required to remain in homes where biological parents had killed or tortured siblings (Bartholet 1999). If one were to take a cold look at what happens in the typical family household—the violence, jealousies, petty bickering, and so forth—one would expect a Congress mindful of its citizens' well-being to call for the family's abolition as soon as possible, and not to curry votes by giving speeches on the importance of the family to Western civilization, as occurred during the floor debates on the 1996 Defense of Marriage Act.

The U.S.-American Family in Law

Curiously, while the empirical evidence does not support the view of a two-parent genetic family as normal or even as especially adaptive, this model continues to dominate, albeit paradoxically, the authoritative juridical basis of the family. In one of the most striking exemplars of the copy defining the original, Antonin Scalia in *Michael H. v. Gerald D.* 491 U.S. 110 (1989) held that because "nature itself makes no provision for dual fatherhood" a custody case would be decided in favor of the husband and against the genetic father (115). In this case, because Gerald was married to Victoria's mother, Scalia awarded him sole paternal custody, even though Michael was acknowledged to be Victoria's genetic father and had actually developed a relationship with the girl, who was three when Gerald claimed custody.

Although Michael's relation conforms perfectly to the "genetic" idiom of paternity—a firm bond of the genetic father with his young progeny—the state proclaimed an entirely different view of the matter. The legal view of parenthood defined what counted as the natural family, and then the state used this so-called natural relation for providing guidance in shaping a result that in its details actually marginalized the genetic tie in the particular case—again, even while institutionalizing a nature-based view of parenthood, i.e., the single father of Scalia's nature authorizes, indeed requires, a single father at law. At the same time, Scalia asserted a principle that gives epistemological primacy to the state, not nature, in determining what counts as a family.¹²

11. For an expanded discussion of this law, see Freundlich (1999).

12. For the standards used to determine the constitutionality of laws used to revoke custody rights, see Wanbaugh (1999), note 34. For a more complete discussion of how the U.S. courts have defined a putatively natural family that is not at all genetic, see Stevens (1999), chap. 5.

Genetic Matter: Rethinking Family Resemblances

Up to this point, I have been referring to “genetic” as opposed to “adoptive” parents. Such a distinction follows from idiomatic notions of children inheriting genes from two parents, producing hereditary links, and thus providing a template for the family, one that may be imitated in other contexts, to wit, adoption. However, not only do conventional genetic families fail to justify themselves on the grounds they are actually the natural organization for raising children, or even ones that are overwhelmingly popular, but the logic of Scalia and others using genetic analysis to fix the parental ties of those whose egg and sperm yielded DNA is itself unconvincing. The assumption underlying the notion that genetic contributions should yield custody rights is that a father’s sperm contains something that is uniquely his and that by virtue of contributing this to the development of an embryo he gains certain rights, first to the embryo and then to the child. And the same holds for the woman who contributes DNA from her ova. Yet neither claim receives backing from the details of genetic transmission.

Not only do the genetic contributions from a particular inseminated egg contribute little to the individual distinctiveness of progeny beyond species specificity,¹³ but the processes of inheritance also point to a much broader gene pool for the individual than one confined simply to the maternal ovum and the paternal sperm. These immediate conduits of genetic material—parental sperm and ova—contain DNA from hundreds of thousands of individuals going far back in time with the genes subject to random mutations, even during pregnancy. No particular parent single-handedly determines which portion of genetic matter actually will be part of the child’s genome. Hence there is no scientific reason to single out the specific contributions of distinctly parental DNA as dispositive of a child’s genetic identity, nor, in turn, to privilege the claims of individuals who convey genetic matter as possessing a special claim to the reproductive consequences of such genetic material, i.e., children.¹⁴

If genetic patterns alone were used to determine custody, then this would imply the potential to parcel custody rights to various individuals based on the specific proportions of one’s DNA contributed to the child’s genome, distinct not only from that of the other parent, but also from those of his or her ancestors. To be true to the logic of genetic prerogatives, one would need to trace out various recombinations and decide which ones most contributed to the distinctive characteristics of a particu-

13. Two good works on the subject are Lewontin, Rose, and Kunin (1984); Sarkar (1998).

14. For a discussion of ethically (in)defensible entitlements following from genetic ties, see Steiner (1994), 274–77.

lar child. In many cases, it might not be the genes mutated in one's parents' genomes, but genes, phenotypical or recessive, from mutations that developed several generations before the child was conceived. In short, the so-called genetic parents consist not only of one's immediate egg and sperm donors, but those relatives from different parts of one's genetic family tree. If because of the hazards of gene expression Jane turns out more like her great-uncle Joseph than her father, does that mean Joseph is her true "genetic parent"? Should Joseph have presumptive custody?

