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## Biological Evaluations: Blood, Genes, and Family

Janet L. Dolgin

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## BIOLOGICAL EVALUATIONS: BLOOD, GENES, AND FAMILY

*Janet L. Dolgin\**

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### I. INTRODUCTION

The form of family prized during the middle of the twentieth century is disappearing. Many commentators – in universities,<sup>1</sup> in courts,<sup>2</sup> in the media,<sup>3</sup> and in private settings<sup>4</sup> – have noted the

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\* Jack and Freda Distinguished Professor of Health Care Law, Hofstra Law School. B.A., Barnard College (philosophy); M.A. and Ph.D., Princeton University (anthropology); J.D., Yale Law School. I am grateful to Toni Aiello, Reference Librarian, Hofstra Law School, for her insightful assistance; to participants in law faculty workshops at Case Western Reserve University and at Seton Hall University for helpful comments; and to Hofstra Law School for research support.

1. See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U.L. REV. 227 (2006).

2. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000) (plurality opinion) (noting major demographic changes in the “average American family”).

3. Joan Biskrupic, *Same-Sex Couples Redefining Family Law in USA*, USA TODAY, Feb. 18, 2003, at 1A (considering options open to gay and lesbians parents and prospective parents);

increasing importance of autonomous individuality and choice to understandings of families in the U.S. For almost a half century, society and the law have increasingly viewed family members – especially adults within families – as autonomous individuals, free to forge their own bargains within family settings. In consequence, families shaped by individuals' nontraditional choices are now commonplace.<sup>5</sup>

Yet, even as society has committed itself to autonomous choice in shaping family relationships, it has seemingly become more obsessed with the biological (and especially the genetic) correlates of family. Moreover, a variety of views about biology's role in defining families has appeared.<sup>6</sup> For some, understandings of DNA are assimilated to traditional understandings of "flesh and blood." For others, understandings of DNA follow from a commitment to choice. Prospective parents, for instance, spend significant sums of money to gain access to donor gametes that they imagine will give them children with certain traits and interests.<sup>7</sup> In still other cases, courts and legislatures have displaced the traditional presumption that a mother's husband is the father of her children through reference to the "facts" of DNA.<sup>8</sup> Elsewhere, "families" are being mapped through online searches for "donor relatives." And in yet other contexts, families are being defined in light of genetic alterations that predispose family members to medical conditions.<sup>9</sup>

Tension resulting from a host of discrepant understandings of

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*Whatever Happened to the Nuclear Family? 2000 Census Report on Families*, FOOD PROCESSING, Aug. 1, 2001; May 20, 2001, Sunday 4 STAR EDITION; Genaro C. Armas, *Living Together Out of Wedlock on the Rise – Even in Bible Belt*, THE HOUSTON CHRONICLE, May 20, 2001, at A24 (reporting increased incidence of nonmarital cohabitation even in Bible Belt states).

4. Karin Cook, *Early Admissions*, N.Y. TIMES, Mar. 4, 2007, §14, at 11 (satire commenting on attractiveness of nontraditional families of choice to private preschool selection committees and thus suggesting popular interest in families of choice); Gargi Chakrabarty, *Changes in Home Designs Reflect Shifts in Lifestyles*, THE INDIANAPOLIS STAR, Nov. 7, 2001, at 01C (noting that according to 1999 survey one-third of new homes in U.S. are purchased by nontraditional families).

5. See, e.g., MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 35-36 (1993) (noting increasing reliance on "contract" in family settings); NATIONAL COMMISSION ON CHILDREN, FINAL REPORT: BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 15 (1991) (describing "social, demographic, and economic changes" in U.S. families in previous 30 years).

6. Ken M. Gatter, *Genetic Information and the Importance of Context*, 47 ST. LOUIS U. L.J. 423, 427 (2003) (noting that many people accept the view of some geneticists about "the power of genetics and its predominance in describing who and what we are"). The specific geneticist to whom Gatter refers in the passage is Francis Crick. Along with James Watson, Crick described the double-helix structure of DNA in the 1950s. *Id.*

7. See *infra* notes 179 - 185 and accompanying text.

8. See *infra* notes 187 - 203 and accompanying text.

9. See *infra* notes 236 - 270 and accompanying text.

family is transparent in the law and in society. A culture committed to autonomous choice in defining the scope of family relationships *and* gripped by suppositions about the centrality of presumed biological facts to the definition of families will, of necessity, be forced to mediate between promises of unending choice and claims about biology (and DNA, more particularly) as a source of personal and familial fate. As society and the law have attempted to mediate such conflicting views of family, a host of new forms of family has emerged.

Even more, along with the waning of the traditional family, the ideology<sup>10</sup> that undergirded that construct – one that assumed a social unit distinct in purpose and design from the industrial marketplace – has crumbled. Yet, many of its elements (its “values” and “social anchors”) have survived. To these elements others, once shunned in the domain of home and family, have been added. Thus, autonomy (including choice and agency), biology (read as “flesh and blood” *and* as DNA), love, intention, commitment, and bargain are variously invoked as society attempts to understand families. Efforts to define and regulate families are rendered more complicated still insofar as any one of these values or anchors (e.g., intention, loyalty, choice, love, bargain, “blood,” or genes) can, depending on context or whim, be combined with any one or more of the others. And any one may predominate over, or be subordinate to, any of the others in efforts to define families. The result is uncertainty. That uncertainty has, in turn, engendered continuing, often vociferous debate about the contours of family relationships.

Much has been written about the role of choice in constructing the “modern” family. This Article assumes the significance of choice and proceeds to examine the shifting uses of biology in the social construction of family.<sup>11</sup>

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10. This essay uses the term “ideology” to refer to a set of pervasive, underlying social beliefs in terms of which people think about and act in the world. This use of the term follows that of the French anthropologist Louis Dumont:

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 preempted. 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).

11. *See, e.g.*, BRUCE J. SCHULMAN, *THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS* (2001); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* (1997); MILTON C. REGAN, JR., *FAMILY LIFE AND THE PURSUIT OF INTIMACY* (1993).

The next Part of the Article (Part II) provides a brief overview of the ideology in terms of which society understood the family during the nineteenth, and most of the twentieth, century. Part III then summarizes the increasing readiness of society and of lawmakers since the 1960s, openly to premise delimitations of family on values once associated with the marketplace, but not the home. Parts II and III provide background to Part IV.

Part IV, the heart of the Article, focuses on contemporary understandings of family that preserve a central role for the biological correlates of domestic relationships. The Part describes four social responses to the widespread presumption that biology (now generally, though not always, read as “DNA”) is significant to understandings of family in light of society’s commitment to autonomous choice in family settings.

The first of these responses reflects an understanding of family – referred to here as the “flesh and blood” family – that harmonizes most closely with understandings of the traditional family. Terms such as “blood” and “flesh and blood” – the presumed truths in terms of which traditional families were constructed – may be replaced with terms such as “DNA” and “genes.” These terms may then serve as modern synonyms for “blood” or “flesh and blood.”

The second response is encapsulated by what is here referred to as the “reprogenetic” family. In this form of family, a notion of DNA as an object of reproductive choice and a notion of DNA as fate compete with each other. Of the four forms of family considered in Part IV, the reprogenetic family most closely resembles contemporary families of choice.

The phrase “families of shared DNA” is used to describe a third response to the collapse of the traditional family that preserves a central role for presumptive biological facts. This notion of family imbues genes with the power to encompass both tradition and choice. Part IV describes two distinct sub-types of such families. The first is a product of recent legislative and judicial decisions that reshape the so-called marital presumption.<sup>12</sup> The second sub-type depends on the significance attributed to shared DNA among so-called “donor relatives.” This second sub-type generally involves “donor siblings” (children conceived from the sperm of one man but not connected to each other through social history or interaction until one party identifies another, usually

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12. See *infra* notes 187 - 203 and accompanying text (exploring parameters of the “marital presumptions”).

through an internet search). It may also include “donor fathers.” In theory, a similar analysis could be entertained concerning egg donation. However, for a variety of reasons, children are far less often conceived through donated eggs than through donated sperm. In part, this seems a simple consequence of the far more exacting burden involved in donating eggs than in donating sperm. It may also reflect a peculiar expansion of differences that reflect more generalized perceptions of gender.<sup>13</sup>

Finally, Part IV considers a fourth distinct form of family that depends centrally on presumptive biological (genetic) facts. This form of family (referred to here as a “medicalized family”) is remarkable in that it largely precludes choice while safeguarding individualism. It suggests a novel and potentially troubling notion of family.

Each of these four forms of family is anchored to presumptive truths about biology. In this, each resembles the “traditional” family. But the difference between the four forms of family reviewed in this Article and the traditional family is as significant as is the similarity just noted. In particular, the nexus that once connected presumed truths about biology to expected modes of conduct among members of traditional families has been rent asunder. Various truths about biology co-exist with various expectations about behavior within the forms of family reviewed in this Article. No longer, however, do presumptions about either the biological or the social order clearly indicate the shape of presumptions about the other.

## II. THE “TRADITIONAL” FAMILY

This Part briefly describes the “traditional family” as a cultural construct.<sup>14</sup> It aims to depict mainstream visions of family from the early years of the Industrial Revolution to the middle of the twentieth century. Yet, it recognizes that from a social perspective, interactions within so-called traditional families varied significantly depending on a wide set of economic, geographical, ethnic, and psychological factors.<sup>15</sup>

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13. See Kristin Spilker & Merete Lie, *Gender and Bioethics Intertwined: Egg Donation within the Context of Equal Opportunities*, 14 EUR. J. OF WOMEN’S STUD. 327, 327-28 (2007) (noting more controversial debate about ethics of egg donation than of sperm donation).

14. This part is thus not concerned with the actual variety of family forms during the nineteenth and twentieth centuries or with the practices through which family relationships were actualized in particular families. There were of course significant differences in families that correlated with geography, class, and national origin, among other things.

15. See STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 14 (1992).

The material in this Part is intended to provide a comparative frame for considering the forms of family considered in Part III, and especially, in Part IV.

During most of U.S. history, families were widely viewed as social units, grounded in “blood relationships”<sup>16</sup> and in set patterns of familial conduct. Traditional families valued hierarchy and reflected fixed roles and statuses.<sup>17</sup> Many family relationships were viewed as resulting from and reflecting what were understood as objective facts of nature.<sup>18</sup> In short, within traditional families, people were expected to follow clearly defined patterns of behavior, structured with reference to the hierarchical organization of family statuses.<sup>19</sup>

The traditional form of family, forged in the early years of the Industrial Revolution, was defined in almost express contrast to the nineteenth – and twentieth – century marketplace. In the marketplace, autonomous individuals were expected to arrange and re-arrange their own bargains. At home, family relationships were defined in light of clear roles, themselves shaped through reference to hierarchically organized statuses. Further, it was assumed that people at work were motivated by money, entered into relationships they understood as transient, and functioned as autonomous individuals. In contrast, society assumed that people at home were motivated by love, that family relationships were enduring, and that autonomous choice had a very limited role in shaping relationships among family members.<sup>20</sup>

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16. Visions of family in the U.S. have always included a place for kinship relations not grounded on a presumed biological connection. The spousal connection is the paradigmatic example. David M. Schneider, *Kinship, Nationality, and Religion in American Culture: Toward a Definition of Kinship* 65 (1969), reprinted in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* (Janet L. Dolgin, David S. Kemnitzer, & David M. Schneider eds., 1977) [hereinafter Schneider, *Kinship, Nationality, and Religion*] (noting that people “related by marriage are not related ‘in nature’”). In this regard, people related “in-law” – a term suggesting the relationship’s grounding, *id.* – include spouses, step-children and parents-in-law, and other relatives connected through a family member’s spouse (and, more recently through a family member’s significant other).

17. These families are referred to in this Article as “traditional” families.

18. The term “biological relatedness” is taken from David M. Schneider, who studied the cultural components of American families during the middle of the twentieth century. Schneider, *Kinship, Nationality, and Religion*, *supra* note 16, at 63. See also *id.* at 65; DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* (2d ed. 1980) [hereinafter SCHNEIDER, *AMERICAN KINSHIP*]. Not all family relationships, of course, were presumed to have been grounded in “blood.” In addition to relations through “blood,” people were understood as related through marriage (“law,” as in “in-laws”). See *id.* at 37.

19. SCHNEIDER, *AMERICAN KINSHIP*, *supra* note 18, at 29. These statuses were generally based on differences in age and gender.

20. Schneider described the family at mid-twentieth century as a social unit of “enduring diffuse solidarity.” SCHNEIDER, *AMERICAN KINSHIP*, *supra* note 18, at 53.

The separation of home and market was an ideological and practical construct that reflected a shift from the colonial world, in which family, community, and work were not sharply differentiated.<sup>21</sup> With the development of the industrial marketplace of the nineteenth century, and the social chaos that that development engendered, understandings of home (social myths,<sup>22</sup> if you will) presumed a universe of home and family that offered sanctuary from the demands of the ever-changing market.<sup>23</sup>

The anthropologist David Schneider studied the American family during the middle of the twentieth century, just before American society self-consciously redesigned the scope and meaning of family relationships (at least between adults).<sup>24</sup> Broadly, Schneider's interviewees assumed a family "consisting of husband, wife, and their children who live together as a natural unit. The family is formed according to the laws of nature and it lives by rules which are regarded by Americans as self-evidently natural."<sup>25</sup>

Schneider's interviewees further described families in terms of a status system based largely on differences in age and gender.<sup>26</sup> Schneider reported that his interviewees understood authority in families to belong to fathers.<sup>27</sup> They justified that allotment of power through reference to fathers' gender, age, and putatively greater experience.<sup>28</sup> In sharp contrast, they explained that women in families were expected to "bear children, nurse them, and care for them."<sup>29</sup>

Finally, and most important, the universe of the traditional family was understood by those whom Schneider interviewed as absolutely different from the world of work.<sup>30</sup> "[W]ork and home," Schneider concluded, "are different in [almost] every significant way."<sup>31</sup> More specifically, explained Schneider:

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21. JOHN DEMOS, *PAST, PRESENT AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 28 (1986).

22. The term "myth" is here used in the sense intended by the French structuralist, Roland Barthes. Barthes defined "myth" as a "system of communication," a "message." ROLAND BARTHES, *MYTHOLOGIES* 109 (Annette Lavers, trans., Noonday Press 1972) (1957).

23. See STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 52-60 (1988).

24. SCHNEIDER, *AMERICAN KINSHIP*, *supra* note 18.

25. *Id.* at 34.

26. *Id.* at 35.

27. *Id.* at 36.

28. *Id.*

29. *Id.* at 35.

30. *Id.* at 46.

31. *Id.*



The set of features which distinguishes home and work is one expression of the general paradigm for how kinship relations should be conducted and to what end. These features form a closely interconnected cluster.

The contrast between love and money in American culture summarizes the cluster of distinctive features. Money is material, it is power, it is impersonal and unqualified by consideration of sentiment or morality. Relations of work, centering on money, are of a temporary, transitory sort. They are contingent, depending entirely on the specific goal – money.

. . . .

. . . [T]he opposition between money and love is not simply that money is material and love is not. . . . [L]ove is spiritual. The spiritual quality of love is closely linked with the fact that in love it is personal considerations which are the crucial ones. Personal considerations are a question of who it is, not of how well they perform their task or how efficient they are.<sup>32</sup>

Thus, understandings of the traditional family presumed a world of home that was prized – and broadly, shaped – by its differences from the commercial marketplace.

