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# Just a Gene: Judicial Assumptions About Parenthood

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# ARTICLES

## JUST A GENE: JUDICIAL ASSUMPTIONS ABOUT PARENTHOOD

Janet L. Dolgin\*

### INTRODUCTION

A profound irony dominates family law at present. The American judiciary, confronted with a basic challenge, has responded with essentially conservative opposition. And yet its response has aided and abetted the challenge. Thus, unwittingly, the judiciary has undermined its own cause and advanced the cause of its avowed antagonists.

The challenge mounted is to nothing less than a traditional, and extraordinarily influential, conception of the family; in particular, to a traditional conception of "fatherhood" and "motherhood." The challenge derives from changes in the family made explicit by the Enlightenment and widely actualized during the Industrial Revolution. These changes have created enormous social pressure to redefine the essential meaning of "family." Confronted with this pressure, the American judiciary has responded with steadfast resistance, insisting that the traditional conception be maintained. But ironically, in the effort to preserve that conception, courts have, without knowing it, empowered the effort to alter and redefine it. Many courts fail to see the needs that motivate the decisions they

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reach, or the extent to which their decisions endanger those ends. Thus, some courts work to protect traditional conceptions of the family, but, in attempting to do so, appropriate the language of change. At the same time, other courts approve new forms of family, but in so doing, disguise the results in traditional garb. The net result is the instructive phenomenon of a judiciary operating at cross-purposes to itself, unaware that its ideological conservatism is fostering the evolutionary change it opposes. The analysis below details this phenomenon.

After Europe emerged from the feudal period, the family remained one of the few domains of life not defined through notions of the autonomous individual, free to negotiate endless new realities with fungible others. Unlike the world of work and money, the family was a world of permanence and loyalty. Beneath the patterns and structures of family life lay an ideology of family,<sup>1</sup> a deeply internalized view of the family and the characters composing it. The obligations and rights accorded people within families stemmed from the inexorable nature of the ties that linked the members of a family together. Family members were conceived as joined through certain *substantial* ties (called ties of blood). However, the last few decades have witnessed great changes in family law<sup>2</sup> and in the composition and perception of the American family.<sup>3</sup> These changes are a dramatic elaboration and solidification of

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1. By "ideology," I mean not a system of political beliefs, but the pervasive forms in terms of which people understand what it means to be human. Janet L. Dolgin & Joann Magdoff, *The Invisible Event*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 363 n.7 (Janet L. Dolgin et al. eds., 1977). This definition of ideology is similar to that of the French anthropologist, Louis Dumont. Dumont wrote:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational or scientific has been pre-empted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, *FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY* 22 (1977).

2. See, e.g., Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) (describing late twentieth century transformation in family law involving, among other things, a shift toward private orderings, a new view of gender roles, and a decrease in "moral discourse").

3. See, e.g., Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991); Note, *Looking For a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991).

the choices and patterns that began to emerge several centuries earlier. As the changes occur, and as they begin to receive legitimization, the ideology of family is brought into conscious play—sometimes to preserve the old order, sometimes to herald new forms, and sometimes without clear direction or intent. The ideology of family has stubbornly resisted change.<sup>4</sup> But that resistance has begun to falter.

This Article examines two domains of family law, each of which seems to threaten or challenge (depending on perspective) traditional family values and structures. One of these domains involves the paternal rights of unwed fathers; the other involves the parental rights of parties to surrogate mother arrangements.<sup>5</sup> Recent judicial decisions<sup>6</sup> in both areas of family law recognize, but

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4. Martha Fineman makes a similar point in a recent article concerning the concept of "mother" in "poverty discourses." Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274. Fineman writes: "My preoccupation with ideology leads me to be more pessimistic about the possibility for social transformation than social critics who focus on structure. Dominant ideologies are subtly and conclusively expressed and repressed in the very creation and recreation of social norms and conventions." *Id.* at 290.

5. Unwed father and surrogate mother cases, taken together, provide an illuminating contrast. Judicial response to these two types of cases dramatically demonstrates the judiciary's confusion as it faces new definitions of family and of parent. Moreover, the two sets of cases offer provocative comparison in a number of specific regards. Each set of cases involves *too many*, rather than too few, parents. In addition, these cases as a whole illustrate differences in the way fathers are understood as parents when they are compared with mothers and when they are compared with other fathers and differences in the way mothers are understood when they are compared with fathers and when they are compared with other mothers. Finally, society's understanding of fatherhood and motherhood has been affected in recent years by technological advances that provide the means of identifying biological fathers with some certainty through blood testing, and that, contrastingly, complicate the identification of biological mothers by separating biological motherhood into discrete aspects and stages. In particular, technology enables the separation of genetic and gestational motherhood so that the woman who gestates a baby may not be the genetic "mother." These scientific advances directly affect the legal system's responses to claims of unwed fathers seeking paternal rights and to claims of parties to surrogate motherhood arrangements seeking parental rights.

6. For the most part, judicial decisions provide the data on which the conclusions in this Article are based. This Article uses these decisions as instances of the culture. It recognizes that the relevant decisions were written by different judges, presiding over different courts. And although many of the opinions analyzed in this Article were issued by the United States Supreme Court, they were written by different Justices. This approach, though not the method of choice if one's aim is to identify the law *per se*, provides precisely the sort of data needed for revealing and analyzing assumptions underlying the law.

Clearly, some judicial opinions may simply represent idiosyncratic positions. However, from an anthropological perspective, even those provide useful information about the contours and limits of the culture. Moreover, by piecing the decisions together and analyzing them as a larger whole, it is possible to identify patterns in the larger culture.

often oppose, shifts in society's understanding of family (of "mothers" and "fathers" and their relations to each other and to "children"). In large part, the decisions at issue here result from an essentially conservative effort to preserve, despite the frequent legitimization of change, a traditional domain of family. The decisions represent an attempt to keep the family separate from and unaffected by the world of money and work, unaffected that is by the market, including its often unremitting view of people as unconnected autonomous individuals. In the effort to preserve traditional families while assimilating patterns and possibilities that seem to constitute dramatic change, courts rely on and articulate, but also begin to alter fundamental assumptions about what makes families "families" and about what makes mothers "mothers," fathers "fathers," and children "children."<sup>7</sup> The result is curious. To safeguard treasured forms in the face of changing values and structures, courts have considered, and then sometimes shifted or defined anew, the key symbols through which families are discussed and understood. But, in consequence, the very effort to preserve traditional families, to preserve traditional notions of family, represents and provides new grounds for justifying the changes feared.

This Article reveals and examines the assumptions that courts make, and the assumptions that courts are willing to question, in cases involving unwed fathers seeking rights regarding their biological children and in cases involving surrogate mothers seeking maternal rights. Frequently, fundamental assumptions are unarticulated; because they are *obvious*, they call for neither explanation nor justification. Especially when tacit, however, fundamental assumptions can powerfully direct and focus thought processes and can effect the conclusions to which those thought processes lead. Although not unconscious, such assumptions can resemble unconscious thoughts in certain crucial respects.<sup>8</sup> The fundamental assumptions of the sort with which this Article is concerned, as well

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7. See *infra* note 218 and accompanying text (noting different problems facing a court and a legislature where each aims to preserve traditional familial values).

8. Fundamental assumptions differ from unconscious thoughts in important ways. In Freudian theory, unconscious thoughts, because often threatening to ego, are expressed and reflected through symbolic forms that function to mask the character of the underlying thought. Fundamental assumptions, in contrast, go unnoted because they are *obvious*. Anthropologist David Schneider has defined "fundamental assumptions" of the sort with which this Article is concerned as assumptions that are "more often than not implicit," that are "assumed to be so self-evident as to need no comment," and that are "widely held and necessary" to the culture's understanding of a particular field of human activity. DAVID M. SCHNEIDER, *A CRITIQUE OF THE STUDY OF KINSHIP* 165 (1984).

as unconscious thoughts, act as effective, though often unnoticed, guideposts for the development of thought and action (including those thoughts and actions that constitute judicial lawmaking).<sup>9</sup> They provide the building blocks of a world view. Thus, when brought into express sight and delineated, the assumptions can explain the direction and form of human behavior.<sup>10</sup> But, in recent family law cases, courts have been forced to explicitly consider and re-examine such assumptions. Sometimes, the consequence is merely apparent change, since the basic assumptions are elaborated and re-organized but left essentially unaltered. Other times, the consequence is real and significant change.

This Article examines the assumptions that courts bring to the analysis of family law cases involving uncertainties about a child's legal parentage as well as the forms and terms through which courts have begun to articulate such assumptions in the face of changing patterns and changing options. This Article does not, however, intend to suggest specifically the paths that courts and legislatures should take in analyzing or resolving these cases.<sup>11</sup> Rather, this Article considers how the choices courts make flow from a set of unexpressed but obvious "truths," or from a set of expressed but changing "truths," and how, as a result, the law will be only as fair, just, and equitable as the underlying "truths" allow.<sup>12</sup>

Part I of this Article considers the ideological<sup>13</sup> framework within which courts approach cases involving multiple claims to parenthood. Part II analyzes a number of assumptions made by the Supreme Court, in a set of cases in which unwed fathers have

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9. *Id.* at 165-66.

10. The claim here—that thought unrecognized because unconscious and thought unrecognized because obvious both undergird human behavior—depends, of course, on the works of Freud and Marx, respectively. The first, particularly in SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (James Strachey, ed. & trans. 1954), demonstrated the power and the structure of that vast part of a person's thinking to which the person has only limited access. The second, particularly in KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* (C.J. Arthur, ed. 1970) and in KARL MARX, *CAPITAL* (1906), demonstrated the power and the structure of ideologies in the construction of social wholes.

11. This is being done elsewhere. In particular, see John L. Hill, *What Does It Mean to Be a "Parent?" The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 413-20 (1991) (arguing that "intentional parents" should be recognized as legal parents as compared with various sorts of biological parents).

12. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing, with regard to racial discrimination, that because racist assumptions are widely held and deeply internalized within the society, lawmaking often reflects those assumptions in an unreflective way).

13. See *supra* note 1.

sought paternal rights. Part III presents and considers assumptions underlying judicial decisions about surrogate motherhood. Finally, Part IV suggests that courts, in the effort to preserve traditional family forms have, though within limits, reconceptualized the symbols (e.g., genes, gestation, sperm, ova) through which kinship is understood and have thereby effected the very changes they intended to deny or deflect.

### I. THE ROLE OF BIOLOGY IN MAKING PARENTS "PARENTS"

The assumption that families and family relationships are essentially the products of biological ties provides the justification, implicit or explicit, for many conclusions judges reach in cases involving the meaning of family. Courts' assumptions about the role biology plays in the creation of parenthood differ for men and for women.<sup>14</sup> Preserving that difference works to limit the scope within which reconceptualizations of the family occur.

Generally, the law, like the society of which it is part, understands the family to include a biological aspect and a social aspect.<sup>15</sup> So for the most part, families and family members are recognized through the identification of a biological link and/or a particular social link.<sup>16</sup> It is not always clear, however, how the biological link is defined<sup>17</sup> nor exactly what is the significance of the biological link vis-a-vis the social link; it is not always clear exactly what the requisite social link looks like; and it is not always clear how the biological aspect and the social aspect combine to form actual families nor how the genders of the family members concerned effect responses

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14. See SCHNEIDER, *supra* note 8, at 97-126 (extraordinarily insightful description and analysis of the extent to which even anthropologists have *assumed* the universality of certain beliefs based in biology for ordering human experience); see also Hill, *supra* note 11, at 360 (definitions of "family" and of family members in hard cases, such as those of gestational surrogacy, often selected through "appeal to some preanalytic concept of parenthood").

15. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977) (describing the existence of family to depend on biological and socio-legal ties, and referring expressly to marriage as a nonbiological relationship, constituting the "basic foundation of the family"); see also SCHNEIDER, *supra* note 8, at 97-112 (describing the anthropological definition of kinship as involving biological and social dimensions).

16. See David M. Schneider, *Kinship, Nationality, and Religion in American Culture: Toward a Definition of Kinship*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS*, *supra* note 1, at 67; see also Hill, *supra* note 11, at 388-413 (arguing against the "presumption of biology" in the definition of parent).

17. See *infra* notes 219-225 and accompanying text (describing aspects of biological links presumed between parent and child).

to such questions. Yet, these matters are basic to the identification of families and family relationships under the law.

Moreover, reproductive technology,<sup>18</sup> by separating the biology of parenthood into various aspects,<sup>19</sup> is asking, and will increasingly ask, judges and legislators to decide what kinds of biological connections carry the most import in the face of competing claims to parenthood. In settling such questions, lawmakers<sup>20</sup> must be ready to articulate the comparative significance of various claims to parenthood. For instance, does a genetic connection imply the presence or likely future presence of a social and behavioral link? Does a gestational tie between a woman<sup>21</sup> and a fetus hold implications for the social connection between the woman and the child? Is genetics more or less important than the task of carrying and bearing a baby? And do the answers to such questions differ for women and men or for cases in which mothers are being compared to fathers, for cases in which mothers are being compared to other kinds of mothers, and for cases in which fathers are compared to other kinds of fathers? As anthropologist David M. Schneider has written:

To merely establish that the culture postulates that one person engenders another is insufficient: is the relationship held to be significant for that very reason or is that just one of the facts of life that are not really important in terms of which social action is regulated?<sup>22</sup>

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18. Reproductive technology includes, among other things, surrogacy and gestational surrogacy, with which this Article is directly concerned. In addition, the so-called new reproductive technologies refer primarily to *in vitro* fertilization (IVF), and embryo transfer procedures. IVF, the method most likely to be used at present in cases of gestational surrogacy, involves treatment with fertility drugs, retrieval of the eggs, fertilization of the retrieved eggs in a culture dish, and finally, insertion of the fertilized eggs into the woman's (or some other woman's) uterus. Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 641-42 (1991). Alternatives to IVF include gamete intrafallopian transfer (GIFT), in which the egg and sperm are replaced in the fallopian tubes where fertilization occurs, and zygote intrafallopian transfer (ZIFT), in which the egg is fertilized in a petri dish and the resulting zygote is placed in the fallopian tube. *Id.* at 642-43.

19. See *supra* note 5.

20. See *infra* note 218 and accompanying text (for consideration of differences in ways judges and legislators handle such questions).

21. Among other things, reproductive technology offers the future possibility that men, as well as women, will be able to gestate fetuses. It may also become possible to gestate fetuses from conception through birth outside the human body. In these regards, this Article limits itself to the present situation and does not consider shifts in our society's notions of what makes a person a parent that might ensue were fathers able to gestate fetuses or were it possible to gestate fetuses outside the human body.

22. SCHNEIDER, *supra* note 8, at 201.



During most of the last century, courts were only rarely burdened with disputes about maternity. A child's mother was the woman who bore the child.<sup>23</sup> Biology—including both genetics and the processes of pregnancy and birth—was paramount and decisive. For fathers, however, biology was more often secondary.<sup>24</sup> Unwed biological fathers had no right to commence paternity actions under the common law.<sup>25</sup> Moreover, the common law established an irrebuttable presumption that a mother's husband was the father of her children.<sup>26</sup>

The European-American traditions recognized motherhood as a natural fact. The evidence of pregnancy and childbirth was irrefutable. Thus, biology has been central to the identification of maternity. Nature identifies mothers. In contrast, fatherhood is "constructed as a (conventional) object of knowledge"<sup>27</sup> and fatherhood can only be presumed through a man's relation to the child's mother.<sup>28</sup>

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23. This did not always give the mother the right to custody. In England the mother's right to custody of her illegitimate child was first recognized in 1883 as superior to any rights claimed by the biological father. Tina M. Hinnan, Note, *Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption*, 25 WAKE FOREST L. REV. 617, 623 (1990).

24. The biological tie between a father and a child even in cases in which the man denies any interest in the child or in fatherhood, has been invoked often, of course, as the basis of a paternal support obligation. In such cases, however, the genetic tie is not invoked as evidence that the man is a social father or must play any part in family relations; it is rather invoked, without regard for any social correlates of family, as evidence that the man is responsible for what is *his*. Cf. STEVE BARNETT & MARTIN G. SILVERMAN, *IDEOLOGY AND EVERYDAY LIFE* 47–48, 64–66 (1979) (discussing difference between ownership in the market and ownership in the family). In such cases, the biological (genetic) link between men and their biological children might better be analyzed as an aspect of the market (as part of a domain in which autonomous individuals, without other ties, interact) than as an aspect of family. At stake in such cases is not the man's paternal role but his obligation, in large part vis-a-vis the state, to support his biological child.

25. Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 370 (1988).

26. The evidentiary corollary to the presumption, known as Lord Mansfield's Rule, states that neither spouse may testify so as to have declared illegitimate a child born after the marriage occurred. *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (1777); see HOMER H. CLARK, *DOMESTIC RELATIONS: CASES AND PROBLEMS* 1107 (1980) (describing the evidentiary principle).

27. MARILYN STRATHERN, *REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY, KINSHIP AND THE NEW REPRODUCTIVE TECHNOLOGIES* 149 (1992).

28. Traditionally, fatherhood could *not* be presumed from a man's biological relation to a child. In this regard, the traditional system is reflected, though in large part implicitly, in the Supreme Court decisions concerned with the paternal rights of putative fathers. See *infra* notes 39–40.

Mediating between a father and his rights to his biological children has been the institution of marriage. As the development of the Industrial Revolution separated fathers from the "home," from the private world of family and attachment,<sup>29</sup> claims to social and legal paternity have rested on the remnants of the father's tie to "family." The market defines its participants as *individuals* only. The preservation of communal ties has thus depended on some connection to the one arena of modern life in which *relationship*, not individualism, has been central—the family.

The father-child relationship, outside the larger context of the family as a social institution, has been accorded little significance during the last few hundred years. Society does not see social paternity to inhere in biological paternity. In fact, the genetic link between a man and his biological child can create a legal obligation in the absence of any concomitant social connection, as in the case of biological fathers required to provide financial support for their offspring even in cases in which the mother is married to another man.<sup>30</sup> In this regard, a biological (genetic) link between a man and a child may be taken as evidence of the obligations (but not necessarily the rights) of paternal ownership even though no familial relationship has been actualized socially. The state relies on the genetic tie between a man and a child to hold the man financially

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29. The system described here developed during the early years of the Industrial Revolution. Before that time, under common law, fathers had an absolute right to the custody of their children. IRA M. ELLMAN ET AL., *FAMILY LAW CASES, TEXT, PROBLEMS* 492 (1991). The common law view represented a modification of Roman law under which children were fully defined as paternal property. Under Roman law fathers could sell or kill their children. *Id.* at 491 (citing WILLIAM FORSYTH, *CUSTODY OF INFANTS* 8 (1850)). Recognition of the mother-child relationship as primary and "natural" occurred in the nineteenth century and was part of the separation that occurred between a private sphere of "personal biological activities" and a public sphere, regulated by the market economy. BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 9 (1978).

In the new economic order that began to reach maturity in the late eighteenth century, fathers, in full control of the market, were separated from the home. Old notions of family hierarchy were shattered. As Ehrenreich and English describe the changes of the late eighteenth and nineteenth centuries,

[there was] a total and revolutionary reorganization. To go from a society organized around household production to one organized around large-scale factory production, from a society ruled by seasons and climate to one ruled by the Market, is to reach into the heart of human social life and uproot the deepest assumptions. Everything that was "natural" is overturned. What had unquestionably been "human nature" suddenly appears archaic; what had been accepted for centuries as human destiny is no longer acceptable, and in most cases, is not even possible.

*Id.* at 11.

30. See *infra* note 114.

responsible for what is *his* even where the man can claim no familial rights to the child he must support because he *chose* to sire the child outside a family setting.<sup>31</sup> And, as with other forms of property, a man has the right to sell his genetic material and, if done according to the rules, his rights and obligations regarding the paternity of any child that may result can be bargained away.<sup>32</sup>

In contrast, the mother-child relationship, more fully contained by the boundaries of home and hearth, and defined biologically, has been recognized as a "natural" unit, not necessarily dependent for legal recognition on the correlates of a larger family network. In short, since the nineteenth century, claims to maternity have invoked nature; claims to paternity have invoked culture.<sup>33</sup> This continues to be the case.<sup>34</sup>

However, changing social patterns<sup>35</sup> as well as the options provided by reproductive technology, allow and encourage courts and

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31. This understanding of a man's obligations to his biological child is framed in market terms and must be distinguished from an older definition of those aspects of a man's relationship to his children (and his wife) that defined them as his property and that were fundamental to the character of the patriarchal family before the Industrial Revolution. See EHRENREICH & ENGLISH, *supra* note 29, at 7-8, 11-12. In the patriarchal order, the father's rights and obligations stemmed directly from the "nature" of man and from the "nature" of the family as a unit. See HENRY MAINE, *ANCIENT LAW* 98-99 (1939).

32. Statutes controlling artificial insemination typically provide that an anonymous sperm donor has no legal connection to the child that results from the insemination. In cases of artificial insemination by donor (AID) (recently renamed donor insemination: DI), the woman's husband is recognized as the child's father if he consents in writing to the procedure. See Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 301-02 (1991).

33. The picture was more complicated in earlier centuries when marriage was itself understood as a relationship with natural correlates, when husband and wife were understood to have one flesh. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 270 n.8 (1990). Sometimes this was recognized as metaphor; sometimes as fact. Marriage itself was understood to produce, and to be based on, a natural and substantial union. To that extent, claims to paternity, mediated through a relationship between husband and wife, involved a complex amalgam of natural and cultural facts. Certainly, in the eighteenth and nineteenth centuries, the law treated married women as not only merged with, but as encompassed by, their husbands. Blackstone described the legal identity of a married woman as fully subsumed by that of her husband. 2 WILLIAM BLACKSTONE, *COMMENTARIES* § 444 (St. George Tucker ed. 1803).

34. The picture has become more complicated but has *not* been essentially changed by new options for parenthood (and for motherhood, in particular) provided by reproductive technology. See *infra* notes 156-160 and accompanying text.

35. Changing social patterns include, among other things, increases in nonmarital cohabitation, ELLMAN ET AL., *supra* note 29, at 797, increases in the number of children living with unmarried parents, *id.* at 882, and rises in rates of divorce, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 500-02 (2d ed. 1985). Commentators too numerous to note have suggested a link between family law and cultural patterns

other social arbitrators to sort out the pieces of the underlying belief system through which families are understood. For instance, the process of differentiating between and comparing the importance of genetics, gestation, intention, and care in the creation of a legal parent may result in an alteration, an elaboration, or a real change in the meanings of the symbols through which parenthood is identified. This can occur because, like all symbols, the symbols of parenthood are multivalent;<sup>36</sup> none carries one certain or primary meaning. And of a symbol's multiple meanings, one may be primary in one context, in one usage, and others may be primary in other contexts, in other usages.<sup>37</sup> Thus, for instance, the term "genes" may have one set of implications when discussed in the context of biological paternity and another set of implications in the context of biological maternity.<sup>38</sup> Moreover, the term carries different sets of meanings when applied to males or females, as the relevant social context shifts. So, for example, "genetic" paternity or "genetic" maternity carries certain implications for fathers or mothers in families and other implications for fathers or mothers outside families.

## II. WHAT MAKES A FATHER A "FATHER"?

Not until 1972 did the United States Supreme Court recognize the constitutional rights of unwed fathers in their relationships with their children.<sup>39</sup> Since that time, the Court has decided four additional cases which further delineate the scope of unwed fathers' pa-

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and values. That is a premise of this Article as well as countless others. However, a word of warning is necessary. The relation between law and values is neither obvious nor certain. Laws do reflect and are reflected in changing values and changing behaviors. However, shifts in social patterns and in the laws that regulate them may *not* indicate concomitant shifts in a society's underlying system of beliefs through which the patterns and the laws are equally understood and played out. This Article argues that underlying systems of belief (here called ideology) tend to adapt to societal changes but are fundamentally transformed much less frequently. See Steve Barnett, *Identity Choice and Caste Ideology in Contemporary South India*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* *supra* note 1, at 270-91.

36. See Janet L. Dolgin et al., *Introduction: "As People Express Their Lives, So They Are . . ."*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS*, *supra* note 1, at 3, 22-23.

37. *Id.* at 22-31.

38. See *infra* text following note 229 (discussing various meanings of the symbols at issue).

39. *Stanley v. Illinois*, 405 U.S. 645 (1972).

ternal rights.<sup>40</sup> Commentators have heralded the unwed father cases as exemplifying a new recognition of the rights of fathers as compared with those of mothers.<sup>41</sup>

Certainly, these cases did effect concrete changes in state laws regulating the authority of unwed fathers to sustain relationships with their biological children. However, the assumptions behind the Supreme Court's unwed father decisions and the theoretical ground on which those cases rest, harmonize with a view of the father produced almost two centuries earlier, during the early years of the Industrial Revolution. In this view fathers—because male—are defined primarily through their relation to the market economy. The organic bonds, seen to relate fathers to their families in an earlier time, had long been sundered.<sup>42</sup> By the early nineteenth century, fathers as family members were defined by *choice*, not nature. In the second half of the nineteenth and first half of the twentieth century, paternity was mediated by the biological father's link to his children's mother. More recently, paternity has additionally been recognized on the basis of the father's *behavior* toward his biological children.<sup>43</sup> That recognition, however, was conditioned by an understanding that the requisite relation between a father and his biological child must include the child's mother. Both the view that conditions paternal rights on a marriage (or other similar relationship) between a biological father and his children's mother, and the view that conditions paternal rights on a biological father's behavior toward his children, assume a father's relationship to his children is a *cultural* creation—and a choice<sup>44</sup>—not the automatic correlate of a biological tie.<sup>45</sup>

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40. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

41. See, e.g., ELLMAN ET AL., *supra* note 29, at 912–18; John R. Hamilton, Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 949–50 (1988). *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is generally treated as a clear break with the positions asserted and suggested in the earlier unwed father cases and has not been analyzed as the harbinger of a new social order regarding paternal rights and relationships.

42. EHRENREICH & ENGLISH, *supra* note 29, at 11.

43. See *infra* notes 52–148 and accompanying text (discussing the unwed father cases).

44. See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1420 (1991) (describing choices involved in father's parental role).

45. Hill correctly asserts that there are three dimensions along which paternity can be identified and invoked. These three “factors” include “the man's biological relationship with the child, his legal or social relationship with the child's mother, and the

The implications of the two positions vary, however. The position that presumes a father becomes a father only through the mediation of his child's mother presumes an older order's definition of family. In such a universe, there is less room for the autonomous individual, free to create relationships as he or she chooses. Rather, relationships are dictated by the order of things. And the view that allows putative fathers to effect their paternity through the development of a relationship with their children, apart from those children's mothers, erodes traditional forms. With this model, the putative father can *choose* to be a father without regard for a larger network of family relationships. He can, that is, effect a connection with his child entirely outside the context of family, much as one might choose to establish a relationship with a friend or even a business associate. This second position, presuming legal paternity to follow from the development of a relationship between a father and his biological child, more fully rejects the old order in which familial relationships are deeply embedded in traditional forms that entail clear rights and obligations, and reflects a newer world of "economic man," connected to others only through a network of impersonal economic relationships.<sup>46</sup>

Recent Supreme Court cases involving the paternal rights of unwed fathers<sup>47</sup> exhibit confusion about which position should finally be selected. The implications of the cases seem ambiguous because the Court shifted between the two positions without acknowledging that it was doing so. All five of the recent cases concerning the legal paternity of unwed fathers say quite clearly, though each with more or less force, that the paternity of biological fathers who have developed social relationships with their children is a guaranteed constitutional protection. Yet, underlying all five cases and explicit in the most recent Supreme Court case, is the suggestion that legal paternity depends on the father's development of a relationship, not with his children, but with their mother.<sup>48</sup> The express language of several of the cases does suggest that legal

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extent of his social and psychological commitment to the child." Hill, *supra* note 11, at 381 (footnotes omitted). However, these factors do not, as Hill's analysis might suggest, carry equal weight for the society or for its legal system. Rather, they are weighted differently depending, in certain cases, on context, and on the essential understanding that fathers, unlike mothers, are not *socially* limited by their biological relation to their children. They are free to invoke biological fatherhood or to ignore it.

46. EHRENREICH & ENGLISH, *supra* note 29, at 19. See MAINE, *supra* note 31, at 98-99 (describing differences between a universe organized in terms of status and one organized in terms of contract).

47. See *supra* notes 39-40.

48. Michael H. v. Gerald D., 491 U.S. 110, 129 (1989).

paternity can be premised on an unwed biological father's paternal relationship with his children.<sup>49</sup> In fact, the majority of commentators have stressed this trend.<sup>50</sup> However, the cases make sense only if the apparently sufficient requirement for effecting legal paternity—that a father effect a social relationship with his biological child—is read as code for the requirement that he effect that relationship *within the context of family*, most easily identified in cases in which the father has established a marriage or marriage-like relationship,<sup>51</sup> with the child's mother.

A. Stanley, Quilloin, Caban, and Lehr: *The Choice to Be a Father*

*Stanley v. Illinois*,<sup>52</sup> the first Supreme Court case to extend constitutional protection to unwed fathers, involved Peter Stanley, who had lived intermittently with his three children and their mother, Joan Stanley, for eighteen years. Peter and Joan never married. When Joan died, Illinois law presumed unwed fathers were unfit and therefore, required the state to take the children as wards.<sup>53</sup> The Court described Peter Stanley as a member of a family unit, including himself, Joan, and the three children and determined that the statute, by failing to provide Peter a hearing on his fitness as a parent, deprived him of due process and equal protection.<sup>54</sup> Justice White wrote for the Court: "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>55</sup>

The Court's decision in *Stanley* strongly suggests that the rights extended to Stanley depended on his position as a biological *and* a social father to his children. But it was not entirely clear after *Stanley* whether biological paternity outside the context of marriage (or an established family unit), or outside the context of an established social relationship between the biological father and his

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49. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

50. See, e.g., Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 *FORDHAM L. REV.* 971, 980 (1992).

51. See *infra* notes 94–95 and accompanying text (for a discussion of what kinds of relationships between a man and his biological children's mother are considered adequate for effecting his legal fatherhood).

52. 405 U.S. 645 (1972).

53. *Id.* at 646.

54. See *id.* at 649.

55. *Id.* at 651.

children, would be enough to constitute legal fatherhood.<sup>56</sup> Nor was it clear from *Stanley* how heavily the Court's decision rested on Peter's having had a relationship with Joan that resembled a traditional marriage. It was not clear, that is, how future courts would interpret the significance of the finding that the Stanleys were a "family."<sup>57</sup>

Chief Justice Burger, dissenting in *Stanley*, was more explicit than the majority about the social and legal consequences of biological fatherhood. Chief Justice Burger disavowed the significance of biological paternity as compared with biological maternity, first, because biological fathers are harder to identify than biological mothers, and, second, and more importantly, because the biological link between mother and child has *social* significance.<sup>58</sup> Chief Justice Burger wrote:

[T]he biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently

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56. Footnote 9 of the *Stanley* opinion created particular confusion about the implications of the case. That footnote read:

We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases, Ill. Rev. Stat., c. 37, § 704-01 *et seq.*, provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

405 U.S. at 657 n.9. The footnote created confusion because the Court failed to explain whether the protections afforded *Stanley* were to be made available to all unwed fathers or only to those, like him, who had played a part in the socialization of their children or who had lived with them and their mother as a family. See David L. Batty, Note, Michael H. v. Gerald D.: *The Constitutional Rights of Putative Fathers and a Proposal for Reform*, 31 B.C. L. REV. 1173, 1181-82 (1990); Marianne M. DeMarco, Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 301-03 (1985).

57. *Stanley*, 405 U.S. at 651.

58. *Id.* at 665-66 (Burger, C.J., dissenting).



or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.<sup>59</sup>

In short, for mothers, biology ordains and constitutes a maternal "role"<sup>60</sup> and thus carries social significance; for fathers it is simply a fact of "nature," not necessarily connected in any way to social consequences. Fathers are left free to choose. Although offered in dissent, Chief Justice Burger's commentary on the comparative significance of biological maternity and biological paternity supports and reflects basic assumptions behind the majority opinion. In both opinions, though more expressly in Chief Justice Burger's, maternity is defined through biology and paternity is defined as a matter of choice.