Moreover, not only do variations in DNA shuffle around among generations and within families, but the legal relevance of genetic similarities also seems doubtful. What is the logical basis of rights following strictly from the contents of one's genome, the shaping of which is beyond anyone's control, as are the contents therein? As grounds for any individual rights, including those of custody, DNA seems especially odd, since the individual does nothing to earn such rights. Classical Lockean theory awards property rights on the basis of laboring, a principle Locke himself applies to reproduction. Locke explains his way of thinking: God is King, not us earthly creatures, because God is "Maker of us all, which no Parents can pretend to be of their children," for to be a maker one would at least need a plan, or to put some hard work into the project. But, asks Locke, "What Father of a Thousand, when he begets a Child, thinks farther than the satisfying his present Appetite?" (1988, I. 53, 54). And, he continues, "for no body can deny but that the woman hath an equal share if not the greater, as nourishing the Child a long time in her own Body out of her own Substance it is fashioned, and from her it receives the Materials and Principles of its Constitution" (1988, I. 55). On Locke's analysis, awarding custody rights for conveying DNA would be like bestowing a Pulitzer Prize for delivering the newspaper.

Even if we accept the disputed view that genes encode our personalities in ways analogous to computers coding robots, we should not overlook the material semiotics of all sorts of symbols, not just those of DNA. Any armchair ethnologist can observe that individual variations depend more on the language, art, forms of technologies, and political institutions into which a human child is born than on the minute variations among individuals' DNA.¹⁵ A child brought up in Athens in 500 B.C. would be more different from a genetically similar descendant there today than she would be from her Egyptian counterpart living in the same epoch. And although one can point to the role of genetics in transmitting a handful of rare diseases, 99 percent of all diseases, including cancers, have a pre-

15. For research debunking twin studies, see Duster (1990), Kamin (1974), Kamin and Eysenck (1981), Gould (1996).

ponderance of environmental etiologies, ranging from geographical location to wealth.¹⁶

Objections to genetic reductivism evoke especially strong responses from men, who, as actual or potential genetic fathers, may rely on mythical assumptions about gene transmission to claim custody rights. If the specific contributions of one person's DNA do not significantly shape progeny, then the weak claim to custody based on genetic similarity vanishes altogether. Moreover, even if paternal DNA could somehow be shown to significantly shape the individuality of the child, that fact alone provides no more reason to recognize the DNA transmitter's paternal rights than does my skill with English mean I can lay claim to owning my child's vocabulary. Gene bearers and language users alike convey information which they do not create or own, and to which they therefore have no individual rights (see also Steiner 1994, 274-77).

Rather than single out adoption as an intrusion into relations experienced as authentic by the transmission of DNA, we need to recognize that all families are adoptive ones, including those with discernible genetic links among their members. Once we recognize that the connotations of the family as an idea as well as a political practice emerge in the mutually determining discourses of law and myth, we can begin to attend to how these narratives stigmatize non-genetic families, the incoherence of the law in this area, and then press ahead with contemplating alternative rules.

ALTERNATIVE METHODS OF ADOPTION

Feminist Interventions

In the United States and, indeed, in all political societies, the family does not emerge from an unmediated nature, but rather, becomes defined through particular rules rooted in the membership practices of that political society. In recognition of the harms perpetuated by a Scalia-esque definition of the family, as well as observations about today's families, feminists have authored a range of proposals for alternative laws and practices to improve families. Underlying a variety of efforts is the belief that kinship rules create hierarchies of sex and sexuality, rather than passively accommodating them. The response to this is a range of legal proposals that would make family law, and in turn family life itself, more equitable, while also privileging the value of care within and toward families from the

16. For analyses of literature on the public health implications of the taxonomies being invented through the Human Genome Project, see Stevens (2002) and Stevens (2003). See also Duster (1990); Edlin (1982); Newman (1998).