At home, people largely rejected the central values of the Enlightenment and of the capitalist marketplace – equality, autonomy, individualism, and the right to individual choice. At home, people valued hierarchy, fixed roles, and community.<sup>33</sup> The ideological dynamic around which society understood this construction was shaped through reference to assumed differences between “blood,” understood as a fact of nature, and bargain (a mode of interaction associated with the commercial marketplace). More important, the biological and social parameters of family were linked. Each set of parameters reflected society’s understanding of the other.

### III. NEW FORMS OF FAMILY: THE PREDOMINANCE OF AUTONOMOUS INDIVIDUALITY

Commitment to that vision of family dimmed in the last decades of the twentieth century.<sup>34</sup> Increasingly, society rejected many of the

32. *Id.* at 48-49.

33. *Id.* at 34-35.

34. See SCHULMAN, *supra* note 11, at 16 (describing the decade of the 1970s generally as one

values that had sustained the so-called traditional family.<sup>35</sup> Even more, society replaced those values with values that predominated in the marketplace.<sup>36</sup> In consequence, alternative modes of family relationships began openly to compete with those associated with traditional families. Family members, and especially adults within families, began to envision their familial lives as they understood their lives in the marketplace – through the presumptions of autonomous individuality.<sup>37</sup> The transformation of family was not of course only a matter of ideological change. As Justice Sandra Day O’Connor noted at the turn of the twenty-first century:<sup>38</sup> “The demographic changes of the past century make it difficult to speak of an average American family.”<sup>39</sup>

#### A. *Choice and Intention: As Between Adults in Families*

By the late 1960s and early 1970s, American law had begun to facilitate a world of family governed by choice and intention. A social world that focused on individual rights began to displace a world that defined family behavior through reference to “natural” truth.<sup>40</sup>

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that “reshaped the political landscape. . . . In race relations, religion, family life, politics, and popular culture, the 1970s marked the most significant watershed of modern U.S. history, the beginning of our own time”).

35. *Id.* at 16-17.

36. *Id.* at xii.

37. *Id.* at 16.

38. *Troxel v. Granville*, 530 U.S. 57 (2000) (finding Washington state’s nonparental visitation statute unconstitutional as applied to the mother in the case).

39. *Id.* at 63-64 (plurality opinion) (citation omitted). Stephanie Coontz compared the demographics of American families of 1950 with those of 1990:

Ninety percent of all the households in the country were families in the 1950s, in comparison with only 71 percent by 1990. Eight-six percent of all children lived in two-parent homes in 1950, as opposed to just 72 percent in 1990. And the percentage living with both biological parents – rather than, say, a parent and stepparent – was dramatically higher than it had been at the turn of the century or is today: seventy percent in 1950, compared with only 50 percent in 1990.

STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES* 37 (1997).

40. See William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN’S L. REV. 435, 524 (1996) (noting appearance of “new values” in family law in decades after World War II). Nelson further explains that:

[T]he new values were cast in the language of rights which their bearers could enjoy without assuming any corresponding duties or responsibilities. When these new ideas about rights became attached to older assumptions about normal and natural male behavior, the social advantages men had customarily enjoyed became reified into formal legal privileges standing apart from the social obligations with which traditional morality had encumbered them. As a result, men gained increased legal power, and women lost significant legal protections.

*Id.*

Lawmakers affected a number of concrete changes in the regulation of family life. In particular, they acknowledged the significance of individual rights in domestic settings. In the last few decades of the twentieth century, states began, for instance – slowly at first and then with widespread determination – to validate prenuptial agreements in contemplation of divorce,<sup>41</sup> to enforce cohabitation agreements,<sup>42</sup> and to provide for divorce without accusations of fault.<sup>43</sup> Since then, a few states have provided civil union options for same-gender couples anxious to marry or have recognized same-gender marriage.<sup>44</sup> Each of these developments reflects the increasing significance of autonomous choice to society's understandings of family relationships among adults.

### B. Choice and Intention: Constructing the Parent-Child Relationship

The law has been more hesitant to welcome choice in shaping family matters that directly affect children. Only rarely have courts acknowledged children's full autonomy in family settings.<sup>45</sup> Moreover, courts continue to exercise *parens patriae* authority over children and will thus invoke children's "best interests," in refusing to effect provisions in agreements between parents that specify custody arrangements for children should the parents separate or divorce.<sup>46</sup> Yet,

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41. See, e.g., *Posner v. Posner*, 233 So.2d 381, 384 (Fla. 1970) (upholding prenuptial agreement). The Posner court took judicial notice of the increase in the proportion of divorces of marriages in society and noted that prenuptial agreements had previously been broadly viewed as invalid violations of a public policy favoring marriage. *Id.* at 383.

42. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 114-16 (Cal. 1976) (upholding agreement between non-marital partners and noting that sexual services cannot provide consideration for such agreements); *Morone v. Morone*, 413 N.E.2d 1154, 1154-57 (N.Y. 1980) (upholding express agreements between domestic partners but refusing to uphold implied agreements).

43. William Nelson concluded, in his fascinating study of New York family law between 1920 and 1980, that in the state "[t]he most decisive shift from law based on traditional family values to law emphasizing individual rights and happiness occurred as the New York courts, beginning in the late 1930's, slowly retreated from the state's century-old policy of keeping marriage indissoluble." Nelson, *supra* note 40, at 498.

44. Vermont, for instance, provides for civil unions, VT. STAT. ANN., tit. 15, §§ 1201-1207 (2007), and Massachusetts allows same-gender couples to marry, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

45. Exceptions exist, but they are rare. See, e.g., *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992). The trial court granted standing to 11-year old Gregory to challenge his biological mother's maternity. *Id.*

46. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 42 n.49 (2006) (agreements between parents that provide for custody of children are not binding) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.08 (2002)); Carolyn Eaton Taylor, Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059, 1069-70 (1984) (noting that judges can redefine agreements between parents about custody or support if the agreements "are not in the child's best interest" or if they are "patently

with regard to the creation of the parent-child bond, especially in contexts that have involved assisted reproduction, courts have expressly displaced presumptive biological links and have predicated family relationships on parental choice. Moreover, judges have recognized novel understandings of the parent-child unit as a result of having previously recognized new forms of familial relationships among adults.<sup>47</sup>

A string of California cases involving disputes about the contours of maternity provides a textbook illustration of the move from biology to intention as the key determinant of legal parentage.<sup>48</sup> These cases reflect a deep commitment to choice, but they also reflect concern with the biological correlates of family relationships *and* with safeguarding traditional forms of family relationships. Thus, they provide an important bridge to the discussion that follows (in Part IV) concerning social efforts to mediate the gap between presumptions that undergird a commitment to choice in defining families and presumptions that undergird a commitment to biological “facts” in defining families.

In 1993, in *Johnson v. Calvert*,<sup>49</sup> California’s highest court considered a parentage dispute between a married couple, Crispina and Mark Calvert, and Anna Johnson, who gestated and gave birth to a child conceived from the Calverts’ gametes. The three had previously entered into a surrogacy agreement that provided for the Calverts to pay Johnson \$10,000 and for Anna to relinquish “all parental rights” to the Calverts at the baby’s birth.<sup>50</sup>

All three California courts that heard the case held for the Calverts, but on different grounds. Judge Parslow, for the trial court, based the Calverts’ parentage on their genetic connection to the child.<sup>51</sup> The appellate court, relying on a set of provisions in state law that provided

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unfair”).

47. See *infra* notes 72 – 100 and accompanying text.

48. This shift has not been as definitively accepted with regard to other sorts of parentage disputes.

49. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

50. *Anna J. v. Mark C.*, 286 Cal. Rptr 369 (Cal. Ct. App. 1991), *aff’d sub nom.* *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied*, 114 S. Ct. 206 (1993). In addition to the \$10,000, which the contract specified the Calverts were to pay to Johnson in installments, the Calverts agreed to purchase a \$200,000 life insurance policy on Johnson’s life. *Id.* at 372.

51. *Johnson v. Calvert*, No. X-633190, slip op. at 5 (Cal. App. Dep’t Super. Ct. Oct. 22, 1990), *aff’d sub nom.* *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Cal. Ct. App. 1991). Trial court judge, Judge Parslow, explained: “In this case 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.” *Id.* at 10.

for the identification of parentage through DNA testing, affirmed.<sup>52</sup> The state's highest court agreed that the Calverts were baby Christopher's parents but rejected both the trial court's invocation of biology (genes) and the appellate court's reliance on state statutory law.<sup>53</sup> Rather, the state supreme court concluded that, in cases such as this one, involving two women with cognizable claims to biological maternity, maternity follows from parental intention.<sup>54</sup> The court explained:

We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.<sup>55</sup>

In a footnote, the court made it clear that its rule did not ensure the maternity of the ovum donor in all cases: “Thus, under our analysis, in a true ‘egg donation’ situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.”<sup>56</sup> Indeed, soon after *Johnson* was decided, a New York court relied on this footnote to denominate an intentional mother who gestated twin girls conceived from her husband's sperm and the ova of a donor as the legal mother of the children.<sup>57</sup>

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52. *Anna J.*, 286 Cal. Rptr. at 373-74 (citing CAL. FAM. CODE §§ 7000-7021 (West 2008) repealed 1994)). The Court relied largely on the Uniform Parentage Act, adopted in California in 1975 as Part 7 of Division of the California Civil Code.

53. The biological frame employed by the trial court failed to account for Anna Johnson's biological role as the woman who gestated and gave birth to the baby. Moreover, the state statutory scheme was constructed before the advent of gestational surrogacy. Other provisions in California's statutory law would have resulted in Anna (the woman who gave birth to the child) being declared its legal mother. The Uniform Parentage Act, on which the appellate court relied in finding that Anna was the baby's mother, also provided that a child's birth mother is that child's mother. *Johnson*, 851 P.2d at 781.

54. *Id.* at 782.

55. *Id.* While not expressly enforcing the agreement into which the parties had entered, the court relied on that instrument for evidence of the parties' intentions. *Id.*

56. *Id.* at 782 n.10.

57. *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. 1994). The court concluded:

In the case at bar, we have a true ‘egg donation’ situation, and we find the reasoning of the Supreme Court of California on this issue to be persuasive. Accordingly, the Supreme Court, Queens County, correctly held that in the instant ‘egg donation’ case, the wife, who is the gestational mother, is the natural mother of the children, and is, under the circumstances, entitled to temporary custody of the children with visitation to the husband.

*Id.* at 480 (quoting *Johnson*, 851 P.2d at 782) (citation and footnote omitted).

After *Johnson*, a California appellate court entertained a so-called traditional surrogacy case, in *In re Moschetta*.<sup>58</sup> In this case, the surrogate enjoyed a relationship of full biological maternity with the child.<sup>59</sup> The intending mother (Cynthia) had no biological link with the child.<sup>60</sup> The case was not, however, occasioned by a dispute between these two women.<sup>61</sup> Rather it was initiated by Robert Moschetta, the genetic and intending father.<sup>62</sup> Soon after the birth of the baby involved, the Moschettas entered into divorce proceedings.<sup>63</sup> Robert (but not Cynthia) wanted Cynthia to be named the mother of the child, presumably so that he would not have to share parentage with the surrogate, Elvira Jordan.<sup>64</sup> The court, concluding that the surrogate, not Cynthia, was the child's legal mother, noted that there was "no question about biological parenthood to settle."<sup>65</sup> Elvira was the child's biological mother.<sup>66</sup> Cynthia had no biological connection to the child. Thus, *Moschetta* seemed clearly to establish that intentional maternity, as defined in *Johnson*, only applies to cases in which the intentional mother has some biological relation (genetic or gestational) to the child involved.

Then, in 1998, in *Buzzanca v. Buzzanca*,<sup>67</sup> a California appellate court reexamined the question in the context of reproductive facts that were more complicated than those at issue in *Moschetta*. In *Buzzanca*, the court relied on *Johnson*'s intent analysis to grant maternity to a woman, Luanne Buzzanca, who had no biological relation to the child she claimed as her own.<sup>68</sup> Luanne (the intending mother) had neither a gestational nor a genetic relationship with the baby involved; those functions had in fact been split between two women – a gestational surrogate and an anonymous ovum donor.<sup>69</sup> Thus, an argument could be

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58. *In re Moschetta*, 30 Cal. Rptr.2d 893 (Cal. Ct. App. 1994).

59. *Id.* at 895.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 895-96.

65. *Id.* at 897 (emphasis omitted).

66. *Id.* at 895.

67. *In re Buzzanca*, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998).

68. *Id.* at 282.

69. John and Luanne Buzzanca believed that the egg used to conceive the baby was donated anonymously. In fact, the egg may have been one of those "stolen" from an infertility patient by the doctors running the University of California-Irvine clinic where the child involved was conceived. See *48 Hours: The Family Tree: Child Born to In-vitro Fertilization May Have Been Created From Stolen Embryo* (CBS television broadcast May 14, 1998).

made that the reproductive facts of *Buzzanca* resembled those at issue in *Johnson* more than those at issue in *Moschetta*. The *Buzzanca* court's analysis expanded *Johnson's* applicability to a woman who was *not* connected biologically to the child for whom she was named as the legal mother.

Then, in 2005, California's highest court elaborated on the implications of the *Johnson* intent model of parentage.<sup>70</sup> More specifically, the court provided for a broader set of tests (based in part on life choices) that allowed a woman to be recognized as a child's parent even in a case in which the intent test delineated in *Johnson* would have led to a different result.<sup>71</sup>

In three companion cases<sup>72</sup> proclaiming that a child can have "two parents both of whom are women,"<sup>73</sup> California's supreme court concluded that application of the intent test to "break a tie" is not necessary in a case involving only two potential parents (regardless of the gender of each),<sup>74</sup> that "natural" parentage does not necessarily mean "biological" parentage,<sup>75</sup> and accordingly, that a woman with no biological or adoptive relation to a child may be deemed that child's "natural" mother if she intends to raise that child and presents herself to others as the child's "natural" mother.<sup>76</sup>

In these cases, the court expressly rejected a series of assumptions that had been basic to understandings of family only a couple of decades earlier. In particular, in *Elisa B.*,<sup>77</sup> the court re-interpreted its conclusion in *Johnson* that a child could have "only one natural mother."<sup>78</sup> The court provided for two "natural" mothers because, explained Justice Moreno, the case involved only two prospective parents (rather than three, as in *Johnson*).<sup>79</sup> "We perceive no reason," the court concluded in

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70. See *K.M. v. E.G.*, 117 P.3d 673, 681-82 (Cal. 2005).

71. *Id.*; *supra* note 55 and accompanying text.

72. *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005) (precluding mother from challenging a stipulated judgment by which she and her lesbian partner agreed to share the parentage of a child that Kristine H. was expecting); *K.M.*, 117 P.3d at 675 (holding that genetic mother was also legal mother of twin girls born to her lesbian partner, who gave birth to the children); *Elisa B. v. Superior Court*, 117 P.3d 660, 669 (Cal. 2005) (holding non-biological mother to be mother of children born to her lesbian partner because the non-biological mother participated in conception of children, received them into her home, and held them out as her children).

73. *Kristine H.*, 117 P.3d at 696.

74. *K.M.*, 117 P.3d at 681.

75. *Elisa B.*, 117 P.3d at 670.