Chief Justice Burger did, however, provide a different version of Peter Stanley's own conduct as a father than did the majority. Chief Justice Burger's rendition of the facts asserted that Stanley was not, in fact, a good father. He suggested that, in general, for men, though not for women, biological parenthood should not be read to imply the likely development of a parent-child relationship. As Chief Justice Burger told the story, Peter Stanley was not the attentive father the majority opinion suggested. Rather, after the death of the children's mother, Stanley transferred care of the children to another couple. He made no efforts to be recognized as the father until the State became aware that no adult had any legal obligation for the support of the children. At that time Stanley made himself known, but only, according to Chief Justice Burger, because he feared losing welfare payments if others were named guardians of the children.<sup>61</sup>

Obviously, Chief Justice Burger recounted these facts in order to buttress his claim that unwed fathers rarely provide adequate care for their children and, more particularly, to implicate *this* father as one of that purported multitude. The additional facts do not, of course, gainsay the position that biological paternity is no

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59. *Id.*

60. It is not entirely clear from Chief Justice Burger's language whether he predicates these conclusions on a natural, and thus presumably inexorable, propensity of females to bond strongly with their children and a natural absence of such a propensity in males, or whether Chief Justice Burger would allow that the condition he describes is cultural, and thus presumably more easily mutable.

61. *Stanley*, 405 U.S. at 667 (Burger, C.J., dissenting).

less, or at least not much less, determinative of parental affections than biological maternity, and pose no theoretical objection to the Court's decision that the State cannot presume men like Peter Stanley unfit fathers.<sup>62</sup> However, in the arena of discourse in which nature and nurture are separated and compared as determinants of human behavior, science offers little assurance.<sup>63</sup> Conclusions about the contributions of nature and nurture to human behavior are more faddish than certain.<sup>64</sup> Therefore, the telling of a particular story can be a crucial determinant of the weight given each component of the nature/nurture controversy.<sup>65</sup>

Moreover, by presenting facts that minimized the significance of Peter Stanley's actual relationship with his children, Chief Justice Burger's account strengthens the significance of Stanley's long-term relationship with his children's mother, and of the fact of "family" in the *Stanley* case, as factors crucial to the Court's holding.

Again, in *Quilloin v. Walcott*,<sup>66</sup> decided six years after *Stanley*, the Court assumed—now more explicitly even than in *Stanley*—that biological paternity, unlike biological maternity, offers no assurances about the probable actualization of parental behavior. In *Quilloin* the Court considered a Georgia statute that gave all unwed mothers, but only certain unwed fathers, the right to veto the adoptions of their children.<sup>67</sup> Leon Quilloin, an unwed father, desired to veto the adoption of his child by the child's stepfather Randall Walcott. The mother, Ardell Williams Walcott, had married Randall Walcott in 1967, almost three years after the birth of her child with Leon Quilloin.<sup>68</sup> Quilloin and Ardell Walcott had never established a home together with the child, who had been in the custody of its mother since birth. Quilloin had offered irregular support and

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62. Similarly, the additional facts presented by Chief Justice Burger about Peter Stanley do not provide logical grounds for questioning the majority's opinion since the majority only required that the State prove, rather than presume, Stanley's unfitness before depriving him of the children. *Id.* at 658.

63. See, e.g., RUTH HUBBARD, *THE POLITICS OF WOMEN'S BIOLOGY* 114-17 (1990).

64. *Id.*

65. *Id.*

66. 434 U.S. 246 (1978).

67. Under the Georgia statute at issue in the case, unwed fathers could acquire the right to veto the adoption of a child if they "legitimized" the child by marrying the mother and acknowledging paternity, GA. CODE ANN. § 74-101 (1975), or by having the child declared legitimate through a court order, *id.* § 74-103 (1975). *Quilloin*, 434 U.S. at 249.

68. 434 U.S. at 247.

had visited on "many occasions" before the mother, asserting the child's best interests, had ended Quilloin's contacts with the child.<sup>69</sup>

The Court in *Quilloin*, retreating from the more expansive implications of *Stanley*, explicitly refused constitutional protection to unwed fathers on the basis of biological paternity alone; under *Quilloin*, constitutional protection was only extended to certain unwed fathers. The Court was less clear about *who* those unwed fathers are. The opinion (especially when read in concert with *Caban v. Mohammed*,<sup>70</sup> decided the following year) has often been interpreted<sup>71</sup> as defining the fathers who *are* protected as those who *act* like fathers, who "shoulder[ ] . . . significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>72</sup> However, that reading of the opinion offers only a partial rendition of what the opinion actually says.

The Court was at least equally concerned with the absence of a "family unit" including Quilloin, his child, and that child's mother, as it was with the absence of a social relationship between Quilloin and his child per se. "[T]he result of the adoption [by the child's step father] in this case," wrote the Court, "is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant."<sup>73</sup> The Court's language about fathers who accept "significant responsibility" regarding the socialization of their children seemed to distinguish Quilloin from separated or divorced fathers who had once had a relationship with their children's mothers, and who had once joined in a "family unit" with their children. This language also served to stress the absence of a relationship between Quilloin and the child. "[E]ven a father whose marriage has broken apart," wrote the Court, "will have borne full responsibility for the rearing of his children during the period of the marriage."<sup>74</sup> That statement may be true as an assumption allowed to law, but, as the Court clearly knew, does not necessarily describe the behavior of any particular father. Thus, the opinion suggests

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69. *Id.* at 251.

70. 441 U.S. 380 (1979). See *infra* notes 83-93 and accompanying text (for consideration of *Caban*).

71. See Mary M. Horton, Comment, *Domestic Relations—Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*, 14 MEM. ST. U. L. REV. 259, 267 (1984); Jennifer J. Rabb, Comment, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process is Due?*, 7 HARV. WOMEN'S L.J. 265, 272 (1984); Zinman, *supra* note 50, at 976.

72. *Quilloin*, 434 U.S. at 256.

73. *Id.* at 255.

74. *Id.* at 256.

even in the midst of a statement about the importance of unwed fathers' paternal behavior, that the behavior itself is conditioned by the father's relationship with the children's mother.

The Court was certainly concerned, as commentators have stressed,<sup>75</sup> that *Quilloin* had no substantial parental relationship with his child. But, of at least equal concern was the absence of a "family unit" involving *Quilloin*, and the presence of a "family unit" including Ardell Walcott, Randall Walcott, and the child. The Court declared that "[w]hatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation [of the child by *Quilloin*], were in the 'best interests of the child.'"<sup>76</sup>

Thus, under the holding in *Quilloin*, biology alone is of minimal importance in securing legal recognition for the paternal relationship of unwed fathers to their biological children. Behavioral ties between such fathers and their children are significant, but not conclusive.<sup>77</sup> Of greatest importance in determining a biological father's rights to a legal relationship with his child appears to be the father's inclusion in a "family unit."<sup>78</sup> Once again, as was true under the common law,<sup>79</sup> *Quilloin* implies that, for most fathers at least, paternal rights are mediated by the father's relation to his child's mother. In sum, the *Quilloin* Court considered three factors that might provide an unwed father grounds for claiming parental rights: a biological tie to the child, a social connection to the child, and a creation of a "family unit" with the child and his or her mother. Of these three factors, the first was accorded little significance; the second<sup>80</sup> and third were recognized as important, but

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75. See *supra* note 71.

76. *Quilloin*, 434 U.S. at 255.

77. The Court in *Quilloin* did not try to delineate exactly *how much* social responsibility an unwed father had to accept for his child in order to be guaranteed parental rights.

78. Although the "family unit" recognized in *Quilloin* was marital, the Court did not express an explicit preference for marital as compared to nonmarital family units. *Quilloin*, 434 U.S. at 255.

Commentators have read *Quilloin* to stress "the substance of the parent-child relation," ELLMAN ET AL., *supra* note 29, at 914. Indeed, the Court did emphasize *Quilloin*'s failure to effect a substantial paternal role; however, the Court assumed that a father unattached to his child's mother will generally *not* have a significant relationship with the child. This position becomes more explicit in the Court's decisions in *Caban v. Mohammed*, 441 U.S. 380 (1979) and in *Lehr v. Robertson*, 463 U.S. 248 (1983).

79. STRATHERN, *supra* note 27, at 148 (citing SYBIL WOLFRAM, IN-LAWS AND OUTLAWS: KINSHIP AND MARRIAGE IN ENGLAND 121 (1987)).

80. See *supra* note 78.

only the third factor emerged as determinative. *Quilloin* suggests, without ever stating explicitly, that the relationship which makes an unwed father most *like* a married father—a relationship founded on the establishment and maintenance of a household with the mother and child—would carry the greatest weight in determining unwed fathers' paternal rights.<sup>81</sup>

Thus, between *Stanley* and *Quilloin*, the Court seemed to move from an equivocal willingness to recognize paternity on the basis of a biological father's commitment to his child, toward a more certain reluctance to recognize paternity unless the biological father made a commitment to a "family unit" that included, at least at some point, the children's mother as well as the man and his children. In either case, paternity is distinguished from maternity as a matter of choice, and biology is not presumed to determine a father's relationship to his children. The *Quilloin* Court did not consider the disparate treatment of unmarried fathers and unmarried mothers.<sup>82</sup> However, the Court did separate out the mother-child relationship as the core around which "family units" form. By implication, the Court understood female, but not male, biology to encompass and therefore, to guarantee, a parent-child relationship.

In *Caban v. Mohammed*,<sup>83</sup> decided one year after *Quilloin*, an unwed father<sup>84</sup> who was anxious to preserve his parental rights presented an equal protection argument based on disparate treatment accorded unwed fathers and unwed mothers. The case involved the constitutionality of a New York statute which gave unwed mothers, but not unwed fathers, the right to withhold consent for the adoption of their children.<sup>85</sup> The parents in *Caban* never married but established and maintained a household together for five years. During that time Maria Mohammed gave birth to two children. When the children were two and four, Maria left Ab-

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81. *Quilloin*, 434 U.S. at 255.

82. *Id.* at 253 n.13. For procedural reasons, the Court refused to consider *Quilloin*'s equal protection claim based on his gender.

83. 441 U.S. 380 (1979).

84. When the case was heard, *Caban* was married to another woman. *Id.* at 383. This fact—making *Caban* part of a "family"—may have played some unstated role in the Court's view of *Caban*.

85. The version of section 111 of the New York Domestic Relations Law in effect at the time provided that "'consent to adoption shall be required as follows: 1. Of the adoptive child . . . ; 2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; 3. Of the mother, whether adult or infant, of a child born out of wedlock; 4. Of any person or authorized agency having lawful custody of the adoptive child.'" N.Y. DOM. REL. LAW § 111 (McKinney 1977), quoted in *Caban*, 441 U.S. at 385 n.4.

diel Caban and shortly thereafter married Kazim Mohammed.<sup>86</sup> Two years after the marriage, Maria and Kazim filed a petition to have Kazim adopt the two children. A New York surrogate court granted the adoption.

Eventually, the United States Supreme Court reversed the decisions below and held New York's statute unconstitutional under an intermediate standard of review.<sup>87</sup> The Court found that the statutory distinction "between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children."<sup>88</sup>

The Court rejected as justification for the statutory distinction the Mohammeds' argument that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does."<sup>89</sup> The Court admitted the statistical validity of this claim, but expressed concern that some unwed fathers may play an important role in the lives of their children and decided that the rights of such fathers deserve protection. "The present case," wrote the Court, "demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother."<sup>90</sup>

*Caban* suggests that a biological father's paternal behavior will determine the degree of protection the Constitution provides in safeguarding his relationship with his biological child. However, the language of the opinion focuses on the fact that Caban "lived together as a *natural* family" with Maria Mohammed and their children rather than on the character of the relationship that Caban affected with his children.<sup>91</sup> It was, argued the Court, *as a member of a natural family* that Caban cared for and supported his children. Once again, in *Caban* the Court in large part rested the unwed father's relation to his children and his claims to legal paternity on the father's relation to his children's mother—on the creation of a "natural family"—as much as on the father's relationship with his children, *per se*.

Commentators analyzing *Caban*<sup>92</sup> have noted the Court's acknowledgment that an unwed father may have a "relationship with

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86. 441 U.S. at 382.

87. *Id.* at 391.

88. *Id.*

89. *Id.* at 388 (quoting Transcript of Oral Argument at 41).

90. *Id.* at 389.

91. *Id.* (emphasis added).

92. See, e.g., Laurel J. Eveleigh, Note, *Certainly Not Child's Play: A Serious Game of Hide and Seek with the Rights of Unwed Fathers*, 40 SYRACUSE L. REV. 1055,

his children fully comparable to that of the mother,"<sup>93</sup> but have frequently failed to recognize the extent to which the *Caban* Court, in fact, premised recognition of the father-child relationship on the unwed father's having set up a "natural family" with the children and their mother.

Technically, the term "natural family" was used in *Caban* to refer to a social unit of *unmarried* biological parents and their children. However, the term carried additional implications. The term "family" refers, of course, to a comparable unit involving two *married* adults. "Natural family" is the marked term.<sup>94</sup> The normal, ideal family can be described without use of the adjective "natural." That adjective is used to delineate a special, marginal family group. In this regard, therefore, *Caban* differed from the traditional position that to achieve legal recognition, a family must include two adults *married* to each other. But the decision did not eliminate altogether the presence of "family" as a basic precondition for the protection of a biological father's legal paternity.

For the Court, the social constellation in *Caban* could be described as a family not only (or even primarily) because there were biological ties between Caban and his children, but because the adults cohabited in the model of a married couple.<sup>95</sup> Thus, the important "natural" relationship giving Caban legal rights to his children was not his biological link to the children, nor even his unmediated social tie to them, but his link to their mother. *That* link made Caban part of a "natural" family and gave him *legal*

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1061-62 (1989); Jane P. Perry, Note, *Lehr v. Robertson: Putting the Genie Back in the Bottle: The Supreme Court Limits the Scope of the Putative Father's Right to Notice, Hearing, and Consent in the Adoption of His Illegitimate Child*, 15 U. TOL. L. REV. 1501, 1511 (1984); Gayle Wintjen, Note, *Make Room for Daddy: Putative Father's Rights to His Children*, 24 NEW ENG. L. REV. 1059, 1075 (1990).

93. *Caban*, 441 U.S. at 389.

94. ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* 76 (1967) (distinguishing marked and unmarked terms). The distinction between marked and unmarked terms, recognized in linguistics, has proved useful in the study of other social phenomena. In this derivative use, marked terms refer to people and groups of people who are in some sense considered peripheral. Thus, using the example of gender, "male" is the unmarked term, and "female" is the marked term. Marked categories of people (e.g., women) will frequently be identified as such. Thus, a female politician or a female doctor will more often be referred to through use of the gender designation than will a male politician or doctor. Male politicians or doctors will simply be referred to as politicians or doctors. Unless otherwise informed, the culture still *assumes* politicians and doctors are male. See *infra* notes 136-141 and accompanying text (for a discussion of implications of term "natural").

95. See *supra* note 33, for discussion of the substantialization of the husband-wife relationship through marriage. Similar substantialization of the nonmarital relationship between cohabitating, unmarried adults can occur.

*rights* to his biological children. Caban was able to effect the right to claim paternity by declaring his connection to his children's mother, the parent whose biological tie to her children so much more irrefutably constituted a parental tie. Thus, again in *Caban*, the choice that gives an unwed father paternal rights is the choice to relate to his children's mother as much as the choice to relate to the children themselves.

Justice Stewart's dissenting opinion shared a set of assumptions with the Court's majority about the comparative significance of female and male biology and delineated more expressly the implications of the assumed differences between biological maternity and biological paternity. This dissent is important because it reintroduces the underlying assumptions about biology that allowed the majority and the dissent alike so facily to distinguish mothers from fathers.

Justice Stewart wrote: "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense, her parental relationship is clear."<sup>96</sup> Justice Stewart posited the mother's relationship with her child to begin with the gestation and delivery of the child. Thus, "the biological connection between parent and child" that does not automatically give rise to parental rights must be a genetic connection, the only biological connection available to a father. On this reading, female biology encompasses maternity, but not because the mother provides the egg from which her child develops. The gestational, not the genetic, role makes a biological mother a "mother" in a case like *Caban*.<sup>97</sup> In contrast, biological paternity, understood to involve only a genetic tie, carries no certain implications for the social relationship between a man and his biological child. "The validity of the father's parental claims must be gauged by other measures," wrote Justice Stewart.<sup>98</sup> Traditionally, continued Justice Stewart, that measure has been legitimation of the paternal relationship through the father's marriage to the mother. So far, Justice Stewart's position resembles that of the majority. The difference, and the determinative difference for Abdiel Caban, is that the

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96. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

97. This appears to be the case where maternity is being invoked per se or where maternity is being compared with paternity. In other cases, those in which one kind of maternity is opposed to *other kinds of maternity*, the comparative significance of genetics and gestation may be reversed. See *infra* text accompanying notes 196-218 (discussing greater claim of genetic than of gestational mother in gestational surrogacy case).

98. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).



majority was willing to read the creation of a "natural family" as comparable to the creation of a marital family for purposes of establishing paternal rights. That difference, although determinative for *Caban*, is in a more analytic context a minor difference, holding few implications for the essential character of paternity.

Like Justice Stewart's dissent in *Caban*, Justice Stevens' dissent stressed the relevance of biological maternity to the establishment of a mother-child tie and was of particular significance in foreshadowing Justice Stevens' majority decision in the next unwed father case to reach the Supreme Court. Referring to the biological ties between mother and child that develop and grow during pregnancy and birth,<sup>99</sup> Justice Stevens' *Caban* dissent invoked a "symbiotic relationship between mother and child" that provided a "physical and psychological bond" between the two, a bond not "present between the infant and the father or any other person."<sup>100</sup> Thus, Justice Stevens declared expressly that social differences between mothers and fathers have "natural" roots. But it was not until *Lehr v. Robertson*<sup>101</sup> that Justice Stevens explained in detail his view of the differences between biological maternity and biological paternity.

In *Lehr*, Justice Stevens, writing for the Court, denied the petition of a putative father, Jonathan Lehr, to prevent the adoption of his daughter, Jessica, by the husband of the child's mother. Lehr argued that New York's failure to provide him with notice of the adoption proceeding denied him due process and that the different treatment of unwed mothers and unwed fathers in the statute denied him equal protection.

Addressing the due process claim, Justice Stevens conceded that the "intangible fibers that connect parent and child" deserve "constitutional protection in appropriate cases."<sup>102</sup> Lehr's case was not seen to be such a case, however, because "a mere biological relationship"<sup>103</sup> cannot alone establish legal paternity. The majority proceeded to quote Justice Stewart's dissent in *Caban*: "Parental rights do not spring full-blown from the biological connection be-

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99. *Id.* at 405 (Stevens, J., dissenting).

100. *Id.* at 405 n.10 (Stevens, J., dissenting). Justice Stevens asserted that sociological and anthropological research indicated the presence and importance of the bond to which he referred.

101. 463 U.S. 248 (1983).

102. *Id.* at 256.

103. *Id.* at 259-60.

tween parent and child. They require relationships more enduring."<sup>104</sup> Justice Stevens declared:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.<sup>105</sup>

Biology, in short, gives men options. An unwed biological father may establish a relationship with his biological child and with that child's mother through appropriate behavior and become a legal father. Alternatively, he may treat the biological relationship as irrelevant and not become a father at all.

Mothers, wed or unwed, do not have the same choices.<sup>106</sup> The Supreme Court implied that for mothers, parental rights *do* spring from a biological, though not from a genetic, connection between parent and child.<sup>107</sup> Biology gives men the *chance* to become fathers. However, it inexorably makes women mothers.<sup>108</sup>

In responding to Lehr's equal protection argument, the Court did not rely on, or even refer openly to, its own assumption that biological paternity and biological maternity are different enough to situate unwed mothers differently from unwed fathers for purposes of constitutional analysis.<sup>109</sup> Rather, the Court decided that Lehr's

104. *Id.* at 260 (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

105. *Id.* at 262.

106. In this sense, the unwed father cases further limit mothers' choices. See, e.g., Czapanskiy, *supra* note 44, at 1457-63 (describing mothers as "draftee" parents and fathers as "volunteer" parents).

107. See *supra* text accompanying note 96. Justice Stewart seemed to restrict his use of the term "biological ties" to ties with a genetic base. See *Caban*, 441 U.S. at 397 (Stewart, J., dissenting). However, the mother's "more enduring" relationship with the child in the form of gestating and bearing it, to which Justice Stewart referred as establishing her parenthood, *id.*, is clearly *biological*, though not genetic.

108. Biology plays a different role in determining maternity in cases in which mothers oppose different kinds of mothers. See *infra* notes 170-176 and accompanying text.

109. Constitutional discourse, based on fundamental assumptions that distinguish men from women with respect to their relationships with their children, will treat the two groups differently. The differential treatment will follow automatically from the tacit assumptions. Only to the extent that the fundamental assumptions involved represent "truth"—that is, only to the extent that the two groups are *not*, in fact, similarly situated—will such cases reach just conclusions. An analysis of the use of implicit, fundamental assumptions about men and women in equal protection cases, in particular, should be carried out, but is beyond this Article's defined parameters. See Lawrence, *supra* note 12 (defining and discussing implications of unconscious racism in judicial decision-making).

equal protection claim failed because *he* had not "established a substantial relationship with his daughter" while the child's mother had.<sup>110</sup> On this basis, the Court distinguished *Lehr* from *Caban*.

Thus, the Court in *Lehr* implied that had Lehr only been a more committed father, had he "'come forward to participate in the rearing of his child,'" <sup>111</sup> his paternal rights would have received constitutional protection. This explanation is unconvincing, however, in light of the facts revealed in Justice White's dissenting opinion which indicated that the child's mother had hidden Jessica from Lehr who "never ceased his efforts to locate" the mother and the child.<sup>112</sup> When he did locate the mother and child, the mother threatened Lehr with arrest if he attempted to see the child.

The facts presented in Justice White's dissent indicate that the decision in *Lehr* rests less on Lehr's specific failure to effect a paternal role than on two broader, implicit assumptions that the Court made. First, the Court assumed that biological paternity, unlike biological maternity, carries no imperatives for fathers—implying, of course, that Lehr's equal protection argument must fail *because* men and women are *not* similarly situated with regard to their status as parents. Second, the Court assumed that the recognition of paternity depends in most cases on a connection (either "lawful" or "natural") between the father and the child's mother.<sup>113</sup>

When the facts of *Stanley* and *Caban* on the one hand, and *Quilloin* and *Lehr* on the other, are examined, the Court's decisions are not adequately distinguished on the ground that *Stanley* and *Caban* effected relations with their children and *Quilloin* and *Lehr* did not. Rather, the determinative difference was that the first two fathers effected relations with the children's mothers that adequately resembled families, while the second two did not. The Court never focused clearly on the importance this difference played in its unwed father decisions. The Court assumed, quite implicitly, that through the mediation of the mother in the context of a "family," biological fathers became social fathers *and* that in the absence of such mediation, they did not.

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110. *Lehr*, 463 U.S. at 267.

111. *Id.* (quoting *Caban*, 441 U.S. at 392).

112. *Id.* at 269 (White, J., dissenting).

113. The *Lehr* Court did not expressly refer to Lehr's failure to establish a household with the mother and the child, but that fact, more than Lehr's not having "come forward," *id.* at 267 (quoting *Caban*, 441 U.S. at 392), distinguishes Lehr's situation from that of the fathers in *Caban* and *Stanley* and makes him more like the father in *Quilloin*.

The assumption that biology does not compel social paternity,<sup>114</sup> as it compels social maternity, undergirds the demand that fathers seek other paths for securing legal rights to their biological children. By forming "families" with the mothers of their children, fathers share in the natural bonds that connect mothers and children. A man's ties to his biological child are thereby socialized. His fatherhood is understood to be constructed socially.<sup>115</sup> Through the mediation of woman ("mother"), the father chooses to proclaim (and thus to claim) his "natural" relationship to his biological child, gaining the status, and therefore the constitutional protection, that for women is viewed to stem directly from the biological connection and has not been viewed as a matter of choice.

#### B. Michael H.: *The Limits of the Choice*

This reading of *Lehr* and the other three unwed father cases that preceded *Lehr* becomes even more compelling in light of the Court's 1989 decision in *Michael H. v. Gerald D.*<sup>116</sup> *Michael H.* tested the principle apparently enunciated in *Lehr*—that an unwed biological father creates a liberty interest in his relationship to his child if he "demonstrates a full commitment to the responsibilities of parenthood"<sup>117</sup>—and found that principle's limit easily reached in a case in which the father demonstrated a commitment to his

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114. One set of cases that seems to posit legal paternity on the basis of biological paternity alone calls for consideration and explanation. These are cases in which unwed biological fathers have been held responsible for supporting their biological offspring despite the absence of any social relationship between the father and his biological child as well as the absence of a continuing relationship between the father and the mother of that child. See, e.g., *Gomez v. Perez*, 409 U.S. 535 (1973) (per curiam) (Texas violated the Equal Protection Clause by not allowing children of unmarried parents the right to paternal support while children of married parents were given such a right). In one recent case, a Nebraska court declared that the state could sue a biological father for support even though the child's stepfather had acknowledged paternity in writing and held himself out as the child's father. *State ex rel. J.R. v. Mendoza*, 481 N.W.2d 165, 171-73 (Neb. 1992).

Although such cases do make declarations of legal paternity on the basis of biological paternity alone, they are essentially decisions that the biological father bears a certain contractual, financial obligation—not that he is or need be a social father (a "real" father). No relationship *with the child* is assumed to flow from the man's biological paternity. His responsibility for the child's support is in essence, even if not literally, a matter between the man (as an autonomous individual—not as a family member) and the state.

115. STRATHERN, *supra* note 27, at 148-49.

116. 491 U.S. 110 (1989). The holding in Justice Scalia's plurality opinion was joined by Justice Stevens in a concurrence.

117. *Lehr*, 463 U.S. at 261.

biological child, but did not establish a familial relationship with that child's mother.<sup>118</sup>

Justice Scalia's plurality opinion in *Michael H.* seems inconsistent with the implications of the *Stanley* line of cases if those cases are read to say that a biological father's relationship with his child will deserve constitutional protection as long as he effects a social relationship with that child. In particular, *Michael H.* seems inconsistent with the broad implications of *Quilloin* and *Lehr* that a putative father at least deserves the right to *develop* a social relationship with his biological child adequate to ensure constitutional protection for that relationship. If, however, *Quilloin* and *Lehr* are read to posit a putative father's relationship to his biological child to rest heavily on, and to be mediated by, his relationship with that child's mother, then *Michael H.* and the earlier cases can be harmonized.

*Michael H.* differed from the earlier cases involving the paternal rights of unwed fathers because in *Michael H.* the child's mother was married to another man.<sup>119</sup> Carole, the mother, was married to Gerald when she conceived and bore a daughter, Victoria. During the period of Victoria's conception, Carole had a relationship with Michael. Gerald was listed as Victoria's father on the birth certificate, but blood tests later showed a 98.07% probability that Michael was the child's biological father. Michael and Carole lived together for eleven months during the child's infancy. Carole then left Michael in California and resettled with Gerald and the child in New York.<sup>120</sup>

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118. The biological father in *Michael H.* did not establish a familial relationship with the child's mother because he legally could not. The mother was married to another man. 491 U.S. at 113. He did develop a *relationship* with his child's mother, but, in the Court's view, that relationship was neither marital nor that kind of nonmarital relationship resembling that between spouses. The Court described a family (what it called a "unitary family") to include the marital family and a "household of unmarried parents and their children." *Id.* at 123 n.3. "Perhaps," wrote Justice Scalia, "the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child . . . ." *Id.*

119. *Michael H.* also differed from the earlier unwed father cases in that Michael was more directly opposed in his claims to his daughter Victoria's paternity by another father instead of by a mother. It may be that a man's biological tie to a child carries even less weight when that tie is compared to the tie of another *man* than when it is compared to the tie of a woman. A reading of *Michael H.* and the other unwed father cases does not provide enough evidence for a conclusion on this point. The question deserves further exploration, however.

120. In fact, Carole moved back and forth between Gerald and Michael numerous times during Victoria's early life. In addition, she moved in with a third man, Scott, for ten months in 1982–83. During Victoria's first three and a half years, Carole and Victo-

Michael appeared to have effected the kind of commitment referred to in *Lehr* as the basis for an unwed father's right to a relationship with his biological child. Within eighteen months of Victoria's birth he filed a petition for a declaration of paternity; he provided financial support to the child; and he established a parental relationship with Victoria. The child called him "Daddy."<sup>121</sup>

In 1984, Michael, and Victoria through a guardian *ad litem*, sought visitation rights for Michael. However, section 621 of the California Evidence Code provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."<sup>122</sup> For a putative father, the presumption was irrebuttable. The California Superior Court granted Gerald's motion for summary judgment.<sup>123</sup> The state court of appeals affirmed, noting that despite Michael's interest in maintaining a relationship with Victoria, "the state's interest in preserving the integrity of the matrimonial family is so significant that it outweighs most other interests."<sup>124</sup> Michael and Victoria then appealed directly to the United States Supreme Court.<sup>125</sup>

The Court, in a five-to-four opinion, affirmed the California court's summary judgment for Gerald. Justice Scalia, who authored a plurality opinion,<sup>126</sup> decided that Michael did not have a

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ria moved a dozen times among different "family" constellations (consisting variously of Victoria, Carole and Gerald; Victoria and Carole; Victoria, Carole, Michael, and Carole's mother; and Victoria, Carole and Scott). Joint Appendix at 44, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (No. 87-746).

121. *Michael H.*, 491 U.S. at 144 (Brennan, J., dissenting).

122. CAL. EVID. CODE § 621(a) (West Supp. 1992), quoted in *Michael H.*, 491 U.S. at 115. The statute allowed rebuttal of its presumption within two years of the child's birth by the husband or, if the biological father filed an affidavit of paternity, by the wife. The biological father was given no right to rebut the section's presumption. *Id.*

123. *Id.* The California Superior Court granted Gerald's motion on the basis of affidavits submitted by Carole and Gerald that indicated that the two had lived together during the period surrounding Victoria's conception and birth and that Gerald was neither impotent nor sterile.

124. *Michael H. v. Gerald D.*, 236 Cal. Rptr. 810, 818 (Ct. App. 1987), *aff'd*, 491 U.S. 110 (1989).

125. The California Supreme Court denied certiorari. That judgment is reported at *Minutes: Supreme Court*, 1987 CAL. OFFICIAL REP. No. 23, Aug. 27, 1987, at 9; Brief for Appellant Victoria D. at 1, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (No. 87-746). Thus, Michael and Victoria were able to appeal directly to the United States Supreme Court. *Michael H. v. Gerald D.*, 485 U.S. 903 (1988) (probable jurisdiction noted).

126. Justice Scalia was joined in whole by Chief Justice Rehnquist and in part by Justices O'Connor and Kennedy. Justice Stevens concurred in the judgment.

Justices O'Connor and Kennedy dissented from footnote six in Justice Scalia's opinion. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part). In that footnote, Justice Scalia explained the method through which the Court decided whether or

constitutionally protected liberty interest in his relationship with Victoria<sup>127</sup> and concluded that the right of putative fathers to develop a relationship with their biological children did not include the right to rebut the marital presumption contained in section 621. The plurality rejected Michael's reliance on *Stanley*, *Quilloin*, *Caban*, and *Lehr*, as well as his reading of those cases. In the plurality's view, those cases did not establish a liberty interest on the basis of "biological fatherhood plus an established parental relationship—factors that exist in the present case as well."<sup>128</sup> Rather, as the plurality viewed them, the unwed father cases rested "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>129</sup>

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not Michael had a constitutionally protected liberty interest in his relationship to Victoria. Justice Scalia declared that, in deciding this issue, the Court was required to ask whether the interest Michael asserted was traditionally protected. He next argued that, in deciding whether Michael's interest was traditionally protected, the Court should look to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 128 n.6. In Justice Scalia's view, that level, in Michael's case, compelled the Court to ask whether historically an "adulterous natural father" received constitutional protection of the type Michael sought. *Id.* at 127 n.6.

127. Justice Scalia analyzed Michael's due process claim as a substantive, not a procedural, claim. The Court read section 621 as a substantive rule of law, phrased as a presumption. *Id.* at 119. The plurality asserted: "California declares it to be, except in limited circumstances, *irrelevant* for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him." *Id.*

128. *Id.* at 123. Justice Brennan pointed out in his dissent that in *Quilloin*, *Caban*, and *Lehr*, "the putative father's demands would have disrupted a 'unitary family' as the plurality defines it . . . ." *Id.* at 144 (Brennan, J., dissenting).

129. *Id.* at 123. Commentators, as well as Justice Brennan's dissent in *Michael H.*, 491 U.S. at 157–58 (Brennan, J., dissenting), took umbrage with Justice Scalia's interpretation of the earlier unwed father cases. *See, e.g.*, Hinnan, *supra* note 23, at 639. And, indeed, the express language in those cases conflicts with the Court's review in *Michael H.* as Justice Brennan pointed out. 491 U.S. at 142–45 (Brennan, J., dissenting). However, Justice Scalia's interpretation of the earlier cases merely articulates the implicit message that runs beneath, and explains, the earlier opinions. The way the fathers in those earlier cases were treated depended, as Justice Scalia noted, on their role in a "unitary family" (a family including the child and his or her mother). *Id.* at 123. The explicit language of the earlier cases failed to explain the assumption behind the law. As Justice White recalled in *Michael H.*, the Court *had* said in *Lehr* that an unwed father receives due process protection when he "'demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.''" *Id.* at 160 (White, J., concurring) (quoting *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392 n.7)). However, the explanation offered is a second-level explanation. The basic explanation—the one that explains *when* the Court, in fact, identified a father in the unwed father cases as effecting the requisite commitment—depended on the father's relation to the mother or, as Justice Scalia put it, on the father's relationships within a "unitary family." *Id.* at 123.