point of view of the state, while removing the stigma from families that currently are "abnormal."¹⁷

Interestingly, such efforts are derided by "traditionalists" as social engineering or simply deviance.¹⁸ And yet all families are socially engineered. Consider, for instance, the varying rules of endogamy and exogamy in political societies without bureaucratic states, the Catholic Church's bans on marriages through the seventh degree, the early twentieth-century eugenics programs, the 1965 Moynihan Report, and the contemporary policy prescriptions for a two-parent heterosexual family as a weapon in the war against the "culture of poverty." In light of these and many other formal and informal efforts to make the proper family, one can only wonder as to how advocates can center as normal and especially natural a form that obviously has taken so many shapes and that requires such tremendous work to reproduce, and unsuccessfully at that.¹⁹ If the two-parent genetic unit cannot survive more than 50 percent of the time even when it is supposedly the cornerstone of this society, instituted by fiat in federal and state laws, and echoed in a range of important cultural activities—from religion to mass entertainment—then imagine how such an allegedly natural practice might fare without these.

Seeing that the present dichotomy between genetic and adoptive families is ill-conceived invites considering alternative kinship proposals. By making transparent the rules shaping the family and by institutionalizing practices that really do serve the interests of children—not myths about genes—a family policy may be possible that destabilizes the current dichotomy's stigmatization at the macro level, while improving the quality of life for children and their caretakers in individual homes. Methodologically this line of reasoning defies the typical postmodernist's suspicion of a liberated subject position that might be produced without harm to others, an anxiety especially provoked when it is the state being charged with authoring such changes. The hope here is that by instituting agnosticism about genetics, the state could avoid the treacherous terrain of hereditary discourse and follow a pragmatic policy of child-rearing. Politically, such a goal, one invited by lesbian feminist theorists since the early 1990s,²⁰ not only challenges Christian traditionalists, but also is at odds with main-

17. See Martha Fineman's excellent analyses in *The Illusion of Equality* (1991) and especially *The Neutered Mother, the Sexual Family, and Other Twentieth-Century Tragedies* (1995). See also Calhoun (2000); Jagger and Wright (2000); Robson (2000); Weston (1991); Lewin (1993).

18. Coming at the crest of the modern feminist movement in the United States, the classic text in this genre is Gilder (1973). Interestingly, Gilder's critique of feminists is incredibly defensive, premised on a masculine insecurity relative to what he describes as women's power in giving birth.

19. See Rainwater and Yancey (1975) and Wilson (1987).

20. See especially Duggan (1994) and Halley (1994).

stream gay rights organizations, including Lambda Legal Defense Fund and the Human Rights Campaign. These groups endorse the idea of having policies for same-sex couples that mimic those for different-sex couples, without fundamentally questioning the premises of this model or calling for broader changes in how the state should support the raising of children.

Before offering policy prescriptions that would eliminate the dichotomy between genetic and adoptive families, I want to turn first to earlier proposals by Martha Fineman, as well their modifications by Drucilla Cornell, as they both provide intriguing, radical alternatives to laws now governing parental custody. Fineman's *Neutered Mother* makes two bold suggestions: first, that the state back off from any involvement in marriage, and second, that instead the state recognize caregiving relations to the child as a legal status. Fineman refers to the "Mother/Child dyad" as a "caregiving family . . . entitled to special preferred treatment by the state." That is, rather than legislate sexual relations, the state should intervene only in the relations between the Mother (who does not have to be a woman) and the dependent child (1995, 146-47; 155; 172-73, note 36; 228; 230-31; 234-35). Under such conditions, Fineman says, "single mothers and their children and indeed all 'extended' families transcending generations would not be 'deviant' and forgotten or chastised forms that they are considered to be today because they do not include a male head of household. Family and sexuality would not be confluent; rather, the mother-child formation would be the 'natural' or core family unity—it would be the base entity around which social policy and legal rules are fashioned" (1995, 5).