76. *Id.* at 668-70.

77. *Id.* at 662.

78. *Id.* at 665 (quoting *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993)).

79. *Id.* at 665-66.

*Elisa B.*, “why both parents of a child cannot be women.”<sup>80</sup>

Even more, the court in *Elisa B.* recognized Elisa B.’s maternity, not because she had expressly entered into an agreement with her partner, Emily B., to co-parent, but on the basis of life choices.<sup>81</sup> More particularly, the court did not recognize Elisa B.’s maternity on the basis of a biological link to the children involved. Elisa B. claimed no biological link to the children.<sup>82</sup> Rather, the court found that Elisa B. was a mother because she had “actively assisted Emily in becoming pregnant.”<sup>83</sup> Moreover, noted the court, Elisa intended to enjoy the rights and to accept the responsibilities of parenthood.<sup>84</sup> Also, she had “received the children into her home and openly held them out to the world as her natural children.”<sup>85</sup>

More particularly, in the set of cases of which *Elisa B.* is one, the California court provided for two women to be denominated mothers of a child (or children), even if one of the women would likely have been denied maternal rights under *Johnson’s* intent test. In particular, the court in *K.M. v. E.G.* named K.M., the genetic mother of twin girls, born to her lesbian partner, as the children’s second parent.<sup>86</sup> Judge Moreno explained that the court did not premise that conclusion on the *Johnson* intent test because there was “no ‘tie’ to break.”<sup>87</sup> In *Johnson*, the California Supreme Court had predicated its intent analysis on the need to break a “tie” between two women with claims to biological maternity.<sup>88</sup> K.M. did not claim maternity at the expense of E.G.’s maternity. Rather, she claimed her own maternity “in addition to” E.G.’s maternity.<sup>89</sup> Thus, unable easily to rely on the intent test, the

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80. *Id.* at 666. The decision seems to leave standing the assumption that children can have two, but no more than two, legal parents.

81. The court supported its holding through reference to section 7611(d) of the Uniform Parentage Act which expressly provides that a man is presumed to be a child’s father if he “receives the child into his home and openly holds out the child as his natural child.” *Id.* at 667. The court noted further that “the legal principles concerning the presumed father apply equally to a woman seeking presumed mother status.” *Id.* (quoting *In re Salvador M.*, 111 Cal. App.4th 1353, 1357 (Cal. Ct. App. 2003)).

82. *Id.* at 663.

83. *Id.* at 669.

84. *Id.*

85. *Id.* at 670.

86. *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005).

87. *Id.*

88. *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993).

89. *K.M.*, 117 P.3d at 681. The court explained:

Unlike in *Johnson*, their parental claims are not mutually exclusive. K.M. acknowledges that E.G. is the twins’ mother. K.M. does not claim to be the twins’ mother instead of E.G., but in addition to E.G., so we need not consider their intent in order to decide



state supreme court in *K.M.* displaced examination of the parties' pre-conception intentions with a more general examination of the parties' choices, including, in particular K.M.'s decision to participate together with E.G. in the conception of a child or children.<sup>90</sup> Had the case been resolved through reference to the *Johnson* "intent" test, K.M. would likely not have been named a parent because, in signing an ovum donation form that provided for her surrendering any maternal rights she might have had, she expressly denied that she was an "intending" parent. In fact, a reading of the facts of *K.M. v. E.G.* in light of the intent test outlined in *Johnson*, led both the trial court and the intermediate appellate court to reject K.M.'s claim to maternity.<sup>91</sup>

After these cases, the law in California – and the state is not alone in this<sup>92</sup> – no longer consistently assumes that identification of legal parentage should conform to presumptive biological truths or to social forms associated with traditional understandings of the family. Rather, parentage can be predicated on choices. Such choices may be made known through a declaration of intentions or in written agreements, or they may become clear through one's actually raising a child in one's home and treating that child as one's own before a larger community.<sup>93</sup>

Another case – one decided in Pennsylvania in 2007 – suggests the far-reaching consequences for children of new forms of familial relationships among adults. In *Jacob v. Shultz-Jacob*, a Pennsylvania appellate court concluded that children can have three legal parents.<sup>94</sup> The court allotted parental responsibility to support two children<sup>95</sup> as

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between them.

*Id.* (emphasis omitted).

90. *Id.* at 682.

91. *Id.* at 677 ("The Court of Appeal affirmed the judgment, ruling that K.M. did not qualify as a parent 'because substantial evidence supports the trial courts factual finding that only E.G. intended to bring about the birth of a child whom she intended to raise as her own.'" (emphasis omitted)). The state supreme court decision replaces an interpretation of "intention" that looks to provisions in a contract or contract-like document with one that looks to acts suggesting parties' states of mind.

92. See, e.g., *In re Roberto D.B.*, 2007 Md. LEXIS 269, 285 (Md., May 16, 2007), *rev'g* 814 A.2d 570 (2003) (allowing name of gestational surrogate to be omitted from the birth certificate of a child conceived as the result of an agreement between the father and the surrogate); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 477 (N.Y. 1994) (relying on *Johnson's* intent test to name an intending, gestational, but not genetic, mother as a legal mother); *Developments in the Law: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2074 (2003) (states have "expand[ed] the notions of 'parents' and 'family'").

93. See *supra* notes 72 and 85 and accompanying text.

94. *Jacob v. Shultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

95. The biological mother was given primary custody. Her former lover was given partial custody, and the biological father was given visitation rights. *Jacob*, 923 A.2d at 476. Two other

well as custodial responsibilities for them, among a biological mother, her former lesbian lover, identified by the court as enjoying *in loco parentis* status,<sup>96</sup> and the sperm donor. The latter had maintained a relationship with, and provided some support to, the children, thus indicating, in the court's view, his "intention to demonstrate parental involvement far beyond the merely biological."<sup>97</sup> Yet, this man objected to a support obligation.<sup>98</sup>

The court seemed unconcerned with the enormity of the implications of its decision for the shape of families, or at least it seemed self-consciously to elide those implications:

In the trial court's view the interjection of a third person in the traditional support scenario would create an untenable situation, never having been anticipated by Pennsylvania law. We are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for Appellant [the biological mother's ex-partner] fractional shares to incorporate the contribution of another obligee.<sup>99</sup>

Thus, in *Shultz-Jacob*, a decision that upends a fundamental assumption about parentage is laid out as if it involved nothing more complicated than dividing a child's support needs among three, instead of between two, adults.<sup>100</sup>

Such unorthodox family relationships are largely grounded in increased judicial deference to adults' autonomous choices about family matters. That deference has shifted the parameters and meaning of parentage. In short, the law is more and more often openly reshaping family relationships that were perceived, but a quarter century ago, as grounded in the very nature of things.<sup>101</sup>

Yet, at the same time, as the forms of family considered in the following Part suggest, society and the law seem increasingly compelled

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children were involved in the case but were not the biological children of the sperm donor. *Id.*

96. *Id.*

97. *Id.* at 481.

98. The biological mother, Jodilynn Jacob, had not pursued support claims against Carl Frampton, the biological father. *Id.* at 479.

99. *Id.* at 482.

100. The decision clearly provides for three parents. However, the fact that the biological father died of a stroke shortly before the decision was rendered may have eased the court's concern about actual relationships among the parties involved. See Reggie Sheffield, *Sperm Donor Must Pay Child Support*, THE PATRIOT-NEWS, May 10, 2007.

101. This paper is concerned with the ideology of kinship. Thus, concern is with relationships that people view as biological (not with the scientific facts, as it were, pertinent to genetic, or other sorts of biological, relationships).

by the putative significance of biological “facts” to the construction of family relationships.

#### IV. PERCEPTIONS OF BLOOD AND PERCEPTIONS OF GENES: “NEW FAMILIES FOR OLD”<sup>102</sup>

And so, as courts, reflecting society, have been crafting a jurisprudence of family that has buttressed nontraditional families-of-choice, society is simultaneously lured by the notion that biology – and especially DNA – is an essential component of personal and group identity.<sup>103</sup> Even as there is more room for choice in shaping family relationships, there is more room for biology (now more often than not referred to as “genes” or “DNA”).

A similar peculiarity was noted by the British anthropologist, Marilyn Strathern, though with a more general set of referents.<sup>104</sup> Strathern describes a society increasingly obsessed at once with the effort to be both more modern and more traditional:

[I]t would seem we cannot be at both ends of the continuum at the same time. I want to suggest that is exactly where we might be. The suggestion arises from an otherwise perplexing sensation. This is the sense that there seems both *more* ‘status’ and *more* ‘contract’ around in the world, or at least in arguments about them. Would it also follow then that one might have both *more* tradition and *more* modernity at the same time?<sup>105</sup>

Thus, Strathern observes a new set of options: just as people may prefer tradition to modernity, so they may prefer modernity to tradition.<sup>106</sup> Such options and the inevitable interplay that develops among them are,

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102. I am indebted to Professor Marilyn Strathern for the heading of Part IV. See, e.g., Marilyn Strathern, *Surrogates and Substitutes: New Practices for Old?*, in JAMES GOOD & IRVING VELODY, *THE POLITICS OF POSTMODERNITY* (1998); Marilyn Strathern, *New Families for Old?*, in *THE FAMILY IN THE AGE OF BIOTECHNOLOGY* (Carole Ulanowsky ed., 1995).

103. Mary R. Anderlik & Mark A. Rothstein, *The Genetics Revolution: Conflicts, Challenges and Conundra: DNA Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J. L. & MED. 215, 216 (2002) (considering importance of the Human Genome Project (HGP), federal welfare policy, the fathers' rights movement and media interest in domestic drama” to increased interest in DNA-testing to provide information about identity, especially in family contexts).

104. Marilyn Strathern, *Enabling Identity? Biology, Choice and the New Reproductive Technologies*, in *QUESTIONS OF CULTURAL IDENTITY* 37, 45 (Stuart Hall & Paul Du Gay eds., 1996).

105. *Id.*

106. *Id.*

as Strathern suggests, “perplexing.”<sup>107</sup>

Shaping and identifying family relations becomes ever the more perplexing in a world in which a person or a group’s genome is *understood* at least in some part to limit and direct that person or group’s physical characteristics, talents, medical future, and even perhaps anxieties, amusements, and daydreams.<sup>108</sup> Dorothy Nelkin and M. Susan Lindee describe the centrality of the notion of DNA to contemporary understandings of personhood:

Just as the Christian soul has provided an archetypal concept through which to understand the person and continuity of self, so DNA appears in popular culture as a soul-like entity, a holy and immortal relic, a forbidden territory. The similarity between the powers of DNA and those of the Christian soul, we suggest, is more than linguistic or metaphorical. DNA has taken on the social and cultural functions of the soul. It is the essential entity – the location of the true self – in the narratives of biological determinism.<sup>109</sup>

That view of DNA presents an unnerving set of options within a society that already has “both more tradition and more modernity at the same time.”<sup>110</sup>

This Part considers four distinct understandings of contemporary family. Each of the four resembles each of the others in placing particular significance on some presumed biological parameter of family. In that, these understandings of family differ from those reviewed in Part III. Yet, each form of family considered in this Part differs from the other three. Most important, this Part suggests that alongside society’s increasing attention to autonomous choice in constructing families, there sits a vision (or more accurately a set of visions) of family in terms of which biology, in one guise or another, continues to play a central role.

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107. *Id.*

108. See Gatter, *supra* note 6, at 427 (considering genetic exceptionalism). Gatter writes: “‘You,’ your joys and your sorrows, your memories and your ambitions, your sense of personal identity and free will, are in fact no more than the [genetically determined] behavior of a vast assembly of nerve cells and their associated molecules.” *Id.* (quoting FRANCIS CRICK, *THE ASTONISHING HYPOTHESIS: THE SCIENTIFIC SEARCH FOR THE SOUL* 3 (1994)).

109. DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON* 41-42 (1995). This is not, of course, a claim about the scientific significance of genomes to people’s behavioral or physical development. It is rather about popular social views of the significance of genomes to people’s lives.

110. Strathern, *supra* note 104, at 45.

A. “*Flesh and Blood*” Families: “DNA” Substitutes for “Biology”

Sometimes, the terms “DNA” or “genes” serve as substitutes for the terms “blood” or “flesh and blood.” This substitution can preserve – or, more likely, appear to preserve – traditional understandings of family in an age in which a variety of dramatically new visions of family abound.

1. Changing Labels: Preserving Traditional Forms of Family?

A recent newspaper account about tensions that attend family celebrations at holiday time comments:

The first Christmas present you ever received was your genetic inheritance . . . .

Who we are, our bodies, our physical and psychological quirks, our habitual sayings, and our way of speaking [about] them are all intimately bound up with our family.

Those endless mantras at family occasions – ‘Doesn’t Keith look like George?’; ‘Helen’s so like mother’ – are lessons in genetic biology.

Insofar as we have complicated feelings about ourselves, our appearance, our characters, we will in turn have complicated feelings about those with whom we share a lot of these things, namely our own flesh and blood.<sup>111</sup>

Here the family is described variously as a unit of “flesh and blood” and as a unit of shared genes. Both references suggest a shared substance in terms of which family relationships may be shaped, bemoaned, or celebrated. The social meaning of this shared substance (whether named “DNA” or “flesh and blood”) seems quite like that described by David Schneider in his study of American kinship in the middle of the twentieth century:

A blood relationship is a relationship of identity. People who are blood relatives share a common identity, they believe. This is expressed as ‘being of the same flesh and blood.’ It is a belief in common biological constitution, and aspects like temperament, build,

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111. A.N. Wilson, *Relative Values*, DAILY MAIL (LONDON), Dec. 28, 2006, at 14. The account describes a celebration in Britain. It is possible to rely on this description because there is a unified set of “knowledge practices” among “modernist” Euro-Americans that result in similar understandings of kinship in the U.S. and in Britain. See Strathern, *supra* note 104, at 48-49.

physiognomy, and habits are noted as signs of this shared biological makeup, this special identity of relatives with each other. Children are said to look like their parents, or to “take after” one or another parent or grandparent; these are confirming signs of the common biological identity.<sup>112</sup>

Additionally, Schneider explained that “[w]hen a person is related to a blood relative he is related first by common biogenetic heredity, a natural substance, and second, by a relationship, a pattern for behavior.”<sup>113</sup>

## 2. Embedding Choice in Tradition

Yet, even as the notion of genes is offered as a synonym for “blood” in popular discourse about family relationships and is thus used to confirm relationships that seem to facilitate traditional forms of familial behavior, developments in biotechnology allow the selection of genes and promise the manipulation of DNA.<sup>114</sup> Assisted reproduction now allows prospective parents to conceive a child outside a woman’s body, to freeze gametes for later use, and to select among embryos and among gamete donors and surrogate mothers.

However, people who create families using such nontraditional reproductive methods seem often to expect that those families, once created, will follow traditional patterns of familial interaction. Prospective parents who rely on gamete donors or on gestational surrogates, or who select against certain embryos or in favor of others seem often to presume that the families that result from their reproductive and rerogenetic choices will, once created, mirror traditional families in becoming units of enduring community, much like the families that David Schneider described in the middle of the twentieth century.

Some court cases occasioned by assisted reproduction reflect parties’ insistence on choice in modes of reproduction, but also reflect continuing focus on biological links as familial anchors *and* further reflect concern for safeguarding tradition in family relationships. So, for instance, the intending parents in *Baby M.*,<sup>115</sup> a New Jersey case

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112. SCHNEIDER, AMERICAN KINSHIP, *supra* note 18, at 25.