Thus, the plurality in *Michael H.* distinguished the earlier cases by interpreting those cases to protect the rights of a father within a "unitary family."<sup>130</sup> In the plurality's view, Michael and Victoria did not belong to such a family unit, and thus Michael's particular relation to Victoria became irrelevant.<sup>131</sup> Justice Scalia's opinion declared a biological father's constitutional right to a relationship with his child to rest firmly on his involvement in a *family* unit. The plurality rejected the possibility, almost without exploration, that an unwed father and his biological child could form a "family unit" in the absence of an appropriate<sup>132</sup> relationship between the unwed father and the child's mother. The opinion refused to include within "traditional," and thus protected, family units the "relationship established between a married woman, her lover and their child."<sup>133</sup>

In short, the opinion denied protection to Michael's relationship with Victoria, however dear. The State was not required to consider the intensity or duration of that relationship in this case, one in which the biological mother's marriage to another man definitively precluded the biological father from establishing the sort of

130. 491 U.S. at 124 n.3.

131. Justice Brennan, dissenting in *Michael H.*, fully recognized the implications of the Court's decision. Justice Brennan described Justice Scalia's opinion to imply

[w]hether Michael and Victoria have a liberty interest varies with the State's interest in recognizing that interest, for it is the State's interest in protecting the marital family—and not Michael and Victoria's interest in their relationship with each other—that varies with the status of Carole and Gerald's relationship. It is a bad day for due process when the State's interest in terminating a parent-child relationship is reason to conclude that that relationship is not part of the 'liberty' protected by the Fourteenth Amendment.

*Id.* at 146–47 (Brennan, J., dissenting).

132. A crucial aspect of the *Michael H.* decision—perhaps the most crucial aspect—was the Court's delimitation of what relationships will be considered the building blocks of a "unitary family" and will thus deserve constitutional protection. *See infra* note 133 (describing Justice Scalia's definition of the "unitary family"). Justice Brennan referred to the plurality's depiction of the "unitary family" as a "pinched conception" and said it was "jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family." 491 U.S. at 145 (Brennan, J., dissenting).

133. *Id.* at 123 n.3. The plurality wrote:

The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships . . . ."

*Id.*



relationship *with the mother* that would provide constitutional protection for his relationship with his biological daughter.<sup>134</sup>

The implications of the assumptions behind this decision are sweeping. The opinion asserted that only fathers in certain families<sup>135</sup> deserve constitutional protection. The implications of Justice Scalia's opinion are especially suggestive because he stated explicitly that fathers become fathers by forming proper, "traditional" families, that the decision that a particular father is part of such a family is unrelated to notions of "biological" truth, and finally, that a man's biological relation to a child (as in the case of an "adulterous natural father," as the Court labeled Michael) may actually imperil the man's reliance on constitutional protection in asserting legal paternity.

These implications are dramatically illustrated by the two distinct, even opposing, meanings that underlie Justice Scalia's use of the term "nature" (or "natural") in his *Michael H.* opinion. Invocations of nature are often suggestive. The divergent meanings of "nature" represent a general paradox in Western culture.<sup>136</sup> On the one hand, that which is natural is good, moral, and inevitable. Nature, as in the phrase "mother nature," directs and protects an inexorable reality with which people toy only at their peril. On the other hand, nature is inferior to culture. Nature represents brute emotion and untrammelled instinct which must be channeled and contained for people to live together in society.

The first use of "nature" is found in Justice Scalia's claim that "California law, *like nature itself*, makes no provision for dual fatherhood."<sup>137</sup> In referring to "nature itself," Justice Scalia asserted that nature dictates that children have one father, not two, and that Michael, by claiming to be Victoria's father, defied that natural, and

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134. Following the Court's decision in *Michael H.*, the California legislature amended the statute at issue in the case. The amendment allows a "presumed father" to rebut the presumption of the mother's husband's paternity if a motion is brought within two years of the child's birth. *Paternity*, 16 Fam. L. Rep. (BNA) 1520 (Sept. 11, 1990). The statute's definition of "presumed father" would have covered the biological father in *Michael H.* The new statute defines a "presumed father" to include a man who "receives the child into his home and openly holds out the child as his natural child." CAL. CIV. CODE § 7004 (West Supp. 1992).

135. Justice Scalia, following earlier cases, referred to "traditional families" as "unitary families." 491 U.S. at 123 n.3. See *supra* note 133.

136. The two meanings that Justice Scalia gives to the term "nature" (or "natural") are instances of the general paradox. See BARNETT & SILVERMAN, *supra* note 24, at 46. Anthropologist David Schneider has described the significance of these two meanings to the ideology of American kinship. DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 107-10, 114-17 (2d ed. 1980).

137. *Michael H.*, 491 U.S. at 118 (emphasis added).

thus, proper pattern. In fact, Michael's claim was that *he* was Victoria's natural father. He argued that as a result of *that* truth, his paternity deserved social and legal recognition. Moreover, the very statute that Justice Scalia's opinion fervently upheld defined a child's father to be the husband of the child's mother *even* in cases in which the mother's husband was not the biological (genetic) father. Thus, in effect, Justice Scalia argued that a child's stepfather is a more "natural" father than the child's genitor.

Later, Justice Scalia invoked "nature's" role, again suggestively, when he referred to Michael as the "adulterous natural father."<sup>138</sup> Now, the very "naturalness" of Michael's fatherhood seems to justify the State's decision to ignore his biological paternity. Here, the description "natural" justifies the deprivation, rather than the extension, of rights, because the term now implies disorder and contrasts with social control, morality, and justice.<sup>139</sup> In this sense of the term "natural," people are cultured. Animals are natural. For fathers, for whom parenthood appears to be, at least in large part, a matter of choice, the "natural" facts get no legal recognition until garbed with social form.

In short, Justice Scalia applauded the preservation of "natural" patterns, as evidenced by "California law." Yet he sustained the law's obliteration of Michael's paternity, the paternity of the man he called Victoria's "natural father," and justified that act *because* the father's paternity was merely "natural."

And herein lies the moral of the tale. A "natural" father's paternity can be ignored precisely because fathers (men) are not encompassed by their biological selves. On the whole, fathers represent culture and history, as opposed to women (and mothers), who stand for nature.<sup>140</sup> For men, the predominant aspect of parenthood must therefore stem from, and be predicated upon, culture, not nature. Thus, only when the two meanings of "natural"

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138. See, e.g., *id.* at 127 n.6.

139. The opinion almost suggests that Michael's claim withered against the need to punish him for interfering with what should have been another man's paternity, for his role as "an adulterous, natural father." *Id.* Justice Scalia wrote further:

We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man . . . . [T]he evidence shows that even in modern times—when, as we have noted, the rigid protection of the marital family has in other respects been relaxed—the ability of a person in Michael's position to claim paternity has not been generally acknowledged.

*Id.* at 125.

140. See, e.g., EHRENREICH & ENGLISH, *supra* note 29, at 247.

come together, is the "natural father" the father.<sup>141</sup> This occurs when the biological father effects his fatherhood in the context of a moral and proper (read "natural," in its other sense) family.

The central difference between *Michael H.* and the earlier unwed father cases is not, as commentators have suggested,<sup>142</sup> that in the earlier cases biological fathers achieved the right to legal paternity by effecting social relationships with their children while *Michael H.* required something more.<sup>143</sup> Rather, *Michael H.* and the earlier cases alike extended constitutional protection to a biological father's legal paternity if the man established a "family," a home, with the child and his or her mother. That position was explicit in *Michael H.* and was implicit in the earlier cases. The difference between *Michael H.* and the other cases lies elsewhere. It stems from the narrowness with which the concept "family" was defined in *Michael H.*<sup>144</sup> If, as Justice Brennan pleaded in his dissent in *Michael H.*, Michael, Carole and Victoria composed a family, then Michael was a social father, whose fatherhood deserved protection. If, however, as Justice Scalia argued, the family is to be defined more narrowly—in, as he framed it, "traditional" terms—then Michael was not part of a family involving himself, his child, and the child's mother. For *that* reason, Michael failed to adequately effect his social fatherhood. By definition, that option—the

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141. See Schneider, *supra* note 16, at 63, 66 (delineating combinations of "natural" and "cultural" connections that comprise kinship relationships in American culture).

142. See, e.g., Batty, Note, *supra* note 56, at 1201; Elizabeth A. Hadad, Note, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*—Michael H. v. Gerald D., 56 BROOK. L. REV. 291, 314, 319–20 (1990).

143. This assertion is based on a reading of the four cases as a whole. Within any one opinion in any one of the cases, it is possible to find support for popular interpretations of the cases. For instance, Justice White, dissenting in *Lehr v. Robertson* and joined by Justices Blackmun and Marshall, was more ready to protect Lehr's paternity on the basis of an independent relationship between Lehr and his biological child that did not include the child's mother. *Lehr v. Robertson*, 463 U.S. 248, 271–72 (1983) (White J., dissenting). Of course, in *Lehr* it was possible to assume, on the basis of the given facts, that Lehr *would have* established a relationship with his child and even perhaps with that child's mother, had the mother been willing. *Id.* at 269–71 (White, J., dissenting). However, it is important to recognize that Justice White expressly predicated his readiness to protect Lehr's paternity on the fact of a biological relationship between Lehr and the child. Justice White wrote: "The 'biological connection' is itself a relationship that creates a protected interest. Thus the 'nature' of the interest is the parent-child relationship; how well developed that relationship has become goes to its 'weight,' not its 'nature.'" *Id.* at 272 (White, J., dissenting).

144. In fact, Stanley and Caban, the fathers whose paternal rights received constitutional protection in the first four unwed father cases did fit into Justice Scalia's definition in *Michael H.* of a "unitary family." However, *Michael H.* made it abundantly clear that the limits of what could constitute a "family" from a constitutional perspective would be strictly defined and uncompromisingly applied.

option of forming a "unitary family" with his biological child and that child's mother—was not available to Michael.

In sum, the unwed father cases, from *Stanley* through *Michael H.*, delineate three factors that make an unwed man a father. These are the man's biological relation to the child, his social relation to the child, and his relation to the child's mother. *Stanley* through *Lehr* seem to suggest, and have certainly been read to say,<sup>145</sup> that a man can effect a legal relation to his biological child by establishing a relationship with that child. However, the facts of those cases belie that as the accurate interpretation. *Michael H.*, which has been read to conflict with the earlier decisions,<sup>146</sup> in fact suggests an elaboration of the message implicit in *Stanley* through *Lehr*, taken as a group. In this regard, *Michael H.* clarifies the earlier cases. A biological father does protect his paternity by developing a social relationship with his child, but this step demands the creation of a family, a step itself depending upon an appropriate relationship between the man and his child's mother.<sup>147</sup>

The ambiguity of the Court's response to the unwed father cases is predicated on real ambivalence. The cases acknowledged and approved a change that carries important implications for the scope and form of the family and then quickly (though quietly) re-treated. The Court proclaimed that unwed fathers may become legal fathers by establishing relationships with their biological children and then hedged that proclamation, though neither directly nor certainly, by tacitly restricting the context in which a father

145. See *supra* note 71.

146. See, e.g., Batty, Note, *supra* note 56, at 1201.

147. In a 1990 New York case, the state's highest court declared unconstitutional a statute that gave only certain unwed fathers the right to veto the adoption of their children. The section of New York's Domestic Relations Law at issue in that case was the same section at issue in *Caban*. *In re Raquel Marie X*, 559 N.E.2d 418 (N.Y.), cert. denied sub nom. Robert C. v. Miguel T., 111 S. Ct. 517 (1990). The court referred expressly to the statute's focus on the relationship between the two parents as a basis for paternal rights and declared that focus inappropriate as a measure of a father's commitment to his children. *Id.* at 426. The case thus affirms the direct importance of the father-child relationship to protecting legal paternity. However, the facts in *Raquel Marie* involved a father who did establish a relationship with his child's mother. Indeed, the father in the case married his child's mother, but only after the child had been placed for adoption pursuant to the mother's consent. In *In re Baby Girl S.*, 535 N.Y.S.2d 676 (Sup. Ct. 1988), aff'd sub nom. *In re Raquel Marie X*, 559 N.E.2d 418 (N.Y.), cert. denied sub nom. Robert C. v. Miguel T., 111 S. Ct. 517 (1990), consolidated and decided by the Court of Appeals with *Raquel Marie*, the father, upon learning of his lover's pregnancy, responded, "I love you and want to marry you." *Id.* at 678. The two did not marry because the mother refused. Thus, both fathers involved in *Raquel Marie* demonstrated a fitting commitment, not just to their children, but to the mothers of those children as well.

could demonstrate the existence of the requisite relationship with his biological children to one including the children's mother, to one defined traditionally as "family." Men are still viewed as less restricted in their commitment to parenthood by biological processes than women, and for men, as for women, family relationships are presumed to be significantly different from market relationships. A man may, indeed must, *choose* his paternity in order to guarantee its legality, but he must embed that choice in certain (familial) forms and processes. The relationship between a father and a child cannot be effected like any relationship between two autonomous individuals, free to come and go as they agree. A man becomes a father by relating to his child *in the context of family*. That context is prototypically<sup>148</sup> created by the development of a spousal or spouse-like relationship between a father and his child's mother.

Thus, in the end, the father *is* required to effect his relationship with his biological children through acts in the world in order to protect that relationship through resort to law. However, not any acts will do. The acts that make a biological father a social and legal father are *familial* acts, acts that socialize the "natural" facts by inserting themselves in, and thus defining themselves through, a certain ordering of the relationship between the father and his child's mother. In that way, the preservation of traditional family forms is supported.

### III. WHAT MAKES A MOTHER A "MOTHER"?

Unlike claims to paternity, claims to maternity have long been recognized as predicated on biological motherhood. In Marilyn Strathern's words: "Between mother and father, the mother is recognized; the father, by contrast, is constructed."<sup>149</sup> In part, this has been a product of the certainty with which biological maternity, unlike biological paternity, could be presumed.

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148. Obviously, some unwed fathers can now obtain constitutional protection for their relation to their children despite the absence of an appropriate relation between the father and the child's mother. Such cases include, for instance, a situation in which the children's mother is deceased. *Stanley v. Illinois*, 405 U.S. 645 (1972). There are, that is, other ways for the father to establish the requisite "family" unit than by establishing a home with the children's mother, but they are not thought of as prototypical.

149. STRATHERN, *supra* note 27, at 148. Strathern means that in traditional European-American thinking a mother's identity is understood as a natural fact while a father's identity, itself a product of his relationship to the mother, is "constructed as a (conventional) object of knowledge." *Id.* at 149.

However, reproductive technology<sup>150</sup> adds a new dimension to motherhood. By allowing the separation of aspects of motherhood that society has assumed to be united, reproductive technology<sup>151</sup> questions the meaning of "mother." Previously, recognition of the biological tie between a woman and her child as the essence of maternity furthered the preservation of traditional family forms. Fathers chose fatherhood. Women *were* mothers, a fact presumed to have been at once demonstrated and effected by the simultaneity of biological and social motherhood. Reproductive technology, by offering choices about motherhood, including the choice to separate social and biological maternity as well as various aspects of biological maternity, threatens traditional understandings of "mother." In consequence, courts and others considering whether to approve or denounce reproductive technology and the social arrangements it makes possible may need to consider anew what makes a mother a "mother."

#### A. *The Surrogate Mother Cases*

The surrogate mother cases involve competing claims to maternity between different women and competing claims to parenthood between women and men. They thus provide a useful ground for examining the views of law and society as to what makes a mother a "mother," as compared with other kinds of mothers, and of what makes a mother a "mother," as compared with fathers.

The cases typically involve conflicting parental claims as between the woman who bears a baby (the "surrogate") and the couple, woman, or man who intends to raise the baby (the "contracting" or "intending" parent or parents).<sup>152</sup> In the cases involving the simplest technology, surrogacy arrangements<sup>153</sup> involve an

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150. This Article, like most work in the field, includes surrogate motherhood as an example of reproductive technology. In fact, the technology necessary for effecting a surrogate motherhood arrangement, involving only artificial insemination of the surrogate, is simple and can be carried out by the parties themselves. However, surrogate motherhood involves questions raised by more complicated reproductive technologies as well, because it separates motherhood into more than one aspect. See *supra* note 5.