In her *The Heart of Freedom* (1998) Cornell largely endorses Fineman's approach, but criticizes the connotations and denotations of Fineman's concept of motherhood (1998, 116). Also contrary to Fineman, Cornell believes that the state should use marriage to recognize sexual relations, including a polygamous one, but without stipulating the subject positions or who may occupy them (1998, 124-25).²¹ According to Cornell, a group

21. There is a telling tension in Cornell's views on the relation between the sexual union and the caregiving one. Cornell's initial justification for insisting, against Fineman, on state recognition of sexual partnerships is that families are eroticized environments (1998, 115). Here she states, again, against Fineman, "it is one thing to argue that there should be no state-enforced confluence between sexuality and intimacy, and another to defend the proposition that the two *must* be separated in a new legally privileged baseline for the family" (1998), 116. But then later Cornell states that custodial units should be established in such a way as to make possible overlapping but analytically separate kinds of attachments: "[C]ustody would not be a given fact of [the] sexual unit. In other words, a man skittish about becoming a parent could choose to stay married to his partner and yet also choose not to share full custodial responsibility for his child, leaving his partner to take on custodial responsibility with another friend or, for that matter, a woman lover other than himself" (1998), 125. If Cornell wants to insist on her earlier statements about the eroticization of the family, then it is unrealistic to imagine a father in a household who is not somehow erotically engaged with a young child

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of two or more individuals would contract among themselves to form a legally recognized family: "Custodial responsibility would remain for life; legal responsibility to the custodial children would continue regardless of the sexual lives of members of the custodial partnership or team" (1998, 125–26).²² Finally, Cornell believes the state should provide income maintenance, child health care, and child care to all families (1998, 128).

While I appreciate Cornell's concern for wanting to make available to men an imaginary space she thinks Fineman's "Mother/Child" terminology limits, even if her definition is technically inclusive, Fineman's Mother/Child unit acknowledges a very important aspect of parenting often lost by analyses that treat paternity and maternity as equivalent. Grounding a jurisprudence of parental custody based on the mother invites attention, in particular, to the unique subject position of pregnancy. While this is not a point stressed by Fineman, I want to elaborate some reasons for why the law should treat the subject position of the pregnant mother as the one with the *de facto* status of "real parent" that should be the initial basis of *de jure* custody rights, though these may be alienated. The ontological difference of a nine-month pregnancy from the casual transmission of DNA from sperm warrants a conceptual acknowledgement Cornell fails to provide.

Cornell offers an internally inconsistent romanticization of genetic ties²³ and she fails to appreciate the material importance of pregnancy, in contrast with the largely useless nature of sperm.²⁴ As Locke points out, having shown the primacy of birth over sperm in reproduction, "as soon

also there, if only by his absent presence, and we should also expect to see the custodial group with a lifetime commitment to raising this child as similarly erotically engaged, despite the absence of any overt sexual behavior. Cornell does not acknowledge this. Also, the point of such a sexual relation without kinship commitments having state recognition can only be to circumscribe the scope of sexual access. This expectation of the state can only follow from assumptions about the requirements of monogamy that are unrelated to the condition of child-rearing (as in this hypothetical the man is uninvolved with this). Cornell gives no reason for singling out the potential erotic engagements of those engaged with child-rearing as requiring *legal recognition* of their sexual relationships, which is why Fineman's proposals—which do not include this provision—are more coherent.

22. Cornell emphasizes the contract is for life and can be broken only in "extraordinary circumstances, for example, sexual or physical abuse" (1998, 126).

23. "Heritage has a genetic component, but not only that. A break with the nation, culture, and language to one's birth which is inevitably imposed by an international adoption; these factors must be made available for symbolization" (Cornell 1998, 109). This claim is weak for two reasons. First, there is no evidence that one's place or parents of genetic origin mandate acquiring any particular culture. And second, there is a logical inconsistency in assuming otherwise: If genes are so important, then how can Cornell be so cavalier in her subsequent calls for custodial units separate from genetic ones?

24. This is not to say that Cornell seeks to limit birth mothers from visiting their children. She endorses this and the child's ability to find her genetic parents as well. However, Cornell's reasons for this are based on rather curious ideas about genes and belonging, as opposed to the view of maternity developed in this essay.

as the Father has done his part in the Act of Generation, that if it [the embryo] must be supposed to derive any thing from the Parents, it must certainly owe most to the mother" (I. 55). Birth mothers contribute intensive, constant, long-term labor to reproduction that fathers do not. However, Locke believes that fathers can make up for this by making sure to provide for their children economically and, equally importantly, taking a strong role in ensuring their education. Importantly, Locke offers no language at all to suggest he thinks women are incapable of providing these themselves—e.g., canards about only men being strong enough to earn money or smart enough to teach. Rather, he presents these masculine stereotypes of breadwinner and teacher as those compensatory to men's inability to give birth and their desire to reciprocate for the life they have been given.²⁵ While Locke himself makes these arguments to say that at minimum women have equal rights to parental authority to those of men, he seems to hint at more far-reaching implications, and surely we can extend those today. If Locke is right—that sperm itself does not give men any rights to the fetus—and if custody decisions must be made at birth, then the only person who has earned the prerogative to initiate these is the pregnant mother, a subject position inadequately represented in present law.