113. *Id.* at 26.

114. See, e.g., Sheryl Lawrence, Comment, *What Would You Do With a Fluorescent Green Pig?: How Novel Transgenic Products Reveal Flaws in the Foundational Assumptions for the Regulation of Biotechnology*, 34 *ECOLOGY L.Q.* 201, 209 (2007) (describing aspect of gene manipulation).

115. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

occasioned by a traditional surrogacy arrangement gone awry, proclaimed the value of traditional family patterns. In fact, they justified reliance on surrogacy by describing its capacity to create stable, traditional families.<sup>116</sup>

Elizabeth Stern (the intending mother) and her husband, William Stern (the intending and genetic father) had entered into an agreement with Mary Beth Whitehead.<sup>117</sup> Whitehead agreed to gestate a child, conceived with William Stern's sperm (introduced into Whitehead's body through assisted insemination) and at the child's birth, to surrender the child and parental rights to the Sterns.<sup>118</sup> Whitehead became pregnant, as planned, and gave birth in March 1986 to a girl (referred to by the courts as Baby M.).<sup>119</sup> After the baby's birth, Whitehead changed her mind about surrendering the child.<sup>120</sup> A custody and parentage dispute between Whitehead and the Sterns ensued.<sup>121</sup> In presenting their case to the New Jersey courts, the Sterns asserted that traditional families can be shaped by effecting prospective parents' contractual choices.<sup>122</sup> They explained that old-fashioned families can be created through nontraditional choices:

Through surrogate parenthood, traditional family values are strengthened. In seeking to create a traditional family structure in the only way available to the commissioning couple, surrogate motherhood insures that the couple who has invested both considerable time and money in the surrogacy process will be dearly dedicated to the child. A surrogate motherhood arrangement actually increases the overall number of family units within society.<sup>123</sup>

Ironically, while contending that the absence of a biological link between Elizabeth Stern and the child was not significant, the couple explained that they had chosen surrogacy over adoption so as to preserve William Stern's genetic heritage.<sup>124</sup> Thus, it would seem, they understood biological links as important, but not as essential, to the development of what they hoped would be a traditional parent-child bond.

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116. See *infra* notes 117 and 123.

117. *Baby M.*, 537 A.2d at 1235.

118. *Id.*

119. *Id.* at 1236.

120. *Id.* at 1236-37.

121. *Id.* at 1237.

122. Brief on Behalf of Respondent at 99-106, *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

123. *Id.*

124. *Baby M.*, 537 A.2d at 1235.

In the decade following *Baby M.*, reproductive options increased rapidly.<sup>125</sup> As a result, some prospective parents have taken on heavy financial and emotional burdens in order to have children connected to them genetically. Some have openly stated that they have relied on reproductive technology *in order to* construct families that reflect traditional assumptions about kin.<sup>126</sup> In the early 1990s, Rochelle Dreyfus and Dorothy Nelkin reported:

Media articles on reproductive technologies imply that women should reproduce at all costs for they will be emotionally “desperate” without their own children. Those unable to conceive seek out surrogate mothers in order to have genetically related children. Films and articles on parent-child relationships suggest the importance of genetic integrity, of “flesh and blood.” Genealogy services are flourishing as people pursue their roots. “How to” books and articles written for adoptees stress the importance of finding one’s natural or birth parents and suggest that knowing one’s genetic heritage is a way to define identity. The very concept of identity is defined more in biological than in social terms.<sup>127</sup>

As Dreyfus and Nelkin report, prospective parents are willing to rely on expensive and nontraditional forms of assisted reproduction in order to have children they can view as their “flesh and blood.”<sup>128</sup> They rely on assisted reproduction so that they will have traditional families.<sup>129</sup> They presume, it would seem, that a biological (genetic) link between parent and child grounds the relationship in something *real* – “flesh and blood” – and thus provides an anchor around which to create loving relationships, intended to endure. And so, such prospective parents seem often to assume, or at least to hope, that their

125. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 776 (Cal. 1993) (resolving a dispute occasioned by a gestational surrogacy arrangement).

126. An additional motive for intending parents to select gestational over traditional surrogacy is the increased likelihood of safeguarding their legal parentage should a dispute develop between them and the surrogate. See, e.g., Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct In Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 385 (2007).

127. See Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 319-20 (1992).

128. *Id.* at 319.

129. See generally *In re Baby M.*, 525 A.2d 1128 (N.J. Super. Ct. 1987), *aff’d in part and rev’d in part*, 537 A.2d 1227 (N.J. 1988). Mary Beth Whitehead, the surrogate, argued that surrogacy should be prohibited because it is unnatural. Brief on Behalf of Mary Beth and Richard Whitehead at 34-55, *In re Baby M.*, 537 A.2d 1227 (N.J. 1988). In contrast, William and Elizabeth Stern, the intending parents, argued that a surrogacy arrangement may be necessary for the creation of a family, but in no way precludes that family, once created, from reflecting traditional modes of family life. Brief on Behalf of Respondent at 99-106, *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).



family – apart from its mode of creation – will follow the pattern of traditional families of the sort described by David Schneider four decades ago.<sup>130</sup>

In such cases, parental choices, stemming from perceptions about the significance of DNA, appear to signal parental hope (or a less self-conscious assumption) that genetic ties identify and fortify familial relationships. More particularly, prospective parents who continue with expensive and emotionally draining infertility care month after month<sup>131</sup> in order to have a child genetically related to them (or to one of them) seem to envision genes as a fit foundation on which to construct familial *relationships*. Even in an age in which parental intentions may trump genetics in courts of law,<sup>132</sup> parents involved in custody or parentage disputes invoke genetic links between themselves and the children involved as strong evidence that the children will be best served by their biological parents being named as legal parents.

In presenting their case for parentage in *Johnson v. Calvert* – in which California’s highest court concluded that parental intentions determined legal parentage<sup>133</sup> – Mark and Crispina Calvert described their genetic relationship to baby Christopher as strong support for the development of a satisfying parent-child relationship. An expert for the Calverts<sup>134</sup> (ultimately declared the legal parents of the child gestated by Anna Johnson, despite Johnson’s post-conception change of mind and interest in becoming the child’s legal mother)<sup>135</sup> argued that “the strongest parental connection to a child is through his genetic factors.”<sup>136</sup> The Calverts further declared:

We tend to take for granted such frequent comments as: “She talks just like her father,” or “he has his mother’s blue eyes,” etc. Those are the reflections of our identity, our inherited traits, intellect and history. . . .

. . . . Indeed, genetics determine our identity. The right to continued

130. See SCHNEIDER, AMERICAN KINSHIP, *supra* note 18. See also *supra* notes 113 - 114 and accompanying text; *supra* notes 125 - 129 and accompanying text (describing prospective parents’ hopes for families being created through nontraditional means).

131. See, e.g., DEBORAH L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 229 (2006).

132. See *supra* notes 49 - 57 and accompanying text (considering *Johnson v. Calvert*, 851 P.2d 776, 776 (Cal. 1993) and *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. 1994)).

133. *Johnson*, 851 P.2d at 782. See also *supra* notes 49 - 56 and accompanying text.

134. *Johnson*, 851 P.2d 776. This case, as noted in Part III, *supra*, reflects a commitment to intention and a concern with preserving biological connection. *Id.*

135. See *supra* notes 51 - 55 and accompanying text.

136. Respondents’ Brief at 17, *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Cal. Ct. App. 1991) (citing Dr. Justice Call, witness for Respondents).

common relationship with progeny and the reciprocal relationship simply cannot be denied.<sup>137</sup>

These claims – made in the context of a case in which the state’s highest court ultimately identified the Calverts as parents *because* of their preconception intentions – suggest the magnitude of the confusions and complexities engendered *by* society’s simultaneous commitment to choice and its fixation with DNA.

In short, the presumption that both autonomous choice and the preservation of tradition can be central to the construction of a family suggests a contradiction at the center of society’s view of family. In the short term, that contradiction can be bridged by bracketing the creation of families from the actualization of social relationships within families, and then presuming that each activity can be shaped and understood in isolation from the other. The fragility of that effort is transparent.

### *B. Choosing Genes/Choosing Kin: “Reprogenetic” Families*

The cases and situations considered in this Section involve prospective parents self-consciously relying on reprogenetics<sup>138</sup> in order to have a certain kind of child.<sup>139</sup> This contrasts with those reviewed in the previous Section in that the focus shifts from DNA as a key determinant of family connections to DNA as a key determinant of an individual child’s personhood.<sup>140</sup> The “reprogenetic family” is described here as an ideal type. It can, in practice, merge with other forms of family. Thus, this Section considers the far-reaching implications of creating families through reprogenetic choices. As the previous Section suggests, those who create families in this way can, in practice, aim to develop more traditional forms of family that stress communal solidarity rather than autonomous individuality and choice. However, this Section also considers the possibility that choosing prospective children’s gametes and gestators will commodify the children who are born as a result of such choices, and will displace

137. *Id.* at 49.

138. Lori Knowles and Gregory Kaebnick define “reprogenetics” (short for reproductive genetics) to “include[ ] all interventions involved in the creation, use, manipulation, or storage of gametes and embryos.” REPROGENETICS, LAW, POLICY, AND ETHICAL ISSUES ix (Lori P. Knowles & Gregory E. Kaebnick, eds., 2007) [hereinafter REPROGENETICS].

139. Suzanne Holland, *Market Transactions in Reprogenetics: A Case for Regulation*, in REPROGENETICS: LAW, POLICY, AND ETHICAL ISSUES 96 (Lori P. Knowles & Gregory E. Kaebnick, eds. 2007) (comparing “older forms of IVF” with reprogenetics).

140. The difference between cases considered in this Section and those reviewed in the previous Section is not absolute. It is, rather, a matter of perspective and cultural stress.

parents as teachers and guides with DNA as the measure of conduct.

For over a century,<sup>141</sup> prospective parents (and/or their physicians) have selected sperm donors,<sup>142</sup> thus engaging in an early form of “reprogenetics.” Since the last decades of the twentieth century, pregnant women have routinely been offered prenatal screening and the opportunity to abort “defective” fetuses.<sup>143</sup> Moreover, sophisticated new modes of genetic selection provide unprecedented opportunities for prospective parents to make choices about their future children’s genomes.<sup>144</sup> Each of these possibilities encourages prospective parents to focus on choices about DNA as they engage in the reproductive process.

But choices about DNA cannot, once made, be reshaped.<sup>145</sup> From the vantage point of prospective parents seeking to select a future child’s genome, DNA may represent choice and freedom. Yet, from the vantage point of the genetically chosen child, genes (the very same genes, as it were) may be viewed as depriving the child of futures he or she may view as preferable to those presumptively offered to him or her by preconception or pre-birth parental choices. Yet, the limits of choice

141. John Hunter, a British physician who worked in the late eighteenth century, is credited with having been the first to rely on assisted insemination to help an infertile patient become pregnant. DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* 163 (2006). Between then and the 1920s or 1930s, the practice was relied on only rarely. Beginning in the 1930s, physicians in Britain and the U.S. more often (though quietly, at first) offered assisted insemination to infertile patients. *Id.* at 165.

142. Of course, in selecting spouses and other sexual partners, people have always been able, as it were, to make choices about the genetics of their future offspring.

143. Gilbert Meilaender, *Designing Our Descendants*, in *THE FUTURE IS NOW: AMERICA CONFRONTS THE NEW GENETICS* 83-84 (William Kristol & Eric Cohen eds., 2002).

144. These techniques include sperm sorting, pre-implantation genetic diagnosis, and genetic changes to sperm or eggs. REPROGENETICS, *supra* note 138, at ix. Preimplantation genetic diagnosis (PGD) has been used primarily by prospective parents anxious to select a specific deleterious genetic alteration such as that associated with Tay-Sachs disease, cystic fibrosis, or Duchenne muscular dystrophy. Maxwell J. Mehlman, *The Law of Above Averages: Leveling the New Genetic Enhancement Playing Field*, 85 IOWA L. REV. 517, 526-27 (2000).

[PGD] requires fertilization of the egg in the laboratory, that is, in vitro fertilization (“IVF”). The fertilized egg is permitted to grow to an eight to twelve cell mass at which point a cell is removed for analysis. This cell removal does not injure the embryo. The single cell can then be analyzed to determine if there are any genetic abnormalities. Typically during IVF, approximately ten to twelve embryos are created. Using PGD on several of the embryos permits a determination of which embryos are “affected” and which are not. One or more embryos without the genetic condition would be transferred to the uterus in hopes of initiating a pregnancy.

Jeffrey R. Botkin, *Genes and Disability: Defining Health and the Goals of Medicine: Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U.L. REV. 265, 280-81 (2003).

145. At some time in the future, it may be possible, through genetic engineering, routinely to alter genomes of individuals.

notwithstanding, prospective parents increasingly entertain choices that reflect a society captivated by the lure of DNA.

### 1. Prenatal Genetic Tests

An increasingly familiar and sophisticated set of tests provides for more and more knowledge about the chromosomes and genes of gametes, embryos, and fetuses.<sup>146</sup> Prospective parents can rely on post-conception testing followed by abortion or on preimplantation genetic diagnosis, followed by selection of embryos to provide for the birth of a child who will (or will not) have or be likely to have a particular set of traits.<sup>147</sup>

Such practices seem clearly to harmonize with a society that views family members (in this case prospective parents) as autonomous individuals, free to welcome or reject particular embryos or fetuses as they contemplate potential children. This new “eugenics,” in the words of the Christian theologian and bioethicist Gilbert Meilaender, “comes embedded in the language of privacy and choice.”<sup>148</sup> On that ground, recent reprogenetic choices have been differentiated from eugenic policies that have depended on coercion resulting from decisions reached by the state.<sup>149</sup>

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146. Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. MED. 233, 234-43 (2002) (describing history and routinization of genetic testing).

147. Prospective parents may, for instance, decide not to implant an embryo, or they may choose to abort a fetus that testing shows will suffer from a serious illness or disability (e.g., Tay-Sachs disease). Others may seek a child that manifests a particular genetic trait or set of traits. For instance, deaf parents, anxious to have a child who could most easily fit into the social world of deaf people, might screen for deafness and select against an embryo or abort a fetus that would not be deaf. See Andrew Grubb, *Regulating Reprogenetics in the United Kingdom*, in REPROGENETICS: LAW, POLICY, AND ETHICAL ISSUES 144, 155 (Lori P. Knowles & Gregory E. Kaebnick, eds., 2007). In 1996, and again six years later, two deaf lesbians, anxious to have children together, sought the sperm of a man who was deaf and whose ancestors had exhibited deafness for several generations. Each time, the couple had a child who was born deaf. Note, *Regulating Pre-implantation Genetic Diagnosis: The Pathologization Problem*, 118 HARV. L. REV. 2770, 2782 (2005) (citing Margarette Driscoll, *Why We Chose Deafness for Our Children*, SUNDAY TIMES (London), Apr. 14, 2002, at 7).

Other parents might select for a child that will be a suitable donor for an existing, sick child (suffering, for instance, from a genetic condition) while, at the same time, selecting against an embryo that will carry the genetic alteration associated with the condition in question. Grubb, *supra*, at 155-56.