151. See *supra* note 18 (describing new reproductive technologies).

152. In fact, to date, most surrogacy contracts have been signed by the contracting father, the surrogate, and the surrogate's husband, if she has one. The surrogate's husband is asked to sign to avoid his claiming paternity as the husband of the biological mother. The contracting mother does not sign such contracts in order to avoid the applicability of statutes that prohibit the exchange of a child for money (so-called "baby-selling" statutes).

153. The concern here is with commercial surrogacy arrangements. Surrogacy has also occurred without the exchange of money. The noncommercial surrogacy cases

agreement with the surrogate mother. In exchange for money,<sup>154</sup> the surrogate mother agrees to be inseminated with sperm from the contracting father, gestate the resulting fetus, and at the baby's birth, terminate her parental rights in favor of the contracting parent or parents (usually the contracting father and his wife).<sup>155</sup>

Alternatives are possible. In one, the surrogate mother gestates a baby that does not share her genes.<sup>156</sup> In such cases, several ova<sup>157</sup> are extracted from the contracting mother.<sup>158</sup> These ova are fertilized *in vitro* with the sperm of the contracting father.<sup>159</sup> The resulting zygote or zygotes are then inserted in the uterus of the surrogate mother, who gestates the fetus. In such cases, the baby is genetically unrelated to the surrogate mother but is genetically related to the contracting mother and father.<sup>160</sup>

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typically involve surrogates who are good friends or relatives of the intending parent or parents and are less problematic legally than commercial surrogacy cases. See Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 525-26 (1990).

154. The typical payment to a surrogate mother has been about \$10,000. PHYLLIS CHESLER, *SACRED BOND: THE LEGACY OF BABY M* 55 (1988) (noting that the fee had not changed in a decade). In addition, institutions and individuals that mediate between the surrogate mother and the contracting parents are often involved in such arrangements and receive fees of about \$10,000. Andrews & Douglass, *supra* note 18, at 635. Fees paid such broker institutions can be higher. In 1991, for instance, The Infertility Center of New York charged intended parents \$16,000 for its role in arranging and effecting a surrogacy agreement. Telephone Interview with Sandra Carter, Attorney, Law Offices of Noel P. Keane (Jan. 18, 1991). Noel Keane established The Infertility Center of New York.

155. See *supra* note 152.

156. In fact, in such cases, the term "surrogate mother" may be somewhat more appropriate than in cases in which the so-called surrogate conceives, bears, and gestates a child who, from a biological perspective, is understood to be her child in every way.

This Article uses the term "surrogacy" to refer both to arrangements in which the gestational mother is also the genetic mother and to those in which she is not. The term "gestational surrogacy" is used to refer only to cases in which the gestational mother is not the genetic mother.

157. Usually, in order to increase the likelihood of a successful pregnancy, the egg donor is treated with fertility drugs. As a result, more than one ovum is generally produced; usually, of those produced, several are fertilized for insertion in the woman who will gestate the baby. Inserting several fertilized ova increases the chances of a successful implantation.

158. In theory, and sometimes in practice, ova can be donated by a third woman, neither the surrogate mother who gestates the baby nor the contracting mother who intends to raise the baby.

159. Again, the sperm, like the egg, may be donated by a male other than the contracting father.

160. This alternative form of surrogate motherhood typically involves a contracting mother who cannot gestate a baby (perhaps because she has no uterus) but who does produce viable ova that can be extracted from her body and fertilized *in vitro*.

Judicial intervention in surrogacy cases routinely assures the legal paternity of the contracting father before the baby's birth and/or affects the adoption of the child by the contracting mother, and occurs, as well, in cases of gestational surrogacy to assure the legal maternity and paternity of the genetic parents.<sup>161</sup>

Cases concerning surrogacy arrangements are usually not adversarial. However, courts have been faced with a few adversarial surrogacy and gestational surrogacy cases. Two cases involving surrogate motherhood arrangements, both adversarial, typify the conundrums that surrogacy and gestational surrogacy pose for society's notions of family (including, in particular, its notions of "mother").<sup>162</sup> The most well-known of these is the *Baby M.* case, decided in New Jersey in 1987.<sup>163</sup> The second is *Anna J. v. Mark C.*, heard by a California trial court in 1990 and affirmed by a state court of appeals a year later.<sup>164</sup>

*Baby M.* amounted to a custody battle between the surrogate mother, Mary Beth Whitehead, and the contracting father, William Stern.<sup>165</sup> A New Jersey trial court, expressly basing its decision on the best interests of the child, granted custody to William Stern, allowed his wife, Elizabeth Stern, to adopt the baby, and terminated Mary Beth Whitehead's parental rights. The New Jersey Supreme Court, reversing the trial court decision, refused to approve the termination of Whitehead's rights as a mother to the baby she had conceived and gestated. The state supreme court described the surrogacy contract as conflicting "with the law and public policy of the [state]" and declared the payment of money to a surrogate mother

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161. See, e.g., *Smith v. Jones*, No. CF 025653 (Cal. App. Dep't Super. Ct. 1987); *Smith v. Jones*, No. 85-532014 DZ (Mich. Cir. Ct. Mar. 15, 1986), cited in Karen A. Bussel, Note, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, 666 n.18 (1991).

162. In using these two cases as the basis for seeking and analyzing assumptions about mothers and motherhood, it is, of course, recognized, that different courts decided the two cases and that both courts differ from the court that decided the unwed father cases analyzed *supra*. And even the unwed father opinions, themselves, although issued by one court, were decided by different judges. This procedure is justified by the position that each case provides a text that constitutes a cultural artifact and that, thereby, provides evidence about the culture's underlying ideology of the family. See *supra* note 1 (defining ideology).

163. *In re Baby M.*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

164. *Johnson v. Calvert*, No. X-633190 (Cal. App. Dep't Super. Ct. Oct. 22, 1990), *aff'd sub nom. Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Ct. App. 1991), *review granted*, 822 P.2d 1317 (Cal. 1992).

165. William Stern's wife, Elizabeth Stern, as the contracting mother, had no legal claim to the child unless and until Mary Beth Whitehead's maternal rights were terminated.



"illegal, perhaps criminal, and potentially degrading to women."<sup>166</sup> William Stern, the contracting father and sperm donor, was given custody, subject to liberal visitation rights for Whitehead. The court refused to grant any legally cognizable maternal rights to Elizabeth Stern, the contracting mother.<sup>167</sup>

The parental rights of parties to a surrogacy deal involving a surrogate with no genetic connection to the baby she gestated were tested in *Anna J.* In *Anna J.*, as in *Baby M.*, the surrogate mother, Anna J., concluded during her pregnancy that she would not voluntarily terminate her parental rights<sup>168</sup> and comply with the agreement she had entered with the contracting (in this case, also, genetic) parents.<sup>169</sup> Judge Parslow, for the California trial court, held that the surrogate mother had no legal rights to a baby whom she had gestated but with whom she had no other biological link. A state appellate court affirmed, avoiding any decision as to the legality or enforceability of the contract and deciding, as a matter of statutory law, that the genetic mother and father were the legal parents of the baby gestated by Anna J.

#### B. *Judicial Decisions and Assumptions in the Surrogate Mother Cases*

The surrogacy cases, and the world of reproductive technology with which they are associated, involve a novel question: who is the mother? Of equal importance, the gestational surrogacy cases involve *two* women with biological claims to motherhood, only one of whom bears a genetic tie to the fetus and only one of whom gestates the fetus. The assertion of the gestational surrogate relies on a *biological*, but *not* a genetic, connection to the child. An assertion of motherhood on the part of the egg donor is structurally similar, if not identical, to that of unwed biological fathers in general and, more particularly, to that of sperm donors. In such cases, biological

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166. *Baby M.*, 537 A.2d at 1234.

167. Although Elizabeth, as the wife of the child's legal father and custodial parent, would play a significant role in raising the child, her rights should her husband die or should the two separate or divorce, are at best unclear and possibly nonexistent.

168. The trial court doubted that Anna had, in fact, bonded with the baby during the gestational period. The judge said, "[t]here is substantial evidence in the record that Anna never bonded with this child until she filed her lawsuit, if then." *Johnson v. Calvert*, No. X-633190, slip op. at 11.

169. The case was initiated in August 1990 by the contracting and genetic parents who sought an order declaring them the legal parents of the unborn baby. (The child was born on September 19, 1990). Anna responded with an action of her own, asking to be declared the legal mother of the baby. The cases were consolidated, with Anna's made the lead case. *Anna J.*, 286 Cal. Rptr. at 373.

maternity is separated into two aspects—gestational and genetic. As a result, law-makers are compelled expressly to consider how and when biology makes a mother a “mother.”

The surrogacy cases thus provide a dramatic arena for unearthing assumptions about what makes a person a mother.<sup>170</sup> Is it biology? And if so, is the biological mother the one who gestates the baby or the one whose genes the child reflects?<sup>171</sup> Is it “maternity,” understood as a particular sort of social relationship with a child, that constitutes a “mother”? And if so, is maternity in some part or in some cases a product of biology? Is it the intention to

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170. Legislative decisions about how to regulate surrogacy provide another such arena. Concrete legislative responses to the questions posed by surrogacy tend to differ from judicial decisions, especially in cases in which those decisions are in response to questions involving adversarial parties. In part, these differences can be attributed to the different view of a lawmaker faced with a real situation involving actual people and families and a lawmaker faced with possibility alone. Thus, for instance, a legislator concerned with preserving traditional families might ban surrogacy altogether or regulate the practice strictly. But a judge with the same interest and faced with an actual surrogate, intending couple, and baby, might permit the surrogacy arrangement to go forward. See *infra* text accompanying notes 209–213 (analyzing decisions in the *Baby M.* and *Anna J.* cases as attempts to preserve traditional families).

In contrast to courts hearing adversarial surrogacy cases, legislatures in the United States and elsewhere have tended, in fact, to prohibit or restrict surrogacy. Less than a third of the states in the United States have passed bills regulating surrogacy although bills have been introduced in the majority of state legislatures. The issue did not become pressing for legislatures until after the decision of the New Jersey courts in *Baby M.* in the late 1980's; thus many states that have not yet passed laws regulating surrogacy are likely to do so soon. Of the states with applicable laws, the vast majority either ban commercial surrogacy or declare surrogacy contracts unenforceable. See, e.g., Arizona. 1989 Ariz. Legis. Serv. 114 (West); Kentucky. KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1988); Michigan. MICH. COMP. LAWS §§ 722.851-722.863 (Supp. 1992); New York. 1992 N.Y. Laws ch. 308. The United Kingdom has prohibited commercial intermediaries from arranging surrogacy deals. United Kingdom Surrogacy Arrangements Act (1986), reprinted in INTERNATIONAL SURVEY OF LAWS ON ASSISTED PROCREATION 184 (Jan Stepan ed., 1990). Arkansas's statute, probably the most permissive to date in the United States, regulates surrogacy on the model of artificial insemination. ARK. CODE ANN. § 9-10-201 (Michie 1989). And in New Hampshire, surrogacy and gestational surrogacy are permitted, though the practice is regulated. 1990 N.H. Laws ch. 87.

In large part, the cases and the statutes alike have been fueled by a similar interest in preserving the family in its traditional forms.

171. Even to describe these options involves a set of assumptions about personhood and what it entails. For instance, do genes really “reflect” a person? Is a child a “reflection” of its parents? Of its genetic parents? Of its mother and its father, equally and in the same way? An important task of the remainder of this Article involves sorting out what genes are taken to mean, by society in general and by lawmakers in particular who, of course, represent their society and culture as much—and as little—as anyone else.

become a "mother" that makes a person a "mother?"<sup>172</sup> Or is it some combination of all these? And if the last, is one factor considered more important, or more important in certain contexts, than other factors?

From the unwed father cases, one would expect that the surrogate mother, whether the genetic and gestating mother or only the gestating mother, would bring more powerful arguments to an adversarial proceeding at which the baby's parentage was in dispute than would the contracting and genetic father. Moreover, one would conclude, at least on the basis of Justice Stewart's dissenting language in *Caban*,<sup>173</sup> quoted favorably in Justice Stevens' majority opinion in *Lehr*,<sup>174</sup> that, everything else being equal, gestational mothers would be preferred to genetic mothers. Discounting the importance of biological paternity per se, Justice Stewart recognized the gestational link between a woman and a child to constitute the foundation for an "enduring" relationship (for a mothering relationship).<sup>175</sup> Thus, the unwed father opinions assert clearly that genetics (biological paternity) plays at best a minimal role in making a man a father; they suggest, by implication, that genetics plays a similarly minimal role in making a woman a mother. But these cases say that for women there is a biological basis for the construction of motherhood—the relationship formed between a woman and the baby she gestates and bears.

Thus, the unwed father cases would seem to support the claims of a surrogate seeking recognition of her maternity in opposition to the biological father, as well as the claims of a gestational surrogate seeking recognition of her maternity in opposition to the claims of the biological father and/or the genetic mother. Yet, the surrogacy cases do not reflect this pattern. Rather, courts in both surrogacy and gestational surrogacy cases have been ready to negate absolutely, or to minimize seriously, the significance of the biological bases of the surrogate's claims to legal maternity. And, in each case, the effect has been to bestow legal parenthood on the parties

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172. See Hill, *supra* note 11, at 418–19 (arguing that intentional parents should be legal parents as compared to genetic parents (sperm or egg donors) and as compared to gestational hosts).

173. *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

174. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)). See *supra* notes 104–107 and accompanying text.

175. Justice Stewart wrote: "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear." *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

who reflected most nearly a middle-class, two-parent family. In the gestational surrogacy cases, this choice is easier. In such cases, the symbols of biological maternity can be rather easily shifted and re-designed so that any decision as to the baby's legal parentage can be justified on the basis of biological "facts." In the surrogacy cases like *Baby M.*, a decision to deny the surrogate's legal maternity is harder to justify since she appears to hold all the biological chips. However, both courts in that case managed, though in different ways, to justify placing the child with the biological father and his wife.

Moreover, the factors that make a woman a mother when her claimed maternity is opposed by a man (a biological father, for instance) differ from the factors that make a woman a mother when her claimed maternity is opposed by another woman (a contracting mother, a genetic mother, a gestational mother, for instance). The *Baby M.* and *Anna J.* cases, read together, permit the delineation of assumptions about motherhood when women claiming maternity are opposed by men claiming paternity and when women claiming maternity are opposed by other women claiming maternity of the same child. The assumptions behind the *Baby M.* decision, similar to those undergirding the unwed father cases, represent assumptions about what makes women mothers when they are compared with fathers; the somewhat different assumptions found in *Anna J.* represent assumptions about what makes women mothers when they are compared with other kinds of mothers.

The *Baby M.* case involved three adults with cognizable claims to parenthood. Mary Beth Whitehead, the surrogate, was the genetic and gestational mother, but not the intending mother.<sup>176</sup> William Stern was the genetic and intending father. Elizabeth Stern was the intending mother. While reaching different legal deci-

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176. Whitehead was not an intending parent in the sense that she did not originally intend to raise the child that she would bear. She did, however, act as a social parent for several months after the child's birth. The child was born on March 27, 1986. When the baby was four-days-old, the Sterns agreed to allow Whitehead to keep the baby for one week. During this period Whitehead decided to keep the child permanently. On May 6, Whitehead, her husband, their children, and the baby flew to Florida where Mrs. Whitehead's parents lived. For almost three months, the Whiteheads lived with the baby in Florida, part of the time at Mrs. Whitehead's parents' home and part of the time in a variety of hotels and with other relatives and friends. On July 31, the child was removed from Whitehead's parents' home by local law enforcement officials pursuant to a court order that the Sterns had sought. At this time, the Sterns received physical custody of the child. *In re Baby M.*, 525 A.2d 1128, 1144-46 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

sions<sup>177</sup> in the case, both the trial court and the New Jersey Supreme Court recognized William Stern as the child's father and Mary Beth Whitehead as her mother. The trial court, which granted custody of the child to William Stern and terminated Mary Beth Whitehead's maternal rights, wrote at the start of its opinion:

Justice, our desired objective, *to the child and the mother, to the child and the father*, cannot be obtained for both parents. The court will seek to achieve justice for the child. This court's fact finding and application of relevant law must mitigate against the heartfelt desires of one or the other of the *natural* parents.<sup>178</sup>

The court appeared initially to presume that on biological grounds the claims of Whitehead and Stern were equivalent and to limit its task to achieving "justice for the child." This it did by applying a best interests analysis to the case. In its examination of the child's best interests, however, the court returned again and again to the "natural" bases of Whitehead's maternity with the apparent, though unstated, intent of reducing its significance.