Cornell and other feminists who want to challenge the potentially restrictive sex-role implications that might follow from such an emphasis on the specificity of pregnancy would probably respond that although only birth mothers are pregnant, nothing about this act precludes establishing pregnancy's equivalences with other activities, say, contributing money or time in child-raising. Indeed Cornell makes just this point, turning around the Lockean position outlined above by using the fact of such compensations as evidence there is nothing so special about pregnancy (1998, 130). But are these apt comparisons? Is it sensible to consider pregnancy as just one more form of nurturance, one that is equivalent to, for instance, driving a child to soccer practice or saving money for her college education? The felicity of such analogies depends on whether we agree that the physical risks, excruciating pain, and uninterrupted dedication to the task of pregnancy can be equated with the cumulative labors invested in other life-sustaining enterprises, such as contributing food, shelter, and other goods and emotional attentions to an infant and child.

Pregnancy as Sui Generis

A further objection to equating pregnancy with financial support alone is that the equivalence seems to call forth the idea of blood money that of-

25. For a more general discussion of "pregnancy envy's" political implications, see Stevens (1999, 105 n. 11 and 269).

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fends common sensibilities in other contexts. If we take offense at flesh as collateral for money (Shakespeare 1965), then perhaps we should also take offense at the Lockean offer of fathers paying for education and providing inheritances as a way of paying off the debt that sons owe their mothers, for in that situation a woman's flesh is literally being taken from her, in exchange for financial consideration given her child (as payment of debt for one's own birth) (Locke 1988, I. 55 and *passim*). Pregnancy involves one's entire body being at the beck and call of another human organism twenty-four hours a day for several months. And pregnancy entails a non-negligible risk of death. Some commentators have pointed out the relative safety of the abortion procedure in contrast to giving birth as a basis for invoking Good Samaritan laws as the grounds for abortion rights (Regan 1979, 1569–70). But analogies to hypothetical Good Samaritan laws for organ donors—suggesting that criminalizing abortion would be like requiring kidney transplants of unwilling donors—do not hold, for reasons that are somewhat revealing. Not only do current medical ethics not require such sacrifices, the norm is that they would not allow them, as pregnancies threaten the donor's life, require huge amounts of forbearance and hardship, and are physically intrusive. Our medical ethics guidelines seek to shelter individuals from such sacrifices and are especially cautious in the area of financial remuneration.²⁶ The point is not that a sexualized body should never be regarded in terms of labor power, one feminist critique of prostitution, but rather, that the very particular harms and risks expected of pregnant women are so enormous that no liberal society would allow this, that pregnancy itself would be rejected altogether by the same principle that liberals forbid slavery, even as a so-called choice—a practice with which women's reproductive choice activists have sometimes, quite aptly, analogized unwanted pregnancies. The very arguments distinguishing the condition of pregnancy for purposes of abortion rights arguments resonate in calls for acknowledging the condition of pregnancy as one that entails special legal recognition. While it is unconstitutional for states to allow even mutually consensual slavery, and it is

26. The U.S. National Organ Transplant Act prohibits "any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation," a requirement based on studies concluding that "society's moral values militate against regarding the body as a commodity . . ." (*Harvard Law Review* 1990, 1622–23), quoted in Jefferies (1998). The British Medical Association advises its members that the British Human Organ Transplants Act of 1989 requires that in "every case where the transplant of an organ is proposed between a living donor and a recipient who are not genetically related, the proposal must be referred to ULTRA. As an independent authority, its function is to consider cases where no genetic relationship exists or where such a claimed relationship cannot be established. When an organ becomes available the Authority will have to be satisfied that no payments have been made or will be proposed" (2001).

against all norms of medical ethics to expect one individual to put her life at risk to preserve another, there is no discussion of legislation to protect women from the potential harms of pregnancy.