148. Meilaender, *supra note* 143, at 83. Meilaender sees the “new eugenics” to remove government “from what is seen as entirely a private choice.” *Id.*

149. See Mary B. Mahowald, *Aren't We All Eugenicists?: Commentary on Paul Lombardo's "Taking Eugenics Seriously,"* 30 FLA. ST. U.L. REV. 219 (2003). Mahowald distinguishes between acceptable and unacceptable forms of eugenic practice through reference to a wide variety of factors (e.g., state coercion versus autonomous choice; practices aimed at ending lives versus practices

But even in the modern context that, to echo Meilaender,<sup>150</sup> prizes privacy and choice, children born as a result of parental choices about DNA are not free to welcome or reject those choices. This raises significant moral concern,<sup>151</sup> and may spur social efforts to mediate the apparent contradiction inherent in a commitment to choices that preclude future choice.<sup>152</sup>

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aimed at supporting lives). *Id.*

The horrifying character of the Nazi eugenics effort is described in Matthew Lippman, *War Crimes Prosecutions of Nazi Health Professionals and the Contemporary Protection of Human Rights*, 21 T. MARSHALL L. REV. 11, 17-19 (1995).

Before World War II, the Eugenics Record Office (ERO) (on Long Island in New York) actively fostered eugenics policies. Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of ??? Are Enough?*, 30 FLA. ST. U.L. REV. 191, 203 (2003). Charles Davenport, Director of the ERO, proposed studying families to identify those likely to produce “great men” and those likely to produce “insane and feeble-minded” people as well as those suffering from a wide host of perceived disabilities. *Id.* at 202-03. The ERO proposed “government coercion” in order to “sanitize[]” the population. *Id.* at 205.

150. Meilaender, *supra* note 143, at 83.

151. Theorists associated with the disability rights critique have criticized prenatal testing followed by embryo selection or abortion as based on an “unfortunate, often misinformed decision that a disabled child will not fulfill what most people seek in child rearing. . . .” Erik Parens & Adrienne Asch, *Special Supplement: The Disability Rights Critique of Prenatal Testing: Reflections and Recommendations*, 29 HASTINGS CENTER REPORT S1, S2 (1999). Other theorists have worried that “genetic technology” may be used for evil rather than for good – that “boundless [genetic] freedom” could become “boundless destruction.” PAUL RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* (1970), *as reprinted in* THE FUTURE IS NOW: AMERICA CONFRONTS THE NEW GENETICS 41, 46 (William Kristol & Eric Cohen eds., 2002). That worry is based in concern that society may go too far in upsetting the “natural” course of events – so far, that we “undermin[e] our humanity.” Gertrude Himmelfarb, *Two Cheers (Or Maybe Just One) for Progress*, in THE FUTURE IS NOW: AMERICA CONFRONTS THE NEW GENETICS 73, 75 (William Kristol & Eric Cohen eds., 2002).

In addition, parental choices about the shape of future children’s genomes result from larger socio-cultural and economic forces. Such choices stem from and reflect a set of shifting cultural assumptions about what an ideal child should be. Moreover, the medical profession, which plays a significant role in mediating such reproductive choices for prospective parents, is broadly committed to using the technological instruments that provide more and more information, thereby augmenting the illusion of endless reproductive choice. In addition, choices about a future child’s genome are not predictive in the straightforward manner that prospective parents may assume. Some genetic decisions are more likely to be predictive than others. Selecting against embryos with genetic alterations associated with Tay-Sachs, for instance, will preclude the birth of children who will suffer from that condition. But the presumption that the gametes of a tall sperm donor or a smart egg donor will result in tall or smart children is far less certain. *See* Maxwell J. Mehlman, *The Law of Above Averages: Leveling the New Genetic Enhancement Playing Field*, 85 IOWA L. REV. 517, 527-28 (2000).

152. The conflict between parental choice and children’s consequent lack of choice (their genetic fate, as it were) can be considered in light of and compared to the wide assortment of cases in which society acknowledges that one person’s liberty may interfere in some way with another person’s choices, or more particularly, to cases in which parental choices about how to raise children limit children’s options. Efforts to mediate between the right to choose, and the consequences of choosing, someone else’s DNA, if considered seriously, may falter precisely

Yet, American lawmakers – in contrast with those in Canada, Australia, and most countries in Europe<sup>153</sup> – have generally not prohibited and have not consistently regulated the use of reproductive technology, including reprogenetics.<sup>154</sup> And so, prospective parents increasingly rely on ultrasound and amniocentesis, often followed by abortion if the results of such tests are seen as disappointing,<sup>155</sup> and on preimplantation genetic diagnosis, often followed by embryo selection, aimed at selecting against disease or even aimed at selecting for (or against, depending on one’s perspective) various traits, including, most often, gender.<sup>156</sup>

## 2. Choosing Sperm, Ova, and Embryos and Choosing Those Who Supply Them

Other sorts of choices aimed at selecting a future child’s DNA are being made by prospective parents who spend large sums of money for infertility care.<sup>157</sup> The high cost of such care, even compared with the cost of adoption which can also be expensive,<sup>158</sup> sometimes suggests the

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because choices about DNA can be viewed as more momentous than a person’s right to annoy a neighbor (by, say, owning a pet despite a neighbor’s fear of animals or by painting one’s house with colors that offend neighbors’ aesthetic sensibilities or sense of priority), or than a parent’s right to make choices about a child’s religious affiliation, elementary school education, or diet.

153. Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283, 2291 (2007) (comparing regulation of fertility industry in U.S. and elsewhere); Debora Spar, *Business and Medicine: Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531, 532 (2005) (reporting that women come to the U.S. in order to obtain donor ova); Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 304 (2005); Ian Fisher, *Italian Vote to Ease Fertility Law Fails for Want of Voters*, N.Y. TIMES, June 13, 2005 (reporting on regulation of reproductive technology and reprogenetics in Italy).

154. There are no federal laws regulating parental reliance on prenatal genetic testing. See, e.g., Bratislav Stankovic, “*It’s a Designer Baby!*”: *Opinions on Regulation of Preimplantation Genetic Diagnosis*, 2005 UCLA J.L. TECH. 3, 4 (2005); Lindsey A. Vacco, Comment, *Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customizing Children. Can the Technology Be Regulated Based on the Parents’ Intent?*, 49 ST. LOUIS U. L.J. 1181, 1200 (2005). A number of states regulate research on embryos. Louisiana’s law, which defines “embryos” as “juridical persons” is the most limiting among these. LA. REV. STAT. ANN. § 9:129 (2004). See also Stankovic, *supra*, at 6 (noting other state laws regulating embryo research). Vacco reports that in contrast with the absence of regulation in the U.S., PGD is prohibited in Austria, Germany, Ireland, and Switzerland, and is regulated in France, Spain, Sweden, and Britain. Vacco, *supra*.

155. SPAR, *supra* note 131, at 111.

156. *Id.* at 99.

157. Debra Spar reports that the cost of a baby conceived in vitro is between \$69,000 and \$85,000 for a young woman and between \$151,000 and \$223,000 for an older mother. *Id.* at 229.

158. Some couples rely on donated gametes rather than adoption because the woman desires to experience pregnancy. See LISA STOWLE CAHILL, THEOLOGICAL BIOETHICS: PARTICIPATION,

interest of many prospective parents<sup>159</sup> in having genetic ties to their children<sup>160</sup> or in choosing their children's genomes.<sup>161</sup> The second sort of interest may arise in cases in which infertility patients, lacking viable sperm or ova, rely on the opportunity that may be offered by an infertility clinic to *select* among gamete and embryo donors.<sup>162</sup>

A market for eggs appeared in the U.S. at the end of the twentieth century.<sup>163</sup> Recipients have often been quite specific about their preferences. Those seeking gametes are now paying tens of thousands of dollars for the eggs of Ivy League, and other, donors presumed to be supplying "superior" genes.<sup>164</sup>

Sperm are cheaper and more easily obtained than ova, and a market in sperm has existed for many decades.<sup>165</sup> Particularly in the U.S., sperm banks market their products to end-consumers rather than to physicians<sup>166</sup> and now reveal significant information about donors from among whose sperm consumers may choose. Sperm banks routinely provide clients with information about a donor's family history, food tastes, hobbies,<sup>167</sup> and I.Q.<sup>168</sup> Prospective parents not only make choices among those offered, but they are willing to pay more for sperm from donors described as having particular traits. They often pay more, for instance, for sperm from a tall man than from a short man.<sup>169</sup>

There is a peculiar tension between the interest of prospective parents in having children to whom they will have a genetic link and in having children by using what they perceive or hope to be gametes carrying desirable genes,<sup>170</sup> though both interests suggest the continuing

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JUSTICE, AND CHANGE 197 (2005).

159. SPAR, *supra* note 131, at 178, 179, 183.

160. *See supra* notes 126 - 138 and accompanying text (noting prospective parents' interest in safeguarding genetic heritage).

161. Conceiving children with the use of donor eggs is likely to cost at least \$50,000 and sometimes much more than that. SPAR, *supra* note 131, at xii. Contracting with a surrogate mother is likely to cost about \$59,000 (2004). *Id.* at xi. In 2004, revenue from infertility care in the U.S. was over \$2 billion. *Id.* at 3. *See also* Holland, *supra* note 139, at 88, 99.

162. Ova alone can cost as much as \$50,000 (2004). SPAR, *supra* note 131, at xi.

163. *See id.* at 45. In 1991, a former actress advertized for the eggs of young actresses and then sold the ova of her recruits at high prices to an "upscale clientele, couples who were picky about their eggs." *Id.*

164. *See id.* at 99.

165. *See id.* at 35 (noting opening of first for-profit sperm bank in the 1970s in Minnesota). Nonprofit sperm banks existed before that time. *Id.*

166. *See id.* at 37.

167. *See id.* at 39.

168. *See* PLOTZ, *supra* note 141.

169. *See id.* at 102.

170. Sometimes, of course, a prospective parent or parents may seek to have a child that is genetically linked to one parent and whose other set of chromosomes comes from a putatively

attraction of biology in shaping families. Some prospective parents, relying on donated gametes to reproduce, have sought donors with traits that resemble their own. Others have sought what they imagined would be superior gametes by seeking gamete donors with particular traits or personal successes. Sometimes the two interests appear to merge. For instance, a spokesperson for a couple that offered \$50,000 for the ova of a tall, smart woman explained, as if it were the most self-evident of matters, that the husband and wife were themselves tall and smart and therefore desired tall, smart children.<sup>171</sup>

A much smaller, less remunerative market in embryos supplements that in eggs and sperm. Embryos are rarely created with the aim of donation in mind. Rather, almost all embryos available for transfer were created in the context of infertility care,<sup>172</sup> and then frozen, but not wanted for use by the progenitors.<sup>173</sup> The market in embryos is too new and too small to provide potential recipients with far-reaching choices. But markets in gametes, both ova and sperm, suggest what David Plotz refers to as Darwinian auctions.<sup>174</sup> The phrase announces the

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superior donor. See PLOTZ, *supra* note 141 (describing in detail views and concerns of parents and their donor-conceived children about the sperm donation process and sperm donors).

171. See *Talkback Live* (CNN television broadcast Mar. 12, 1999) [hereinafter *Talkback Live*] (reporting statement by lawyer of couple who placed advertisements in elite university newspapers seeking ova from students with SAT scores of at least 1400 and at least 5' 10" tall). See also Irene Sege, *A \$50,000 Dilemma on Campus*, BOSTON GLOBE, Mar. 6, 1999, at A1.

The couple's lawyer, interviewed on CNN, explained that the couple, themselves tall and smart, preferred to have a child who would resemble his or her parents, but added unhesitatingly that the couple (perhaps thinking of the happenstance in DNA), would love a short, dumb child. "Let me point out," he maintained, "this child will be loved, no matter if it's short, tall, smart or not so smart." *Talkback Live, supra*. The lawyer's statement dramatically illustrates the contours of the social effort to amalgamate marketplace tactics with family values.

172. See SPAR, *supra* note 131, at 88-89.

173. A small market in such excess embryos was stimulated by the efforts of a Christian adoption agency to avoid the destruction of embryos produced in the context of infertility care. The agency generally matches Christian donors and recipients. *Id.* at 89-90. Recipients agree, before getting embryos, that they will not abort or selectively reduce a pregnancy for any reason. Susan L. Crockin, *Embryo Wars: How Do You 'Adopt' a Frozen Egg?*, THE BOSTON GLOBE, Dec. 4, 2005, at D12. Crockin, a Boston lawyer specializing in reproductive technology, reports that less than 2% of people who create embryos agree to donate unused embryos to other couples. *Id.* She suggests as well that "abandoned" embryos are more likely than other embryos to have tested positive for deleterious genetic alterations. *Id.*

Spar reported in 2006 that embryo donees paid \$5,500 as an agency fee, and another \$3,000 to \$4,000 for medical care. SPAR, *supra* note 131, at 90.

Unlike almost all of the cases considered in this Section, the work of this agency aims to short circuit modernity and to create the most traditional sort of families through use of donated embryos.

174. PLOTZ, *supra* note 141, at 202. Writing, in particular, about prospective parents seeking donated eggs, Plotz describes "[m]iddle-aged couples –acting more like Darwinian auctioneers than aspiring parents . . ." *Id.*



troublesome excesses of reproductive choice.

Society's commitment to reprobogenic choice threatens to subordinate biology to choice (when, for instance, prospective parents are able to offer huge sums of money for gametes from donors with certain physical traits and achievements). But at the same time, it threatens to subordinate choice to biology (when, for instance, the resulting child is not what the parents bargained for or when the resulting child later resents choices made about his or her DNA).

In his book about the so-called "Nobel prize sperm bank," David Plotz wonders whether the commodification of sperm will inevitably result in the commodification of the children conceived through use of donor sperm.<sup>175</sup> Plotz worries that the more the market in sperm, replete with customers, advertisements, and competition,<sup>176</sup> resembles other markets, the more the process will encourage prospective parents to imagine prospective children as commodities; the more they will view the reproductive process as one views selecting among commodities in the marketplace; and the more they will think it reasonable to respond to the children who result as one responds to satisfying or unsatisfying merchandise.<sup>177</sup>

From this perspective, the possibility of choosing one's children's gametes from a catalogue harmonizes with a social ideology that prizes individualism and choice. The practice is discomfoting to many because it challenges the notion that parents do, or at least should, love their children regardless of their genetic endowments.<sup>178</sup> The situations considered in the next subsection magnify this concern.

### 3. Designer Babies<sup>179</sup>

A marketplace in sperm, ova, and embryos may seem moderately serene – even old-fashioned – when compared with prospective parents relying on genetic engineering and pre-implantation genetic diagnosis

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175. *Id.* at 181.

176. *Id.*

177. *Id.*

178. Others express concern about the cultural forces that shape presumptive reproductive choices or that some people's reproductive choices will prove harmful to the larger social whole. See CAHILL, *supra* note 158, at 204-05.

179. At present, opportunity to produce "designer babies" is limited. See, e.g., Staff Background Paper, Human Genetic Enhancement (Dec. 2002), available at <http://www.bioethics.gov/background/humangenetic.html> (noting that "[w]hile we are currently a long way from the ability to produce 'designer babies,' techniques are currently available to make possible some forms of somatic genetic enhancement").