Under New Jersey law, the State cannot deprive a legal parent of parental rights absent a showing of unfitness. Whitehead did not meet the statutory definition of an unfit mother. Indeed, the court explicitly asserted that she was a fit parent for her two children with her husband, Richard Whitehead.<sup>179</sup> Yet, through implication and innuendo, if not under the law, the trial court questioned Whitehead's fitness to be a mother *to this baby*. In a clever, though probably uncalculated, move, the court predicated its concerns about Whitehead's fitness to be a mother to Baby M on the very motherliness of her maternity. The court wrote:

Mrs. Whitehead has been found too enmeshed with this infant child and unable to separate her own needs from those of the child. She tends to smother the child with her presence even to the exclusion of access by her other two children. She does not have the ability to subordinate herself to the needs of this child. The court is satisfied that . . . Mrs. Whitehead is manipulative, impulsive and exploitive [sic].<sup>180</sup>

The court also wrote: "[Whitehead] exhibits an emotional over-investment. It was argued by defendant's counsel that Mrs. Whitehead loved her children too much. This is not necessarily a

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177. The supreme court overturned the trial court's termination of Mary Beth Whitehead's parental rights, its adoption order allowing Elizabeth Stern to adopt the baby, and its conclusion (apparently dicta rather than law) that the contract was legal and enforceable. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

178. 525 A.2d at 1132 (emphasis added).

179. *Id.* at 1170.

180. *Id.*

strength. Too much love can smother a child's independence. Even an infant needs her own space."<sup>181</sup>

Whitehead, as the court viewed her, was too much a mother. To the extent that her claim to legal motherhood rested on the invocation of her "natural" maternity, the court viewed that maternity, in her case, had run amok. She smothered the child and failed to separate herself reasonably from it. She loved her child too much. Her natural mothering instincts, perhaps due to her effort to reclaim the child she had earlier chosen to give to others, developed uncontrolled. Whitehead's exaggerated maternity had become a parody of motherhood. Originally, Whitehead presumed to choose what no "real" mother would dare select. She chose to abdicate maternity. The court wrote: "Mrs. Whitehead was anxious to contract. . . . She knew just what she was bargaining for. This court finds that she has changed her mind, reneged on her promise and now seeks to avoid her obligations."<sup>182</sup> When later she "changed her mind," she was unable to resume a normal mothering role. In her attempt to do so she smothered the child, denied it independence and subordinated its needs to her own.

Against Whitehead's uncontrolled, strangulating motherhood, the court balanced Stern's proper home, proper job, and proper wife. Judge Sorkow described the Sterns as a perfect American family. Both were middle-class professionals, characterized as rational, sensitive, private,<sup>183</sup> and "mutually supportive."<sup>184</sup>

While dismissing the significance of Whitehead's biological claims to parenthood, the court stressed the importance of Stern's biological paternity. On the basis of the unwed father cases, that fact alone should have held little weight. However, a component of biological paternity not stressed in the unwed father cases emerges in *Baby M*. That component consists of the ownership rights of a biological father to his child in cases in which the father *is* deemed part of a proper family. The court, concluding that Stern had not paid Whitehead *for the baby*, justified that conclusion by asserting

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181. *Id.* at 1168.

182. *Id.* at 1160.

183. *Id.* at 1170.

184. *Id.* at 1167. The *Baby M*. opinion is in large part based on clear class biases. An analysis of the role class plays in all the unwed father and surrogate mother cases would provide useful information about how courts apply assumptions and rules to particular cases. It may be, for instance, that courts give added weight to the social relationship between a man and his biological child if the man appears middle-class, thus perhaps rendering him the type of man courts perceive as a potentially good parent. However, a detailed class analysis is beyond the scope of this Article.

that in such cases "the father does not purchase the child. It is his own biological genetically related child. *He cannot purchase what is already his.*"<sup>185</sup>

The genetic link made the baby Mr. Stern's. It did not automatically make him a social father. Had he not been a social, as well as a biological, father, the ownership component of Stern's paternity could have created obligations,<sup>186</sup> but not rights. But Stern's social fatherhood was confirmed for the court by Stern's relationship with Elizabeth Stern and by their joint appearance, in the court's view, as an ideal American couple. For the trial court, the two factors—Stern's genetic connection to the child and the character of his familial role—together made the decision irresistible: William Stern, joined by his wife, were to be the child's only parents.

So, as the trial court finally arranged the pieces, the assumptions behind *Baby M.* harmonized with those behind the unwed father cases. Stern's biological paternity assumed importance—even importance superior to that of the biological mother—because he had effected a proper relationship with the woman who would be the baby's mother. That woman's maternity could substitute for the maternity of the biological mother whose untoward, exaggerated maternity deserved only evisceration. As a result, the Stern family would survive as an instance of what a family ought to be.

The decision of the New Jersey Supreme Court<sup>187</sup> overturned almost every aspect of the trial court's opinion. Elizabeth Stern's adoption of the child was rescinded; Whitehead's parental rights were restored; and the contract was declared void. Yet, like the trial court, the supreme court gave custody to William Stern. Whitehead was to be given such visitation rights as the trial court, upon remand, would design.<sup>188</sup> Like the trial court, the supreme court assumed that William Stern was the child's father, Mary Beth Whitehead its mother, and Elizabeth Stern, a third party with no biological claim to legal maternity. And like the trial court, the

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185. *Id.* at 1157 (emphasis added).

186. *See supra* note 31 (describing character of "property" aspect of father's link to biological child).

187. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988). The higher court read the case in light of existing New Jersey adoption and termination statutes that the lower court had dismissed as inapplicable.

188. On remand, the trial court granted Whitehead the immediate right to have the child visit with her several hours each week. Over the course of the following months, the periods of visitation were to increase to include, eventually, several over-night visits each month as well as visits during certain important holidays. *In re Baby M.*, 542 A.2d 52 (N.J. Super. Ct. Ch. Div. 1988).

supreme court read the "facts" to downgrade the significance of Whitehead's biological maternity.

Again, the proper model for defining family emerged as the central issue. Rather than viewing the "natural" parents as analogous to those in the unwed father cases—in which case, Whitehead's claim to maternity might well have predominated over Stern's claim to paternity<sup>189</sup>—the court viewed Whitehead and Stern as it would a divorced couple battling for the custody of their child.<sup>190</sup> The court wrote:

[T]he legal framework becomes a dispute between two couples over the custody of a child produced by the artificial insemination of one couple's wife by the other's husband. . . .

. . . the issue here is which life would be better for *Baby M*, one with primary custody in the *Whiteheads* or one with primary custody in the *Sterns*.<sup>191</sup>

In this context, the court gave custody to Stern but recognized the strength of Whitehead's claims to maternity: "[H]ow much weight should be given to her nine months of pregnancy, the labor or child-birth, the risk to her life compared to the payment of money, the anticipation of a child and the donation of sperm?"<sup>192</sup> These rhetorical questions were soon answered when the court criticized the initial *ex parte* order awarding custody *pendente lite* to William and Elizabeth Stern.

When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother *pendente lite* . . . . The probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father—all counsel against temporary custody in the father. A substantial showing that the mother's continued custody would threaten the child's health or welfare would seem to be required.<sup>193</sup>

So, in effect, for the New Jersey Supreme Court as (more strongly) for the trial court, Whitehead's "natural" ties to her child were

189. In theory, the relevant section of the state statute, drawn from the Uniform Parentage Act, provided that "the claims of the natural father and the natural mother are entitled to equal weight." 537 A.2d at 1256.

190. Later in the opinion, the supreme court, while expressly asserting that the case was *not* a divorce case, went on to compare the Whitehead-Stern situation to one in which "the non-custodial spouse has had practically no relationship with the child." *Id.* at 1263.

191. *Id.* at 1256–57.

192. *Id.* at 1259.

193. *Id.* at 1261.



marred and weakened by her willingness, as the courts saw it, to redefine them as commodities. By entering into a contract for "the sale of a child, or, at the very least, the sale of [her] right to her child,"<sup>194</sup> she forfeited the protection normally afforded a biological mother. She agreed to interrupt her "natural" maternity, and that interruption persuaded the state supreme court to deprive Whitehead of her child's custody.<sup>195</sup>

Each New Jersey court began its inquiry with the assumption that Whitehead was the baby's mother. Each deprived her of her maternity, in full or in part. In doing that, neither court renounced the model presented in the unwed father cases whereby motherhood, though not fatherhood, is an aspect and a continuation of biological processes. Instead, each court defined Whitehead as an exception. By presuming to define her child in the terms of the market, rather than of the family, Whitehead thwarted her own maternity. In the eyes of the trial court that act was total. Whitehead's maternity was eradicated absolutely by her willingness to define her child as a commodity and by her later, hysterical attempt to compensate for the original agreement. In the eyes of the state supreme court, Whitehead's maternity, though intact, had been deformed by the consequences of her agreement to sell her child. Neither opinion denied the presumption underlying the unwed father cases, that biological maternity, especially in its gestational aspect, symbolizes and constitutes motherhood. Rather, both courts, though in somewhat different ways, characterized Whitehead as an example of nature gone awry.

*Anna J.*, a case much like *Baby M.* except that the surrogate had no genetic link to the child, brought a new consideration into play and required an elaboration of the assumptions underlying the earlier cases. Now, for the first time, there were two women whose claims to motherhood could be grounded on biological links to the child.

In the view of Judge Parslow for the trial court, Anna J. was the baby's "gestational carrier" but a "genetic hereditary stranger" to the child.<sup>196</sup> Crispina C. was its "genetic, biological and natural" mother and her husband, Mark, was its "genetic, biological and natural" father. The trial court paid heed to the part Anna played in

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194. *Id.* at 1248.

195. *Id.* at 1261.

196. *Johnson v. Calvert*, No. X-633190 (Cal. App. Dep't Super. Ct. Oct. 22, 1990), slip op. at 5, *aff'd sub nom. Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Ct. App. 1991), review granted, 822 P.2d 1317 (Cal. 1992).

the creation of the child, but clearly and unhesitatingly described her role in social, environmental—but not biological—terms. The court compared her to a foster parent who surrenders her parental role as soon as the child's "real" parent is able to resume a parenting role. In *Anna J.*, genetics emerged as the primary factor linking a biological parent to his or her child:

Who we are and what we are and identity problems particularly with young children and teenagers are extremely important. We know that there is a combination of genetic factors. We know more and more about traits now, how you walk, talk and everything else, all sorts of things that develop out of your genes, how long you're going to live, all things being equal, when your immune system is going to break down, what diseases you may be susceptible to. They have upped the intelligence ratio of genetics to 70 percent now.<sup>197</sup>

Judge Parslow identified the "family unit" by referring to shared genes. "In this case," said the judge, "we have a family unit, all genetically related. You have Mark Calvert, Crispina Calvert and their child they call Christopher; three people in a family unit."<sup>198</sup>

Thus, the court unequivocally defined kinship through relationships based on a natural substance (genes).<sup>199</sup> The family, as a legal entity, was delineated as a unit anchored in shared substance. The claims of the woman who carried and bore the baby, characterized by Justice Stewart in *Caban* as the party whose "parental relationship is clear,"<sup>200</sup> were no longer paramount. The great importance paid the gestational role in the earlier cases is replaced in *Anna J.* by a clear statement that families are a matter of shared substance, a matter of genes. The trial court judge recognized this apparent shift and offered an explanation. "One of the reasons," he said, "we had a presumption that the person from whom the child emerged was the mother is it made that side of the transaction clear at birth. Paternity was always a matter of opinion, but you could always establish who delivered the child."<sup>201</sup> This explanation suggests that gestating and bearing a child were never per se important. But that ignores the significance given to gestation as evidence not just of *who* the mother was but of *what* the mother was. In Justice

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197. *Id.* at 8.

198. *Id.* at 10.

199. See SCHNEIDER, *supra* note 136, at 27–29 (characterizing American kinship to consist of relations based on shared substance and relations based on a "code for conduct").

200. *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

201. *Johnson*, No. X-633190, slip op. at 18.

Stewart's description in *Caban*,<sup>202</sup> carrying and bearing a child constituted a parental relationship. Until reproductive technology made other options available, gestation was not just the easiest way of identifying the mother, but was viewed as an inevitable correlate of genetics (of "femaleness"). The gestational role both signaled and followed from the substantial (genetic) link between a mother and her child.

In order for Judge Parslow to premise the legitimacy of Crispina Calvert's claims to motherhood on her "natural" maternity, he had to rend Anna's gestational role asunder from the biological links that make a mother a "mother." He accomplished this in two ways. First, he located the gestational role in a social, rather than a natural, domain. He defined gestation as a social role, akin to that of a temporary caretaker or foster parent.<sup>203</sup> Then, and more forcefully, he redefined gestation as a matter almost entirely unrelated to familial affairs. He characterized Anna's gestation of the baby as primarily a business deal and thereby separated it decisively from any claim that gestation signals or symbolizes "real" maternity. Anna, concluded Judge Parslow, had been paid \$10,000 for her "pain and suffering."<sup>204</sup> "I haven't carried a child myself," wrote the judge, "but from what I've seen, it's a tough program. And I think altruism aside, there is nothing wrong with getting paid for nine months of what I understand to be a lot of misery and a lot of bad days."<sup>205</sup> Thus, Anna's gestational role was essentially a contractual, and not a biological, matter.<sup>206</sup>

Anna's gestational role was defined to exclude maternity. In contrast, the Calverts' genetic role had to be defined to constitute parenthood *and* to harmonize with the notion that the gestation of the baby was a business deal. Accordingly, the judge characterized

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202. 441 U.S. at 397 (Stewart, J., dissenting).

203. *Johnson*, No. X-633190, slip op. at 5.

204. Although the parties had entered a contract in arranging the gestational surrogacy, at the appellate level, the case was decided on statutory, not contractual, grounds. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 381 (Ct. App. 1991), *review granted*, 822 P.2d 1317 (Cal. 1992). The trial court spoke briefly to the validity of the contract. In that regard, Judge Parslow said that in gestational surrogacy cases, contracts did not violate public policy and should not be declared void on that ground. *Johnson*, No. X-633190, slip op. at 11.

205. *Johnson*, No. X-633190, slip op. at 21.

206. The definition of Anna's gestational role as somewhere between a market and a foster parent relationship bears some similarity to the minimization of Mary Beth Whitehead's biological role in *Baby M.* See *supra* notes 179-182 and accompanying text. The task of defining the gestational role so that it did not inevitably imply maternity was easier in *Anna J.* than in *Baby M.* since in the former the intending, as well as the surrogate, mother was able to claim biological maternity.

the Calverts' genetic contribution in multidimensional terms, as a link that constituted parenthood and as evidence of the privileges of ownership. The Calverts, said the court, were "desperate and longing for their own genetic product."<sup>207</sup>

The opinion lacked almost entirely any consideration of the baby's best interests.<sup>208</sup> However, in this case, as in *Baby M.*, the court found parental rights to lie in the couple that more fully reflected a traditional, middle-class family.<sup>209</sup> Anna, who was part-black, part-Native American, and part-Irish, was a single mother of a three-year-old daughter and had, from time to time, been a welfare recipient.<sup>210</sup> Crispina was a Filipina, and Mark was white.<sup>211</sup> As in the trial court interpretation in *Baby M.*, the judge in this case coordinated the biological "facts" to accord with and support a declaration of legal parentage desired primarily on other grounds.<sup>212</sup> The opinion, in combination with *Baby M.* and the unwed father cases, demonstrates the remarkable flexibility of the symbols that compose and describe the "facts" of kinship.<sup>213</sup>

The appellate court, relying on state statutes to affirm Judge Parslow's opinion, also stressed the significance of a genetic tie as the basis of a claim to parenthood.<sup>214</sup> However, Justice Sills, writ-

207. *Johnson*, No. X-633190, slip op. at 21.

208. The trial court referred to the child's best interests in its conclusion, in reference to any continued contact between Anna J. and the child. In this regard, the judge said he believed "whether or not Anna Johnson has a relationship [with] or knows anything about the progress of this child through life is going to have to be and must be for the sake of the best interests of the child on a voluntary basis." *Id.* at 20.