The dangers of pregnancy notwithstanding, the U.S. Department of Health and Human Services has not invoked the Hippocratic Oath's maxim of "First Do No Harm" as grounds for prohibiting pregnancy, which suggests that this is an act that really is *sui generis*. Unlike Cornell, my own objection to Fineman's "Mother/Child" dyad is not based on its wrongly excluding people from the category, but on it wrongly including those as "mothers" who do not labor to bear children. Current laws wrongly instill a dichotomy between genetic and adoptive parents and also fail to distinguish the contributions of a woman's pregnancy to the life of her child, raising the question of new laws that would remedy these gaffes and lacunae.

Proposals

The objectives guiding the following proposals are as follows:

1. To provide children with resources and caretakers who can attend to their physical, emotional, and intellectual needs.
2. To make viable long-term relations between a child and a child's caregivers.
3. To allocate the privileges and responsibilities of child care equitably, and, as a corollary to this, to recognize the special relation of pregnant mothers to the children they bear.
4. To ensure that laws designed for the micro level resonate positively in broader social discourses.

The policies offered below in pursuit of these objectives are of course not immune to violation, just as current family laws may be disobeyed. However, because these alternatives are much more flexible than rules giving rise to our current child-rearing roles, they are far less likely to be broken. They are also conducive to inviting people to participate in forming families through a range of encounters, not just sexual ones, and therefore may enrich other relations by allowing for this potential to develop, while at the same time lessening the pressure on sexual ones. No single item below should be considered in isolation from the others.

1. The government should provide health services to everyone, including reproductive health services.
2. The government should make child-care services available to all parents.

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3. Every child has one mother, the person who gave birth to him or her.²⁷
4. Every child shall have one or more parents. For purposes of legal custody, a parent is someone, including a mother, who adopts a child alone or in a group of two or more.
5. The adoption is valid until the child is twenty-one years of age.
6. The mother is responsible for finding one or more parents to raise her child within three months of birth. She fulfills this responsibility either by (a) signing an enforceable contract with the state acknowledging that she is adopting the child by herself; or (b) by forming a larger group to legally adopt the child; or (c) by finding another adult or group that will sign this contract; or (d) by requesting that an officially sanctioned adoption agency perform these activities. No money other than incidental fees can be exchanged for the purpose of executing adoption contracts.
7. All adoption contracts will require minimum adult commitments to child care.
8. Marriage is a purely private activity, receiving no recognition as a legal status by any government agency.

Taken together, the above proposals would directly accomplish the rather mundane objectives mentioned, the goals of which differ not much if at all from those offered by mainstream and even conservative commentators on the family. One would be hard pressed to find the critic advocating a family policy designed to increase children's chances of being malnourished, unsafe, and stupid. The major difference between the present framework for family policies and the one used to develop the above recommendations is that the latter does not attempt to meet its objectives through mediated, confusing, and unfounded religious aims or genetic fantasies.

Were the Christian fundamentalists associated with the rhetoric of "family values" really concerned with the well-being of children, then the first policy they would direct attention to would not be ballot initiatives pre-

27. The above status seems to formalize not only discrimination against genetic fathers—it does, for reasons explained above—but it may appear also to disadvantage the parent in a lesbian relation who does not give birth. However, this is not the case for two reasons. First, the arrangement above precludes any state recognition of sexual arrangements altogether, so same-sex couples would have no different relation to the state in contrast with different-sex couples. Second, while the status of "mother" is held by only the person giving birth, the effect of this in the context of laws denying the status of "father" is to put all non-maternal parents on equal footing. Instead of the non-birth parent in a lesbian couple being inferior to the mother, the emphasis here is on providing juridical parity for parents, making the female non-birth parent in a lesbian relation legally identical to the male partner of in a different-sex relation where the mother maintains custody with the man who may be the one whose sperm inseminated the maternal egg.

cluding the possibility of same-sex marriages,²⁸ but a national health and child-care system that would ensure children and their caretakers would receive high-quality services. These Christians would argue vociferously against allocating health care on the basis of either employment status or marital ties to someone who has health care benefits, and the same would go for lesbian and gay groups pressing to change marriage law to make it more inclusive by invoking “family values” as well. It seems partial and parochial to press for domestic intimacies as the basis for the security presently afforded by marriage. One deserves such protections because one is human, not because one has the romantic affections of someone who has good benefits, a good apartment, or assets one may inherit if that person dies—the traditional arguments for why same-sex couples deserve marital recognition.²⁹