(PGD) to shape a future child's genome.<sup>180</sup> Selecting gametes and embryos can at least arguably be viewed as an extension of a more traditional approach to selecting one's child's other parent. Genetic engineering and PGD provide the technological backbone for the production of what have come to be referred to as "designer babies."<sup>181</sup> Critics of PGD have predicted that the practice will lead to "individual, consumer eugenics," allowing people with adequate resources to select their future children's traits from a catalogue of possibilities.<sup>182</sup> The notion of "designer children" challenges society's commitment to autonomous choice with images of prospective parents shaping their future children's DNA in light of personal whim and shifting social trends.

In her book about the economics of infertility care, Deborah Spar predicts that an existing market in designer babies will grow.<sup>183</sup> Morals or price may discourage some people from entering this market, but others, Spar predicts, will "want to choose, paying not only for a baby but also for the genetic probability of a particular kind of kid."<sup>184</sup>

A serious instability can be found at the center of families defined through one generation's autonomous (self-conscious) choices about another generation's DNA. Perhaps most troubling, the locus of familial responsibility may shift away from parents as guides and role models toward DNA as the presumed arbiter of social behavior. Efforts to categorize parental choices about a future child's DNA with choices about health care, athletic training, or singing lessons<sup>185</sup> will likely prove misguided. Such efforts presume that the commodification of children, lurking at the edge of choices about their DNA, will not seriously undermine the ongoing structure of family life. That presumption may well prove to be a misapprehension.

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180. Stankovic, *supra* note 154. See also *supra* notes 146 - 156 and accompanying text.

181. A background paper, written for the President's Council on Bioethics, notes the difference between genetic screening and "directed genetic change." The second involves the effort to "make heritable changes in the genes of human cells." THE PRESIDENT'S COUNCIL ON BIOETHICS, STAFF BACKGROUND PAPER: HUMAN GENETIC ENHANCEMENT (2002), <http://www.bioethics.gov/background/humangenetic.html>. Gene therapy, the background paper further notes, has "produced positive results for a few diseases." *Id.*

182. Stankovic, *supra* note 154, at 4.

183. SPAR, *supra* note 131, at 100. In 2006, Spar reported the existence of more than fifty clinics offering PGD as part of reproductive care, and that "[m]any of the more recent 'patients' at these clinics . . . do not suffer from infertility or carry potentially devastating genes." *Id.* Rather, they opt for PGD "to get the kind of baby they want." *Id.*

184. See *id.* at 100.

185. Rhonda Shaw, *Life in a Petri-Dish: Procreative Liberty, Choice, and the Governance of Women's Bodies*, 32.2 HECATE 141, 147 (2006).

Choices about the genetic composition and construction of “designer babies” entail a self-conscious effort to “design” another person: that effort limits *that other person’s* choices. Within families that define themselves through reference to autonomous choice about children’s genes, the actualization of one party’s genetic choices about another’s DNA presents a contradiction unlikely easily to be bridged. That is especially so if, as seems probable, family members view each other primarily as autonomous individuals rather than as embedded in a structured, communal whole.

### C. Families of Shared DNA

This Section describes a third response to the collapse of the ideology that supported traditional families. It resembles those already described in this Part in that it depends centrally on assumptions about the biological parameters of family. This third response, like the others described here, pays homage to the presumed significance of biological facts. It reflects a commitment to DNA as the ultimate decisor of personhood.

In “families of shared DNA,” genetic links displace tradition and ultimately challenge choice. Yet, more often than not it seems, the self-conscious effort to create enduring familial ties to “kin” connected only through DNA is unsuccessful.<sup>186</sup> For instance, searches for kin, carried out by children conceived from the sperm of anonymous donors, do encourage participants to focus on genetic identity. But that focus seems to facilitate a form of individualism dependent on a notion of self-as-DNA rather than to facilitate enduring family relationships. The families described in this Section are here referred to as “families of shared DNA.” The Section describes two sub-types.

#### 1. DNA and Paternity: Abandoning the Marital Presumption<sup>187</sup>

This sub-section considers one use of paternity tests in which facts about DNA may prove determinative even as those facts upset traditional expectations about family relationships and collide with

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186. David Plotz notes that most sperm donors do not want to be social fathers to children conceived through use of their sperm. PLOTZ, *supra* note 141, at 256-57.

187. The so-called “marital presumption” presumes that a woman’s husband is the father of her children. “Lord Mansfield’s Rule” refused even to the spouses the right to rebut the presumption. See ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 162, 193-94 (5th ed. 2005).

participants' choices.<sup>188</sup> It considers the law's increasing readiness to acknowledge the paternal rights of men whose children's mothers were married to other men at the time of the children's conception and/or birth.<sup>189</sup> Increasingly, in these cases, courts and legislatures look to presumptive biological "truths," discerned through DNA testing, and then provide for those "truths" to supplant traditional expectations about paternity.

About two decades ago, the Supreme Court sided with traditional understandings of family despite the opposing claims of both facts about DNA and of parties' nontraditional choices. In *Michael H. v. Gerald D.*, the Court concluded that a biological father did not enjoy a constitutional right to legal paternity in a case in which the child's mother was married to another man at the time of the child's conception and birth.<sup>190</sup> The Court's decision reflects the social weight it gives to the marital presumption – the presumption that a child's father is the man married to that child's mother.<sup>191</sup> Proper fathers, Justice Scalia's opinion in *Michael H.* implies, have entered into a marriage or marriage-like<sup>192</sup> relationship with the mother of their children.<sup>193</sup> Therefore, in the Court's view, other "fathers," – fathers such as Michael H., a biological father unmarried to his child's mother – have no moral, and thus, it would seem, no legal, right to a parental relationship with their genetic children. The decision strongly favors a view of family structured around the marital relationship.<sup>194</sup>

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188. A fuller treatment of the subject might consider other uses of paternity tests – to determine child support obligations, for instance, in cases in which a child's mother is not married. That analysis is beyond the scope of this Article.

189. Investigation of the use of paternity testing to identify a parent responsible for child support provides another source of data for investigating social views about the significance of DNA in a society that has welcomed autonomous individuality in the domestic arena. That discussion is beyond the scope of this Article.

190. *Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989) (upholding California statute that provided that the child of a woman "cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage") (quoting CAL. EVID. CODE § 621(a) (1989)). Although the mother's husband and the mother had a limited right to rebut the statute, a biological father did not. *Id.*

191. See June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1315 (2005).

192. Justice Scalia's plurality opinion in *Michael H.* referred to traditional families as "unitary families." *Michael H.*, 491 U.S. at 123 n.3. The unitary family, he explained, is "[t]he family unit accorded traditional respect in our society." *Id.*

193. In fact, Judge Scalia's plurality opinion referred to Michael, the nonmarital, biological father, as an "adulterous natural father." *Id.* at 127 n.6.

194. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 663-72 (1995) (analyzing the Court's view of *Michael H.* in light of earlier Supreme Court decisions about the parental rights of unmarried fathers).

In the period since *Michael H.*, state legislatures have limited the reach of the marital presumption<sup>195</sup> and state courts, relying on state constitutional provisions, have reached conclusions contrary to that reached in *Michael H.* about the significance of the marital presumption.<sup>196</sup>

A decision of the Iowa Supreme Court, a decade after *Michael H.*, is illustrative. In *Callender v. Skiles*,<sup>197</sup> Iowa's highest court concluded that the state's constitution protects a biological father's paternal interest in a child born to a woman married to another man.<sup>198</sup> The court premised that conclusion on what it perceived as a social shift away from traditional understandings of family:

We acknowledge our society has not traditionally afforded parental rights to persons like Charles [the biological father in the case]. . . . Our constitution is not merely tied to tradition, but recognizes the changing nature of society. The traditional ways to establish legal parentage have dramatically changed in recent generations, as has the traditional makeup of the family. Scientific advancements have opened a host of complex family-related legal issues which have changed the legal definition of a parent. It has also made the identity of a biological parent a virtual certainty. Social stigmas have also weakened. If we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced. Instead, we need to focus on the underlying right at stake. The nontraditional circumstances in which parental rights arise do not diminish the traditional parental rights at stake. We therefore find Charles has a liberty interest in challenging paternity.<sup>199</sup>

Here, the Iowa court relied on facts about DNA to dethrone traditional visions of paternity (and of marriage).<sup>200</sup> *Callender* proclaims that safeguarding traditional forms of family is no longer of primary concern to society or law, but it does not openly displace

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195. Most states now allow the marital presumption to be rebutted. Moreover, under federal law, the presumption can be rebutted if genetic test results suggest that a man other than the mother's husband is a child's genetic father. See MNOOKIN & WEISBERG, *supra* note 187, at 167 (citing 42 U.S.C. § 666 (5)(G) (2002)).

196. See, e.g., *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999); Carbone, *supra* note 191, at 1317 (reporting that more than twenty states allow putative biological fathers the right to establish paternity even when that right interferes with the marital presumptions).

197. 591 N.W.2d 182.

198. *Id.* at 192.

199. *Id.* at 190 (footnotes and citations omitted).

200. See Dolgin, *supra* note 194 at 663-72.

tradition in the service of choice.<sup>201</sup> Rather, the court concluded that a man's biological (genetic) link to a child establishes a liberty interest allowing the man to seek paternal rights.<sup>202</sup> In this context, paternal rights are understood in terms of a universe that prizes individualism, not community. Traditional understandings of paternity are thus re-situated and re-shaped. Here, paternity no longer makes sense in the context of an encompassing family structure but in light, only, of a man's DNA.

The decision thus preserves one component of the traditional family – that linked to understandings of biology – but it discards other components central to understandings of the traditional family.

*Callender* acknowledges autonomous individuality in that the biological father's agency (manifest in the reproductive act that led to the birth of the child that Charles, the putative biological father, sought as his legal child) was important to the court's conclusions. The court framed Charles's interest in paternity as a "liberty interest" – an "interest" grounded firmly on a presumption of autonomous individuality. Yet, the essence of *Callender*, as an anthropological matter, is that genetics unhinges tradition.<sup>203</sup> *Callender* invokes the power of genetic relationships in order to anchor a form of family that displaces traditional expectations and demands. The decision acknowledges the role of individual agency, but it is DNA, not choice, which effectively displaces tradition. Thus, *Callender* foreshadows a theme that appears in a more worrisome form, in a set of cases and declarations about "genetic families," explored in Section D of this Part.

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201. While unconcerned with choice, per se, the case does frame the significance of reproductive agency (the fact of having conceived a child). The decision suggests that DNA along with reproductive agency has consequences that must be acknowledged by the law even as they contrast with traditional understandings of family.

202. In other cases, a similar view of the importance of genetics to paternity has led to the imposition of paternal support obligations on men regarding children they would have preferred to ignore. See, e.g., *Louisiana ex rel. Wilson v. Wilson*, 855 So. 2d 913, 915 (La. Ct. App. 2003) (obliging both biological father and mother's husband to pay child support; the mother's husband married the mother when she was pregnant with biological father's child).

203. Other states have become similarly ready to abandon or limit the marital presumption. See Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246 (2006). Singer explains that:

[E]ven when courts acknowledge the [marital] presumption, they increasingly view it as a procedural device or a rule of evidence, which can be overcome by convincing evidence of contrary fact. Scientifically accurate DNA tests present precisely this sort of convincing contrary evidence. And the increased ease and reduced cost of DNA testing means that previously married parents who seek to disestablish paternity are increasingly likely to come into court already armed with DNA evidence, rather than having to ask a court to order testing. In the face of such "incontrovertible" scientific evidence, the marital presumption is easily overcome.

*Id.* at 257-58 (footnotes omitted).

## 2. Anonymous Sperm Donors<sup>204</sup> and “Sibling” Groups

In some part, understandings of genetic links explored in this subsection provide a bridge between those underlying *Callender* and those assumed in the construction of “medicalized families” described in the next Section. “Donor families”<sup>205</sup> are a product of the increased popularity, beginning in the 1980s, of assisted insemination using the sperm of anonymous donors.<sup>206</sup> Often sperm banks mediate between individuals or couples seeking sperm and sperm donors. Usually, sperm banks identify anonymous donors through codes consisting of numbers, letters, or colors.<sup>207</sup> Relying on such codes, donor-conceived children have used the internet to search for donor relatives, including genetic fathers and other children conceived through the sperm of the same man.

Since the 1980s, over a million children have been conceived in the U.S. through anonymously donated sperm.<sup>208</sup> Those who have searched

204. A comparable analysis regarding a donor-sibling group created from the ova of one woman is possible. There are now registries of egg donors. *See, e.g.*, The Donor Sibling Registry, [www.donorsiblingregistry.com](http://www.donorsiblingregistry.com) (last visited Dec. 16, 2007). Ova donation is more recent than sperm donation and has led to fewer births. *See SPAR, supra* note 131, at 41-42. Eggs became available in the early 1990s. *Id.*

205. Known donors are more likely to be recognized as legal parents than people who donate gametes anonymously. A 2007 Irish case is illustrative. Danielle Hamm, *Sperm Donor Seeks Custody of His Biological Son*, *BIONEW*, July 18, 2007, <http://www.bionews.org.uk/new.lasso?storyid=3518>. The donor had given sperm to a lesbian couple in 2006. *Id.* The parties signed an agreement which gave the biological father visitation rights. *Id.* He sought custody of the resulting child when his relationship with the couple deteriorated. *Id.* In July 2007, an Irish court precluded the couple from taking the child to Australia for a year. *Id.* A final decision awaits a custody hearing. *Id.*

206. *See* PLOTZ, *supra* note 141, at 167-81 (summarizing history of sperm banking in U.S.). Plotz reports a study by the Office of Technology Assessment in the late 1980s which located hundreds of sperm banks in the U.S. and estimated that about 30,000 children were being born each year as a result of donor sperm. *Id.* at 170. By the late 1980s, largely, according to Plotz, as a result of the influence of the Repository for Germinal Choice in California (the so-called “Nobel sperm bank”), sperm banks began routinely to present themselves to end consumers as concerned with safety (including donor testing) and consumer choice. *Id.* at 173.

Single women and women in lesbian relationships account for about 40% of the clients at California Cryobank (perhaps the world’s largest sperm bank) and they account for about 75% of clients at some other sperm banks. PLOTZ, *supra* note 141, at 178.

207. The Repository for Germinal Choice, the so-called “Nobel Prize Sperm Bank” about which David Plotz wrote, identified donors by colors and numbers. *Id.* at xv. Thus, the bank’s catalogue advertized a Donor White # 6 (described as a scientist who likes to read history); Donor Coral # 36 (described as having a high I.Q. and as being good at math), and Donor Yellow/Brown # 22 (described as a “great scientist” who enjoys mountaineering). *Id.*

208. On the basis of at least 30,000 children born as a result of donor sperm each year since the 1980s, Plotz estimates that there may now be more than a million children in the U.S. conceived with donor sperm. *Id.* at 170. One commentator suggests that at least 50,000 children conceived from donor sperm are now born in the U.S. each year and that an average sperm donor is the genetic parent of 26 children. Paul DiLascia, *How Many Children?*, *SPERM*CENTER, 2006,

for donor fathers have not usually identified the men they seek. According to David Plotz, most anonymous sperm donors have no interest in having social and/or legal children when they donate sperm, and they do not develop such an interest later.<sup>209</sup> Searches for “donor siblings” (other children conceived from the same donor’s sperm) have been more successful. David Plotz reports one meeting in the early 1990s between what he refers to as two “sperm bank brothers.”<sup>210</sup> Plotz believes the meeting may have been only the second or third time that children conceived with sperm from the same anonymous donor had met.<sup>211</sup> Plotz, who knew about the prospective meeting before it occurred, imagined what it might be like:

Tom and Alton would be inventing an entirely new relationship: . . . the sperm bank brother was something new. Regular half siblings have a *known* father in common: They share a family history, a name, a life. But sperm bank half brothers have only DNA in common; their shared father is a complete blank. Coral [the sperm bank catalogue’s label for the donor] was not a real person to Alton and Tom. They didn’t even know his name. The only thing they knew about him was that they didn’t know anything about him.<sup>212</sup>

By now, the scenario that Plotz imagines, or a variant of it, has occurred over and over.