209. Anna Johnson, unmarried and the mother of a three-year-old child, was a vocational nurse. Crispina Calvert was a registered nurse and worked in the same hospital as Anna. Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back into the Bottle*, 18 LAW, MED. & HEALTH CARE 345, 345 (1990). Her husband, Mark, was an insurance broker. Katha Pollitt, *When Is a Mother Not a Mother?*, 251 THE NATION 825, 842 (1990).

210. Nicole M. Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN'S L.J. 89, 95 (1991).

211. Don J. DeBenedictis, *Surrogacy Contract Enforced*, A.B.A. J., Jan. 1991, at 32, 33. The effect of the race of the parties on the court's decisions has been debated. The lawyer for Johnson argued it was determinative. *Id.*

Nicole Miller Healy, noting that Crispina Calvert's Filipina heritage was rarely noted by the media, in contrast with Johnson's heritage, suggested it were as "though by marrying a white man, Crispina Calvert became white herself and lost her Filipina heritage." Healy, *supra* note 210, at 97 n.39.

212. Richard C. Gilbert, the attorney for Anna Johnson, said that Judge Parslow "wanted to give the white couple the white baby." DeBenedictis, *supra* note 211, at 33.

213. See *infra* notes 224-225 and accompanying text (considering the flexibility of kinship symbolism).

214. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Ct. App. 1991), review granted, 822 P.2d 1317 (Cal. 1992). Justice Sills, for the court, described genetics as "a powerful

ing for the appellate court, suggested, obliquely and almost in passing, that other "rational" bases for claims to maternity or paternity might exist. The court declared Crispina Calvert the "natural" mother, by relying on statutory law<sup>215</sup> that allowed a man or woman to be presumed a "natural" parent on the basis of blood tests which identified genetic similarities between the man or woman and the child.<sup>216</sup> The court, expressly describing the rule as "rational and not arbitrary," thus allowed for the possibility that other equally rational schemes might exist.<sup>217</sup>

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factor in human relationships. The fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological bond. Heredity can provide a basis of connection between two individuals for the duration of their lives." *Id.* at 380-81.

215. The Uniform Parentage Act, on which the court is in large part relying here, was passed in California in 1975 as Part 7 of Division 4 of the California Civil Code (§§ 7000-7021), *cited in* 286 Cal. Rptr. at 373-74. *See infra* note 216.

216. In fact, the connection of applicable statutory provisions as outlined by the court was more complicated. Section 7015 of the California Civil Code provided that provisions of the act applicable to the father and child relationship could be applied, "[i]nsofar as practicable" to identify the existence or nonexistence of a mother and child relationship as well. 286 Cal. Rptr. at 374 (citing CAL. CIV. CODE § 7015 (West 1983)) (alteration in original). Section 7004 stated that "[a] man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code . . . ." *Id.* (citing CAL. CIV. CODE § 7004 (West 1983)). Section 621 of the Evidence Code provided, in turn, that

if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7, are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly."

*Id.* at 375. Chapter 2 of Division 7 of the Evidence Code, the Uniform Act on Blood Tests to Determine Paternity (codified as CAL. EVID. CODE § 895 (West 1980)) provided, just as did section 621, that if the evidence showed the husband not to be the child's biological father, the legal system would accept that finding as fact. The section then provided that if the experts were to disagree "in their findings or conclusions, or if the tests show the probability of the alleged father's paternity, the question . . . shall be submitted upon all the evidence, including evidence based upon the tests." *Id.* In this case, Anna was excluded as a parent by the report of the parentage testing laboratory. *Id.* at 376. The report was submitted to the court as an exhibit and can be found in the appellate court's opinion. *Id.* at 373 n.12. The report concluded that Anna was "not the mother of [the] Baby Boy," but referred to the opinion as one of "non-paternity." *Id.*

217. The Uniform Status of Children of Assisted Conception Act, 98 U.L.A. 122 (Supp. 1992), drafted by the National Conference of Commissioners on Uniform State Laws in 1988 provides for such alternatives. One option makes surrogacy contracts unenforceable and defines the legal mother as the woman who bears and gives birth to the child. The other alternative provides that a (genetic) surrogate may claim legal maternity within 180 days of the last insemination. The Act does not extend that right to gestational surrogates. *See DeBenedictis, supra* note 211, at 346 n.6.

In fact, the viability of such alternative schemes was suggested by the Uniform Parentage Act itself, the key statute on which the appellate court relied in the *Anna J.* case. That Act provided that "between a child and the natural mother [the parent and child relationship] may be established by proof of her having given birth to the child." The court dismissed Anna J.'s reliance on this section as a basis for her claims to "natural" maternity by asserting that the statute only gave a woman otherwise identified as a "natural mother" the right to refer to the birth process as proof of maternity. That reading is not, of course, inevitable. The legislative body that promulgated the statutory provision at issue simply assumed that the genetic and the gestational mother were one; it is therefore entirely illegitimate to presume anything about the legislative definition of "natural mother" in this case from a reading of the statute at hand.<sup>218</sup>

*Anna J.*, unlike *Baby M.* and unlike the unwed father cases, forced a selection between two women whose claims to motherhood could both be premised on biological facts. In *Anna J.*, it was possible to demarcate genetics as the predominating biological fact without equating biological maternity and biological paternity. Neither opinion in the case spoke to the comparative importance of the sperm and ovum donors vis-a-vis each other. The case required a choice between mothers, or more accurately between one mother and another mother plus her husband, the father, and did not call for selecting between claims to maternity and claims to paternity. For this reason, it was possible to minimize the significance of gestation in effecting maternity, to define gestation as social and contractual, but not biological, and to avoid threatening the presumption that men stand in relation to culture as women stand in relation to nature.

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218. In fact, legislative bodies, both in the United States and abroad, that have considered gestational surrogacy have tended to define motherhood as flowing more directly from the gestational, than the genetic, aspects of biological maternity. See Rothenberg, *supra* note 209, at 346. A legislature, considering gestational surrogacy in the abstract, may well reach different conclusions than a judge, faced with actual people, already engaged in a gestational surrogacy arrangement. Particularly, if the object of the legislative and the judicial decision is to preserve the family in its traditional forms, the legislator and the judge are often compelled to reach different, even sometimes apparently contradictory, conclusions—the legislator, for all cases, and the judge, for a specific case.

## IV. IMPLICATIONS OF THE ASSUMPTIONS

In his book, *A Critique of the Study of Kinship*,<sup>219</sup> anthropologist David M. Schneider analyzes the assumption in anthropological writings about kinship that "blood is thicker than water."<sup>220</sup> He refers to this as the "fundamental assumption in the study of kinship,"<sup>221</sup> and argues that it explains the "privileged position" accorded kinship studies by nineteenth and twentieth century European and American anthropologists. Writ large, the assumption that "blood is thicker than water" means kinship bonds are taken to be "*states of being*, not of *doing* or performance—that is, the grounds for the bonds 'exist' or they do not, the bond of kinship 'is' or 'is not,' it is not contingent or conditional, and performance is presumed to follow automatically if the bond 'exists.'"<sup>222</sup> In the course of this analysis, Schneider examines the related and equally fundamental assumption that *ideas* about kinship are considered distinct from the *facts* of kinship (e.g., the facts of blood relationship). The distinction takes the facts to reside "in the nature of things" and the ideas to stem from the "intelligent observation of these facts."<sup>223</sup>

The unwed father and surrogate mother decisions resemble the anthropological writings analyzed by Schneider in assuming a set of "natural" facts about family relationships and family members that, to some extent, can be shifted and interpreted by the analyst, in this instance, the legal system. Just as anthropologists work from the belief that "ideas are, or derive from, the intelligent observation of [the] facts" and "become part of culture,"<sup>224</sup> so lawmakers proceed by defining and delineating the "facts" in various ways to actualize one vision or another of what the law is taken to require. That process is especially obvious in the unwed father and surrogate mother cases because the "facts"—the facts of genetics, the facts of gestation, the facts of family—are relatively tenacious, reproductive technology notwithstanding.<sup>225</sup>

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219. SCHNEIDER, *supra* note 8.

220. *Id.* at 165.

221. *Id.* at 165–77.

222. *Id.* at 165–66.

223. *Id.* at 167.

224. *Id.*

225. Little work has been done on the effects reproductive technology has on the culture's understanding of the "basic facts" of kinship, but it may be that reproductive technology, like the culture in its other guises—like "ideas" themselves—is understood powerfully and impressively to interpret and manipulate the "facts," but not to change them fundamentally. Although reproductive technology is understood to offer eventu-

Each of the cases analyzed in this Article entailed a potential threat to, or shift in, traditional family patterns. In each case, a court recognized legal parenthood in that party (or parties) whose family relations most closely approximated traditional patterns. In the unwed father cases the potential threat to traditional forms of family came from an attempted expansion of the definition of family to include parents unmarried to each other, and in some of the cases parents married to other people. In the surrogacy cases, the threat to traditional forms of family stemmed from an attempt to create families through procedures and forms of interaction traditionally associated with the market rather than with the home, as well as from a perceived redefinition of the composition of family. The court, in each case, opted to preserve a traditional family, insofar as that was possible, even where doing so meant ignoring or reinterpreting the biological facts.

This process was most obvious in *Michael H.*, and, in different ways, in both *Baby M.* and *Anna J.* In the other unwed father cases, the presumption that biological paternity contains no certain social correlates, and thus provides no evidence of social paternity, was reenforced by each decision. The men in *Stanley* and *Caban* were given legal rights to their biological children. Both men had formed families, though nonmarital families, with their children and the mother of those children. In *Stanley* in particular, Peter Stanley's claim to fatherhood was not opposed by his children's mother, who had died. Had Stanley not been recognized as the legal father of his biological children, those children would have been left orphans. In contrast, *Quilloin* and *Lehr* involved fathers who had never established homes with their children and those children's mothers. Ignoring the biological ties between these men and their children constituted a refusal to acknowledge the social significance of the father-child link *outside family*.

*Michael H.* was a harder case because Michael, the biological father, had committed himself to his biological child and had, at least for a time, established a home with that child and her mother. However, Michael's biological paternity posed a harsher assault against traditional family forms than the paternity at issue in the

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ally unlimited choice in the process of having and choosing to have children, this may be ultimately understood as "nothing more" than the application of a vast consumerism to the "facts" of reproduction. See Marilyn Strathern, *Enterprising Kinship: Consumer Choice and the New Reproductive Technologies*, 14 CAMBRIDGE ANTHROPOLOGY 1, 2 (1990) (arguing that in large part, at least, reproductive technologies are seen as simply another mechanism for enabling people to better effect what they want).



other unwed father cases because Michael, "the adulterous, natural father," as Justice Scalia labelled him, was the biological father of a child whose mother was married to another man at the time of the child's conception and birth. In the Court's view, the Constitution's failure to protect Michael's paternity followed clearly from the absence, in his case, of a traditional family (a "unitary family," in the Court's words).

In *Baby M.* and *Anna J.*, the challenge to traditional family forms came from the negotiation of the parent-child tie as if it were a fungible commodity. Commercial surrogacy is problematic because it seems to obliterate the long-standing difference in Western culture between relationships based in status and relationships based in contract,<sup>226</sup> because it seems to merge the family with the world of business and commerce, to define family relations as negotiable ties between otherwise unconnected, autonomous individuals.

All the decisions in the *Baby M.* and *Anna J.* cases chose, though in different ways, to preserve the family in traditional terms. In *Baby M.*, Judge Sorkow viewed Whitehead's very decision to enter the surrogacy contract as such a threat to traditional views of maternity that the decision itself became evidence against her. Clearly, any woman who would agree to abandon her child could not be a good mother. Yet Whitehead *did* seem to be a fit mother. She was adequately raising her two children with her husband and she seemed clearly to love the child that resulted from the surrogacy arrangement. The court redefined that love, describing it as evidence of Whitehead's abnormal maternity. Even her love for her child was "exaggerated" and harmful. The court understood Whitehead's attempt to sell her maternity to have warped her maternal instinct, to have rendered it unworthy, and thus ineffective. As a result, Whitehead's claim to motherhood, which would normally have been assured by the fact of her biological maternity, could, in this case, be ignored. Stern, of course, was equally a party to the surrogacy agreement. However, his claims to paternity were not weakened by his involvement in the contract since there was no expectation that biological paternity would presage or constitute social paternity.<sup>227</sup> In assessing Stern as a potential father, the trial court paid no heed to Stern's willingness to enter the surrogacy con-

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226. See MAINE, *supra* note 31, at 164-65 (distinguishing the world of status from the world of contract); Dolgin, *supra* note 153, at 517-25 (applying Maine's status/contract distinction to surrogacy arrangements).

227. This claim does not refer to New Jersey law, but to a wider and older conception of biological paternity.

tract. Traditional definitions of paternity as a matter of choice made this decision unproblematic.<sup>228</sup>

The state supreme court similarly selected tradition over change, but in a manner more consistent with a model holding motherhood to flow naturally from biological maternity. The supreme court declared the surrogacy contract void and declared that, without it, Whitehead's claims to parenthood equalled, but did not exceed, Stern's. By viewing Stern and Whitehead on the model of a divorced or divorcing couple, the court protected Stern's paternity.

In *Anna J.*, more clearly than in any of the other cases, the judiciary interpreted the biological facts themselves so as to recognize the parenthood of the more traditional family. Both courts recognized the combined genetic contribution of Crispina and Mark Calvert<sup>229</sup> to provide a basis for their claim to legal parenthood, and correspondingly, characterized Anna Johnson's gestational motherhood as incidental.

*Anna J.*, unlike the other cases, allowed—even compelled—the courts to consider separately and to weigh the symbols of maternity. Without hesitation, the courts interpreted those symbols to create a traditional family. The weight paid the gestational role in the unwed father cases vanishes in the surrogate mother cases when *another woman* presents a similarly impressive claim to biological maternity and that other woman, unlike the gestational mother, is part of a traditional family. In *Lehr*, the mother's gestational role differentiated her from the biological father whose paternity went unprotected. But when a mother is compared to another mother, as in *Anna J.*, the need to differentiate the claimants on the basis of their biological contribution to parenthood vanishes. Thus, Anna's biological maternity could be rendered insignificant without directly undermining the position that biological maternity differs from bio-

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228. Obviously, in enforcing the contract, the trial court sanctioned surrogacy and therefore allowed for future arrangements in which biological mothers could bargain away their maternity. At least to some extent, the court perceived this consequence and was troubled by it. In fact, the trial court referred to the analysis of the contract issue as "commentary." *In re Baby M.*, 525 A.2d 1128, 1132 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

229. It would be instructive to analyze a gestational surrogacy case in which the claim to maternity of the surrogate was opposed by the claim of an unmarried egg donor where the sperm had been donated anonymously. To date, no such case has been reported. Such a case would force a court to choose between two parties neither of whom had established a traditional family and might, therefore, test the viability of the position taken by both courts in *Anna J.* that genetic motherhood is more fundamental than gestational motherhood as the basis of a claim to legal maternity.

logical paternity in that the former constitutes motherhood while the later offers the option of fatherhood.

### CONCLUSIONS

Assumptions about biological "facts" undergird definitions of family. For the most part, courts, like the larger society, need not and do not review or interpret biological facts in reaching family law decisions. When, however, the family, understood as a domain different, and set off, from the world of money and work, is threatened by social or technological changes, courts are compelled to reconsider, and sometimes to realign, the facts themselves.

In order to preserve traditional families, in general, or one family, as an instance of traditional families, courts have proved willing to manipulate, even to dismiss, the biological facts. That process does, however, have its limits. At present, those limits are reached with characterizations that fail to preserve the essential difference between biological maternity as an aspect and condition of motherhood and biological paternity as a fact without ordained social consequences.

The ambivalence behind the judicial response to changing family patterns is manifest. Some decisions (such as the unwed father cases as a group) that appear to sanction change provide for or depend on traditional definitions of family that belittle or restrict the changes recognized. Other decisions appear to choose traditional families over others, but do so in ways that approve the very changes feared. So, for instance, the trial court in *Baby M.* chose Stern over Whitehead because he, along with his wife Elizabeth, promised to provide the more traditional home for the child. But in doing that, the court approved a contractual approach to family law questions. Similarly, in *Anna J.*, the California courts chose a traditional family for the child and thereby realigned the biological facts so as potentially to undermine the traditional definition of mother as "mother."

The cases, read as a whole, reflect a society moving between one vision of the family and another. It is not, however, clear whether or for how long the conservative impulse to safeguard and reproduce traditional patterns will balance the evolving abandonment of the family as one of the last stands of a world that did not presume each individual a separate, autonomous whole, free to negotiate the terms of life.