Eliminating Fathers

Confining “mother” to the person who gives birth (not the egg donor, in cases where she is not pregnant) gives due weight to this key activity that allows a child to come into the world while appropriately diminishing the possibility of custodial privileges gained by the illogical privileging of genetic ties. Curtailing custodial privileges³⁰ (as well as obligations)³¹ based on parental genomes affects two classes of people regarded as parents today: women whose eggs are carried by another woman would no longer have any claim to custody on this basis; and, more significantly, the claim

28. As of January 26, 2003, 37 states have laws prohibiting the recognition of same-sex married couples, even when these couples are legally formed elsewhere (Human Rights Campaign Foundation 2001). And President Bush has given his blessing to a Constitutional Amendment that would ban any state from recognizing same-sex marriages.

29. David Chambers writes: “A final criticism of the laws bearing on married persons is more fundamental: even if legal marriage would offer benefits to a broad range of same-sex couples, some might claim that all these advantages are illegitimate—illegitimate for both same-sex and opposite-sex couples—because they favor persons in two-person units over single persons and over persons living in groups of three or more, and because they favor persons linked to one other person in a sexual-romantic relationship over persons linked to another by friendship or other allegiances” (1996).

30. If, for reasons of superstition regarding their sperm and DNA, men do not want “their” children to be conceived without assurances of custody, they can either wear condoms or decide to have sex only with those women whom they trust to comply with these desires, a situation similar to that confronting women who are anxious about conception. If genetics companies may “own” someone else’s DNA because the company’s research created something of use, then surely mothers too come to possess the consequences of the sperm, especially as the use of it in the creation of a child is always an implied possibility and therefore a matter of presumptive consent when men ejaculate in women’s vaginas. For a defense of paternal genetic prerogatives, see McCulley (1999).

31. If the state provides basic provisions for raising children such as health and child care, then there is little argument for pursuing child support payments from “fleeing inseminators,” who, under current regimes, do not pay in any case. For an excellent discussion of the law and theory of paternal obligations for children of poor women, see Smith (2002).

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to paternity based only on sex and DNA would play no legal role in custody decisions, including that of the mother to contract an adoption. In short, with "mother" as the legal term for the woman who gives birth and "parent" the legal term for those contracting to raise a child, the "father" as a subject position will be eliminated altogether, a consequence that radically reconfigures not only particular families, but, at least as significantly, refashions the gendered psychic life ordered by kinship rules and the law of the father.

While this call to eliminate the father is the change likely to provoke the most resistance, its implementation is the most logical of all the proposals above. As we saw above, as a matter of political anthropology, current marriage law exists to bring men into relation with children, even if these are not their genetic offspring.³² That pregnant women must be secured by men in matrimony (from the Latin *matrix*, meaning womb) institutionalizes the paranoia of a masculinity anxious about men's inability to give birth, and therefore intent to influence reproduction by those who do give birth. Forcing men to earn the status of parent outside the realm of sexual access—managing to ejaculate during intercourse—promotes a new incentive system for becoming a parent.

Eliminating the "father" does not mean limiting men's participation in child raising; in fact, it suggests the opposite. By decoupling gender from parenting altogether—confining "mother"hood only to pregnancy and not to egg donors—all people should consider themselves on equal footing for this responsibility of parenting. Moreover, by removing the availability of family ties based on the crude act of ejaculation, men would have to actually work to earn this status, presently accomplished now either by copulation or by simply having the legal status of husband to the child's mother.³³ As far as same-sex couples are concerned, the absence of the sexed parental subject positions in the present heterosexual genetic family undercuts the search for, or avoidance of, the "real" parent. Assuming some sexual dyads may decide to adopt, gay male and lesbian couples will both be "parents," eliminating the possibility that the non-mother (if a mother exists in that couple) or the non-genetic parent will be either a copy and therefore inferior to a real father or a copy and therefore inferior to a real mother. Analytically and legally distinguishing the custodial relations that follow from conception—none—from those attendant on birth—mothers may adopt—recognizes the uniqueness of maternity as a condition that should legitimately engender the choice of whether to pursue custody. This, again, is a mother's choice and does not entail an es-

32. This is a basic anthropological point made most succinctly by Durkheim (1965) and elaborated most systematically by Lévi-Strauss (1969).

33. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

sentialist biological collapse of maternity with long-term child custody. Rather, maternity is recognized as a *sui generis* condition without a copy.

Obviously, idioms and hence intuitions about genetic and adoptive parents, as well as a discourse of "fathers" and "mothers" would persist in the immediate aftermath of legal changes, but eventually one can imagine that the "father" will be as meaningful a status as the Sultan, a subject position that just 100 years ago seemed as though it would persist for eternity as well. Once the Ottoman Empire was vanquished as a legal system, its titles of authority also disappeared.

Implementation

Cornell says parenting contracts should be for life. While such ties over life are definitely something to aim for, it seems very important to make sure the rules governing child rearing are narrowly tailored to the task. People can survive and flourish, even if their parental units break up after they are twenty-one; this may not true for children who are younger. I selected twenty-one as a possible threshold, because this is the age when most people in developed countries finish their formal education. The number is based on the belief that parents should commit to making education a financial possibility for their children. I am not sure that this is really right. Perhaps the state should guarantee funding for higher education, or perhaps the interest of the child in an education beyond high school does not outweigh the parents' desire to cease what may well be uncomfortable relations among each other or with the child by that time. That is, as a social value as well as a utilitarian one, we can imagine a calculus that gives heavy weight to family stability, whatever form that family takes, but does not ignore tensions that arise in any social setting, especially such a demanding one as the family, tensions that themselves make for an unhappy home. From a child's point of view, the need for the family to be stable and nurturing decreases over time. While of course one prefers those caring for children to be always on good terms, a child's survival depends less on this over time. Conceptually, then, there is a point at which considerations of parental discord trump the interest of the child. That point will depend on the particularities of the situation. None of this requires that families dissolve their emotional and other ties; it merely ends their legal responsibilities, and even here the agreements may be revisited with a new contract.

A uniform family law cannot accommodate these details—no laws do—but by taking account of such factors and being reasonable about what parents must commit to, parents may actually follow through on these obligations in a manner that many currently cannot. Again, parents who want to continue to support their children's education or training, not to mention

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assisting children in other ways, will not be prevented from doing so. By lowering the expectation of what parenting entails, we can perhaps develop realistic goals that give parents an incentive to stick it out rather than leave in despair.

The provisions of the contract should be substantial minimum commitments to provide for a child's physical, emotional, and intellectual needs. This requirement is more of a burden on the very poor than on the very rich, but it is much less of a burden than exists under current laws, which do not provide for health coverage or child care, and hence impose tremendous hardships on poor families. In any case, if a parental group cannot provide minimum care, then they should not be allowed custody. If Good Samaritan laws cannot require me to donate a healthy kidney, they certainly should not require a child to donate her entire future in exchange for a culture's myths about genetic prerogatives—the only basis an unfit parent would have for asserting the right to care for a child. If the state provides for health and child care, then it is fair to expect potential parents to live up to this minimum expectation regardless of class background.

Finally, Fineman's arguments for removing any state role in the recognition of intimate relations among adults should be heeded. If people want to establish long-term contractual commitments with each other based on their sexual or mutually caregiving affinities, they would be free to do so. However, there is no reason to expect this relation to receive special treatment from the state.

While I have tried to sharpen some contrasts now at play in family law between genetic and adoptive parents—to point out how they unfairly stigmatize certain kinds of families—I also want to emphasize some positive implications of the above proposals. A new model of family life, one that severs the raising of children from the traditional kinship group, would not only be good for children and parents, but for all adults. As Fineman has pointed out, currently people who seek intimate relations are faced with the confounding task of finding qualities in a romantic partner also suitable for a parent. Separating the two roles clearly removes some pressure from sexual relations. However, far more importantly, the legal norm that any two or more people can be parents together and form a family regardless of genetic or biological ties institutionalizes a potential connectedness among all of us. Not the person I am dating, but perhaps my colleague or the person who I met in line at the supermarket could be the perfect parent. Enlarging the scope of potential parenting partners, acknowledging a broader community as potentially family, can only deepen all our connections.