Thousands of donor siblings have identified each other.<sup>213</sup> That was due in some part to the pioneering efforts of Wendy Kramer, a mother, anxious to help her son locate the man from whose sperm the boy was conceived.<sup>214</sup> Kramer and her son created a website (called Donor Sibling Registry) that assists children anxious to find donor siblings and sperm donors.<sup>215</sup> Kay Hymowitz reports that 3,000 “donor

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<http://www.spermcenter.com/How%20Many%20Children.pdf>.

209. PLOTZ, *supra* note 141, at 180. It has been much more common for those seeking donor relatives to find donor siblings than sperm donors. Sperm donors have not often posted information on relevant websites. Plotz writes: “For most American sperm donors, donating was something they did when they were quite young in order to make money. Most didn’t spend a lot of time pondering the consequences of their action, because they didn’t think there would be any. They counted on anonymity to shield them forever.” *Id.*

210. *Id.* at 63.

211. *Id.*

212. *Id.*

213. *See, e.g.*, The Donor Sibling Registry, *supra* note 204 (noting an active membership of 9,406 people and 3,873 “matches” between “half siblings (and/or donors)”).

214. The website created by Wendy Kramer and her son, Ryan, can be found at <http://donorsiblingregistry.com>. *See supra* note 204.

215. *Id.* Kay S. Hymowitz, *The Incredible Shrinking Father*, 17 CITY JOURNAL (2007), available at [http://www.city-journal.org/html/17\\_2\\_artificial\\_insemination.html](http://www.city-journal.org/html/17_2_artificial_insemination.html).



mothers and children” have successfully relied on the site to locate donor siblings or sometimes, but less often, donor fathers.<sup>216</sup>

At least initially, those who identify donor relatives and the relatives so identified view each other in light of a notion of family constructed around suppositions about DNA and little else. Donor siblings do not share social histories, biological mothers, social or legal fathers, or even narratives about the genetic father’s motives for or responses to becoming a sperm donor. In short, donor siblings share no history with the sperm donor beyond the fact of the anonymous sperm donation.<sup>217</sup>

The effort to construct family relationships with sperm donors and with donor siblings must contend with the essentially a-historic context of anonymous sperm donation. The connection among donor siblings or between a donor and the children produced from his sperm is not even grounded in family narratives about a family-that-once-was. The existence of a family is suggested only by suppositions about shared DNA.

Sometimes, ongoing relationships are created among those who find each other in the search for donor relatives.<sup>218</sup> But more often, it seems, one party or another loses interest. Katrina Clark, a 17-year old who easily identified and located her sperm donor father through the internet, reports that, in the end, the man in question told her that he was “tired of ‘this whole sperm-donor thing.’”<sup>219</sup> Clark concludes that, ironically in her view, “[t]he very thing that brought us together was pushing us in opposite directions.”<sup>220</sup> The irony that Clark identifies is real. It lies in this donor child’s successful effort to locate – and name as

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216. See *supra* note 209 (explaining why matches to sperm donors occur less frequently). The site itself reports somewhat more successful “matches.” The Donor Sibling Registry, *supra* note 204.

217. See *infra* notes 218 - 222 and accompanying text (noting lack of social history among donor relatives).

218. See, e.g., Jeff Stryker, *Regulation or Free Markets?*, SCIENCE PROGRESS, Nov. 7, 2007, <http://www.scienceprogress.org/2007/11/regulation-or-free-markets/>; Katrina Clark, *Who’s Your Daddy? Mine Was An Anonymous Sperm Donor*, WASH. POST, Dec. 17, 2006, at B01. Katrina Clark uses the phrase genetic “roots” to refer to more than medical issues. *Id.* See also Amy Harmon, *Hello, I’m Your Sister: Our Father is Donor 150*, N.Y. TIMES, Nov. 20, 2005. Harmon notes that some donor mothers have attempted to find other donor siblings and the mothers of those children in order “to create a patchwork family for themselves and their children.” *Id.* She describes one such group of woman as feeling connected by their children’s genetic connection and by their having all participated in conception using donor sperm. *Id.* Such efforts to establish family relationships from such donor-sibling groups move beyond the construct of the medicalized family.

219. Clark, *supra* note 218.

220. *Id.*

“father” – a man who, despite having posted his photo on a donor website, had no intention of creating a family or of developing a new familial relationship when he donated sperm, and no intention of actualizing a family once identified by his genetic child. Yet, this man, who had posted identifying information about himself on a donor registry, presented himself as someone a donor child would identify as “father.”

David Plotz’s study of donor relatives suggests that Katrina Clark’s experience is typical. Children who identify donor fathers may try to create enduring familial relationships with these men.<sup>221</sup> But almost all of these donor children, according to David Plotz’s account, conclude, after meeting donor fathers as well as donor siblings, that – the presumptive promise embedded in genetic links notwithstanding – they have little in common with their “donor relatives.” And most thus conclude, finally, that they are uninterested in, or even if interested, unlikely to develop longstanding relationships with such donor relatives.<sup>222</sup> Plotz’s reports suggest that donor families constitute a new type of virtual family.

Sometimes donor children acknowledge two distinct family groups, one constructed through choice and commitment and a second created through biological chance. One mother of two children conceived through donor sperm, one of whom had an identified donor sibling, explains that her two children (with different donor fathers) have a “strong sibling bond that comes from living together and making a family.”<sup>223</sup> But, she added, the child whose donor sibling had been identified, also had a biological sibling who “wasn’t really [the child’s] brother” but who shares the child’s “origins.”<sup>224</sup> This mother explained that she seeks a “language” that “will respect our nuclear family yet acknowledge the biological relationship [with a ‘donor half-sibling’]”.<sup>225</sup> She thus aimed to define two distinct family groups but not, it would seem, to embed one in the other or to mediate the distinction between the

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221. See, e.g., Wendy Kramer, *Ryan and Anna, Two Half Siblings Meet*, <http://donorsiblingregistry.com/ryanandanna.pdf> (last visited Dec. 16, 2007). According to Kramer’s account, her son, Ryan, and his donor sibling, Anna, formed a close bond after meeting as adolescents. *Id.* The account is, however, of only one meeting. *Id.* It is thus unclear whether or not the relationship developed over time as Kramer’s report presumed it would. *Id.*

Only one donor father among those whom David Plotz interviewed seemed likely to remain connected with a donor child with whom he had connected. PLOTZ, *supra* note 141, at 204-12.

222. PLOTZ, *supra* note 141, at 213-33.

223. Lisa DiGirolamo, *Donor Sibling*, 11 OUR FAMILY COALITION NEWSLETTER 2 (2006).

224. *Id.*

225. *Id.* at 11.

two.

In other cases people do not seek donor relatives because they yearn for family relationships but because they want medical information. Such searches have resulted in the identification of large “medicalized”<sup>226</sup> family groups. Because sperm from one donor may be used to conceive dozens of children, the size of medicalized sibling groups can be very large.<sup>227</sup> Sometimes, the diseases involved may be serious. One family sued the California Cryobank for failing to inform them that the donor (number 267) whose sperm they used to conceive their daughter, by then an adolescent, had a family history of autosomal dominant polycystic kidney disease (ADPKD).<sup>228</sup> The donor’s aunt and mother died of the condition and an ultrasound of the donor’s kidneys (taken before his sperm was used) had revealed multiple cysts, suggesting that he suffered or would soon suffer from ADPKD.<sup>229</sup> The donor himself, whose sperm had been used by a number of other clients of the bank, refused to provide information or to take a blood test that would have provided additional information about the severity of his condition. Such information would have been useful to predict the course of the illness for the children conceived from the donor’s sperm.<sup>230</sup>

In another case, a woman chose a donor with blond hair and green eyes because she wanted a child with those characteristics.<sup>231</sup> She gave birth to a son with very different coloring. However, the child resembled the sperm donor (which the mother discovered later) in suffering from an unusual genetic platelet disorder<sup>232</sup> and from a related assortment of troublesome allergies.<sup>233</sup> Through the Donor Sibling Registry, the child’s mother eventually tracked down several other

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226. Carl Elliott sees the origin of “medicalization” in “refer[ences] to the way that a society manages deviant behavior by bringing it under the medical umbrella.” CARL ELLIOTT, *BETTER THAN WELL: AMERICAN MEDICINE MEETS THE AMERICAN DREAM* 228-29 (2003). Medicalization turns people who are not sick into patients. The form of medicalization at issue in this Section is specific to that resulting from the identification of genetic alterations that pose a risk of illness.

227. Jennifer Wolff, *The Truth About Donor 1084: Angry Mothers Say Sperm Banks Are Hiding Evidence of Donors’ Genetic Defects*, SELF MAGAZINE (2006), available at [http://www.self.com/magazine/articles/2006/10/23/1006donor\\_single\\_page](http://www.self.com/magazine/articles/2006/10/23/1006donor_single_page).

228. *Johnson v. California Cryobank, Inc.*, 124 Cal. Rptr. 2d 650 (Cal. Ct. App. 2002). See also Wolff, *supra* note 227.

229. *Johnson*, 124 Cal. Rptr. 2d 650.

230. Wolff, *supra* note 227.

231. *Id.*

232. *Id.* The condition in question is delta storage pool deficiency. It causes easy bleeding and bruises. *Id.*

233. *Id.*

families who had used sperm from the same donor – referred to as donor number 1084.<sup>234</sup> A number of the children created with this donor’s sperm have suffered from similar health problems.<sup>235</sup>

Medicalized families are usually identified within the context of existing families. The next Section considers some of the consequences of constructing familial groups through reference to shared deleterious genetic alterations.

#### *D. The “Medicalized Family”*

The observation that several members of a family have become ill with a condition categorized as “familial” (now called “genetic”) may result in the medicalization of family groups.<sup>236</sup> Kaja Finkler’s anthropological study of medicalized (genetic) families shows how the revelation of information about deleterious genetic alterations<sup>237</sup> within families can stimulate new modes of interaction among those involved.<sup>238</sup> But even in the context of ongoing family units, Finkler reports that within medicalized families, the a-historicity and a-morality of DNA may compete with, and even displace, social memory.<sup>239</sup>

The medicalization of kinship binds the person to the past as well as to the future – even though, ironically, the tie is mediated by suffering – propelling people to search for ancestors and also to anticipate future afflicted descendants . . . . Lamentably, the DNA harboring memory of ancestors is devoid of morality or affect, the hallmark of family and kinship relations. DNA molecules are inherently impersonal: they do not impose, express, or insist on responsibilities, obligations, or love, other than requiring living relatives to furnish blood samples in order to establish genetic markers on chromosomes.<sup>240</sup>

Thus, Finkler’s ethnographic investigation revealed a remarkable consequence of genetic medicalization. Focus on shared DNA within ongoing families may displace the bonds created through social interaction and thus redefine the “family” for those involved.

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234. *Id.*

235. *Id.*

236. See KAJA FINKLER, EXPERIENCING THE NEW GENETICS: FAMILY AND KINSHIP ON THE MEDICAL FRONTIER 106-62 (2000).

237. See Beatrice Godard, et al., *Guidelines for Disclosing Genetic Information to Family Members: From Development to Use*, 5 FAMILIAL CANCER 103, 110 (2006) (noting increasing availability of genetic tests). See also, *supra* notes 146 - 156.

238. FINKLER, *supra* note 236, at 184.

239. *Id.* at 187.

240. *Id.*

The form of family considered in this Section – the “medicalized family” – resembles aspects of the two sub-types of family described in the previous Section. However, families considered in the last Section (both families constructed on the basis of paternity testing and donor families) preserve some role, even if more implicit than explicit, for agency and choice. As a construct, the form of family considered in this Section provides no place for choice.

The medicalized family reflects yet another form of family that has developed in the last several decades and that relies centrally on a presumption about biological “truths.” The medicalized family suggests a vision of family that values neither tradition nor choice.

Understandings of biology underlying the notion of medicalized families resemble those associated with traditional families in that medicalized families view biology (DNA) as a substance that, when shared, joins people together in presumptive familial groups. But understandings of the shared substance (DNA) associated with medicalized families differ dramatically from those associated with traditional families, and resemble those associated with modern families, in that they are predicated on the valuation of individualism, not communal holism. The medicalized family also differs from modern “families of choice,” however in that in its very formulation, the medicalized family precludes any role for autonomous choice.

Construction of the medicalized family gained support in the last decades of the twentieth century with the advent of tests for deleterious genetic alterations.<sup>241</sup> Biotechnology has thus transformed what were once known loosely as “familial” diseases into conditions associated with genetic alterations that can be identified in particular individuals or in the putative genome of larger groups. Thus, such genetic alterations and the diseases to which they may give rise may be associated not only with individuals but with familial groups and even with groups identified through reference to ethnicity, race, or nationality.<sup>242</sup> Through genetic testing, deleterious genetic alterations can be identified with certainty, but generally the risks presented by such genetic identification are far murkier. People identified as being at risk for particular illnesses because they bear deleterious genetic alterations may not be, and may

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241. See *supra* note 237 (considering deleterious genetic alterations).

242. See Ellen Wright Clayton, *What Should the Law Say About Disclosure of Genetic Information to Relatives*, 1 J. HEALTH CARE L. & POL'Y 373, 373 (1998) (noting that family members of someone diagnosed with a genetic condition are more likely than others to be “similarly affected”).

never become, ill with the conditions in question.<sup>243</sup> Yet, once family members know that they may carry a deleterious genetic alteration predisposing them to a potentially serious illness, they may see themselves and be seen by others (assuming others are aware of the family's genetic risk) as patients or potential patients.<sup>244</sup>

Genetic tests provide information. From a social perspective, that information is peculiar. Genetic information is unique to a particular person. Yet, it may also be invoked to identify or describe wider social groups, defined through shared genes.<sup>245</sup> Genetic families, identified through reference to genetic information, provide a remarkable social construct. From the perspective of shared genetic information, each person is equivalent to every other person in the larger familial group. Moreover, and more remarkable still, each person (viewed from a genomic perspective) is equivalent to the whole.<sup>246</sup> This Section considers the troubling implications of the ideological construct that underlies this vision of family.

The potential for new and discomfoting understandings of families as units, identified through reference to genetic alterations and the diseases with which they are associated,<sup>247</sup> is illustrated dramatically by *Safer v. Pack*,<sup>248</sup> decided in 1996 by a New Jersey appellate court. Genetic diseases have raised questions about the obligation of physicians or of patients identified as having such diseases (or of having deleterious genetic alternations or a family history associated with such diseases) to inform patients and/or patients' family members about the risk.<sup>249</sup> *Safer* was occasioned by this sort of question.<sup>250</sup>

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243. Alissa Brownrigg, Note, *Mother Still Knows Best: Cancer-Related Gene Mutations, Familial Privacy, and a Physician's Duty to Warn*, 26 FORDHAM URB. L.J. 247, 249-50 (1999) (noting increasing reliance on genetic testing in routine health care).

244. See FINKLER, *supra* note 236 at 160-62 (anthropological analysis of genetic inheritance based on studies of adoptee and of women with familial breast cancer).

245. See Gatter, *supra* note 6, at 428 (noting difference between genetic information and "other types of information" in that, among other things, genetic information "invokes the interests of the family as well as the individual"); Patricia A. Roche & George J. Annas, *Protecting Genetic Privacy*, 2 NATURE REVIEWS 392, 393 (2001).

246. See *infra* notes 248 - 272 and accompanying text (considering "family" assumed by court in *Safer v. Pack*, 677 A.2d 1188 (N.J. Super. Ct. App. Div. 1996)).

247. Further, larger ethnic and racial groups are being defined through reference to genetic alterations associated with members of the group in question. See *supra* note 242.

248. *Safer v. Pack*, 677 A.2d 1188 (N.J. Super. Ct. App. Div. 1996).

249. See, e.g., *Pate v. Threlkel*, 661 So.2d 278, 282 (Fla. 1995) (allowing woman with hereditary condition to sue her mother's doctor for having failed to inform the mother that her condition was genetic; the daughter was not allowed to argue that the doctor was obliged to warn her directly).

250. *Safer*, 677 A.2d at 1190.

In 1990, Donna Safer was diagnosed with metastatic colon cancer.<sup>251</sup> Twenty-six years earlier, when Safer was ten, her father, Robert Batkin, died from that disease.<sup>252</sup> Batkin was then forty-five years old.<sup>253</sup> After Donna's diagnosis, she sued Dr. George Pack.<sup>254</sup> Dr. Pack had treated Batkin during the course of Batkin's illness.<sup>255</sup> Dr. Pack had never served as Safer's physician, but she contended that he was obliged to have warned her (presumably through her mother, Batkin's wife) of the hereditary character of her father's illness.<sup>256</sup> Had she been aware that she was at risk for multiple polyposis and thus for developing colon cancer, she would presumably have undergone frequent colon screenings in the hope of preventing or mitigating the consequences of colon cancer.

Donna (along with her husband, Robert Safer, himself a physician) claimed that the hereditary character of Batkin's illness was known when Batkin was ill, and that prevailing medical practice was "to warn those at risk."<sup>257</sup> Donna's mother, Ida Batkin, testified that she had not been told that her husband suffered from colon cancer.<sup>258</sup> The New Jersey trial court dismissed Donna's suit, concluding that the doctor was not under a "legal duty to warn a child of a patient of a genetic risk[.]"<sup>259</sup>

The appellate court reversed, expressing "confiden[ce] that the duty to warn of avert[a]ble risk from genetic causes, by definition a matter of familial concern, is sufficiently narrow to serve the interests of justice."<sup>260</sup> The surprising aspect of the *Safer* court's decision was that the duty to warn of the genetic risk was not defined as being owed to the doctor's patient alone but as owed directly to "members of the immediate family of the patient who may be adversely affected by a

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251. *Id.*

252. *Id.*

253. *Id.*

254. The suit was brought against Dr. Pack's estate. Pack had died in 1969. *Id.*

255. *Id.* at 1189.

256. The duty, had it been imposed, would presumably have been to warn Donna's mother of the risk. The court noted expressly that it was uncertain as to how exactly the physician's "duty is to be discharged, especially with respect to young children who may be at risk, except to require that reasonable steps be taken to assure that the information reaches those likely to be affected or is made available for their benefit." *Id.* at 1192.

257. *Id.* at 1190.

258. *Id.* Ida Batkin's testimony was especially relevant in that Donna was a young girl when her father died. Thus, any duty to warn her would likely have been fulfilled by warning Donna's mother.

259. *Id.* The motion judge assumed that Donna's father did not know of the genetic character of his illness in light of the absence of evidence that Batkin had been told about the risk to family members. *Id.*

260. *Id.* at 1192.

breach of that duty.”<sup>261</sup> The court expressly rejected the more limited ruling of the Florida Supreme Court in *Pate v. Threlkel*, a similar sort of case.<sup>262</sup> In *Pate*, the court required only that the patient herself be told about the genetic risk that her illness posed for close relatives.<sup>263</sup>

In other cases, courts have imposed an obligation on a physician to warn a pediatric patient’s parents about a genetic risk (especially to other children of the same parents) associated with a child’s illness.<sup>264</sup> The implications of that obligation differ dramatically from those of *Safer*. In *Safer*, the court required a patient’s physician to communicate information to a patient’s child about the parent’s illness.<sup>265</sup> That obligation, unlike a similar obligation imposed on a child’s doctor to inform the child’s parents about a genetic risk, challenges expectations about privacy within family settings and suggests a family unit that differs significantly from that associated with the traditional family (within which parents were routinely provided with information about their children’s health and welfare).<sup>266</sup>

The medicalized family assumed by the *Safer* court<sup>267</sup> differs from

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261. *Id.* (quoting *Schroeder v. Perkel*, 87 N.J. 53, 65 (N.J. 1981)). A year before the decision in *Safer*, the Florida Supreme Court held a doctor responsible for failing to warn his patient about the risk to family members from a condition the patient suffered from. *Pate v. Threlkel*, 661 So.2d 278 (Fla. 1995). But in *Pate*, the court did not extend that obligation to warning family members of the patient. That task was left to the patient. The court explained:

Our holding should not be read to require the physician to warn the patient’s children of the disease. In most instances the physician is prohibited from disclosing the patient’s medical condition to others except with the patient’s permission. Moreover, the patient ordinarily can be expected to pass on the warning. To require the physician to seek out and warn various members of the patient’s family would often be difficult or impractical and would place too heavy a burden upon the physician. Thus, we emphasize that in any circumstances in which the physician has a duty to warn of a genetically transferable disease, that duty will be satisfied by warning the patient.

*Id.* at 282 (citations omitted).

262. *Safer*, 677 A.2d at 1192.

263. *Id.*

264. *Molloy v. Meier*, 679 N.W.2d 711, 719 (Minn. 2004) (imposing duty on doctor of young patient with Fragile X Syndrome to warn biological parents that subsequent child could have same condition); *Schroeder v. Perkel*, 432 A.2d 834, 839-40 (N.J. 1981) (imposing independent duty on physician to warn parents of young patient with cystic fibrosis that a subsequent child might suffer from the same illness).

265. *Safer*, 677 A.2d at 1192.

266. Even more, within the setting of the traditional family, wives were not always entitled to medical privacy from their husbands. *See, e.g., Tooley v. Provident Life & Accident Ins. Co.*, 154 So.2d 617, 618 (La. Ct. App. 1963) (defining husband as “head and master of the community” and thus privy to medical information about his wife).

267. A 1998 statement of the American Society of Human Genetics (ASHG) reflects a similar view of the medicalized family. American Society of Human Genetics Social Issues Subcommittee on Familial Disclosure, *ASHG Statement: Professional Disclosure of Familial Genetic Information*, 62 AM. J. HUM. GENET. 474 (1998). That group recommended that normal rules of confidentiality



both the traditional family and many contemporary families, defined by widespread insistence on an increasingly broad panoply of choices. The family assumed in *Safer* is a whole, composed of identical units, each indistinguishable (from the perspective of DNA) from the others *and* from the larger whole. This family is not structured through expectations about hierarchy and community, as is the traditional family. Nor is it composed of autonomous individuals, increasingly understood as agents of choice, each distinct from each of the others – a presumption familiar to families of choice.

The family assumed by the *Safer* court views separate persons through the lens of a larger group (in the *Safer* case, a familial group), identified through reference to shared DNA. As such, members of such groups are indistinguishable, each from the others. That is evident in the readiness of the *Safer* court to assume that no one within such a group need enjoy medical privacy from others in the group. Donna Safer, Robert Batkin's daughter, is entitled to know about her father's illness because, from the perspective of the medicalized family, there is no difference between the two. This construct of family bears some resemblance to "families of shared DNA" (described in Section C of this Part).<sup>268</sup> Yet, the medicalized family described in this Section is peculiar even in comparison to other forms of family identified through invocation of genetic "facts." Genetic families sit uneasily within the array of family forms examined in this Article, because they *value individualism while failing almost completely to value, or even to recognize, choice.*

As a practical matter, the medicalized family assumed in *Safer* is actualized in the restricted setting of medical conditions associated with genetic alterations.<sup>269</sup> Yet, as an ideological matter, this form of family is a remarkable and troubling construct. It reflects a broader ideological

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be set aside and that health care workers have the "discretionary right" to reveal information about hereditary conditions to patients' family members. *Id.* at 474. This rule differs from that voiced in *Safer* in that it is discretionary, not mandatory. *Id.* The society identified "at-risk relatives" to whom such disclosure might be made to include siblings and children as well as "identifiable parents, cousins, aunts, and uncles, whom the health-care professional can reasonably contact." *Id.*

268. If it resembles any other form of family in this regard, it is the form of "donor" family, described in the next subsection of this Section.

269. Kaja Finkler provides a focused account of medicalized families. She describes such families as ongoing social units: "in the past, the family was identified by honor, status, power, or even poverty, whereas in contemporary times family and kin tend to be stabilized and bounded by the sharing of DNA molecules, which lack the moral responsibilities associated with relatedness." FINKLER, *supra* note 236, at 206. See also Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 563-65 (2000) (describing this aspect of *Safer* in more detail).

frame within which individualism is preserved because the whole is understood through the metaphor of the individual, and each person's autonomy is sacrificed to that of the whole.

One might think that the medicalized family described here is understood at the level of the whole and thus, as an ideological matter, reflects a form of community, or more particularly, a form of *totalitarianism* rather than of individualism. A similar error was described by Louis Dumont, a French anthropologist known for his studies of caste in India.<sup>270</sup> Dumont reviewed understandings of the ideology that informs totalitarianism in the West. In describing the ideology underlying a fascist state, Dumont wrote:

A major difficulty in the effort to grasp totalitarianism comes from the spontaneous tendency to consider it a form of holism. The word itself refers us at first sight to the social "totality"; and the regime, in its contrast to democracy, is first thought of as "reaction," a return to the past. These are vulgar notions. . . . [A]s the totalitarian regime constrains its subjects most radically, it appears to oppose individualism in the current meaning of the term, so the analyst is faced with a contradiction. To solve it, one should remember that the phenomenon is internal to the modern world, that the totalitarian ideology is contained *within* modern ideology. The hypothesis is that totalitarianism results from *the attempt, in a society where individualism is deeply rooted and predominant, to subordinate it to the primacy of the society as a whole.*<sup>271</sup>

Obviously, the dangers of fascism differ from and would seem to be more encompassing than those of the medicalized family.<sup>272</sup> However, each social form resembles the other in that its survival depends on "subordinating" (to use Dumont's word) the individual to the group, and thus undermines individual autonomy.

The family defined in *Safer*, depends on a form of individualism – one that views the whole through the metaphor of the individual and each individual as substitutable for each other individual (and for the larger whole). Although the medicalized family continues to value individualism (though in a troubling guise), it virtually precludes the sort of choice associated with autonomous personhood. Thus, the medicalized family provides an almost paradigmatic instance of a social

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270. DUMONT, *supra* note 10, at 12.

271. *Id.* (emphasis in original).

272. This claim follows, in part, because the medicalized family is not the *only* form of family recognized in the society. Were that ever to be the case (and it is hard indeed to imagine), it would be as troubling indeed.

form, constructed in light of the presumed significance of DNA that favors individualism, but not choice.

## V. CONCLUSION

The “traditional family,” forged in the early nineteenth century and elaborated during the rest of that century and during much of the next century, was structured within a broad ideological<sup>273</sup> frame that prized hierarchy and communal holism. As that ideological frame collapsed in the last decades of the twentieth century, so did the traditional family. The forms through which the notion of family was once understood have grown murky. Discrete values once associated with the traditional family survive but are no longer understood through reference to a larger set of structured social truths. Even more, both the biological and social parameters of family survive, but no longer does either set of parameters inform the other. In the traditional family, assumptions about biology shaped and reflected assumptions about social behavior. In the forms of family described in this Article, that is not true or it is true only incidentally.

And so, old values have been reshaped, and new values have been added to social understandings of family. A wide variety of conflicting ideological presumptions is now invoked in the construction of various forms of family. All of those considered in Part IV preserve a vital role for some understanding of biological connection. Yet each differs from the others as much as each differs from the form of family referred to as “traditional.”

Society and the law struggle to construct a frame, or more accurately, a set of frames, within which to understand and regulate family relationships. In consequence, old beliefs about family are combined with new ones. Various aspects of family life (e.g., the social correlates of family and the biological correlates of family) merge and shift. And an assemblage of assorted values – some culled from the universe of the traditional family, some taken from the world of the marketplace, and others developed only in the last few decades – is variously molded to create new forms of family.

As a result, ideological constructs for understanding and defining families have proliferated. This Article focuses on four such constructs. Each of these depends on the centrality of biology to the construction of family. In that regard, each variant may seem disconcerting insofar as

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273. See *supra* note 10 (defining “ideology”).

forms of family that have emerged in the last several decades are generally seen as having discarded or downplayed the notion that biological relationship is or should be central to definitions of family. The presumptive form of the modern family in the U.S. – the family of choice – has received significant attention from theorists and popular commentators. This Article suggests that alongside such families of choice other forms of family subordinate choice to biology, re-define choice in light of biology, or even, in at least one construction of family, eviscerate choice altogether.

The first form of family considered in Part IV, the “flesh and blood family,” depends on viewing DNA (or genes) as a synonym for “blood” or “flesh and blood” – for an old-fashioned understanding of biology’s role in the construction of family. In this guise, the concept of DNA supports understandings of family that do not appear to differ dramatically from those assumed during the previous two centuries. In sharp contrast, understandings of DNA that undergird the “reprogenetic family” depend on society’s compulsion to identify and to appropriate choices. That compulsion is long familiar within the marketplace.

And at still other times, the presumptive significance of DNA mitigates the role of choice in the construction of family. This process is reflected in “families of shared DNA” (including both families defined through paternity testing in contravention of the traditional marital presumption and donor families). Moreover, while those seeking to define themselves within such families seem often to long for connection and loyalty, that has not generally happened (especially among donor relatives). In the end, the presumptive genetic links on which such families rest seem more often to define the individuals who seek to construct “families of shared DNA” than to shape lasting family units. Even more, a new form of family – the medicalized family – reflects individualist values while eviscerating choice.

In sum, any sense that understandings of family in the U.S. have been effectively recast in the language of choice alone is belied by the important role preserved for the presumed biological correlates of family. Yet, even among these four views of family, each defined centrally through reference to presumed biological truths, significant differences distinguish each form of family from the other three.

Perhaps one form of family will ultimately be deemed the successor to the nineteenth and twentieth century family, developed to support the interests of the industrial marketplace (the so-called traditional family). Perhaps that form of family will venerate choice. Perhaps it will be founded on presumed biological truths. Perhaps it will be created

through a novel set of suppositions. More likely, the notion of family will continue at least for a time to encompass a discordant set of beliefs about the essence of personhood and about the forms through which people define themselves as kin, and the forms through which people join together to create “families.” In consequence, ideological disquietude characterizes the law and society’s attempts to understand and regulate contemporary families.