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Julie Shapiro

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# A Lesbian Centered Critique of “Genetic Parenthood”

*Julie Shapiro\**

## I. INTRODUCTION

The recognition of parenthood matters. Parents possess rights that no one else can exercise, including both reasonably well-defined legal rights and more amorphous social rights. Both in law and in fact, parents have a special relationship with their children, one that is protected from interference by other individuals or by the state. In addition, parents bear special obligations towards their children—obligations that are not shared by the society at large.

Often the identification of a child's parents is simple, though on occasion it is not. It can be contested when there are either too many or too few individuals claiming parental rights.<sup>1</sup> Assisted reproductive technology (ART) has complicated the problems of determining parenthood even as it has increased the frequency with which the question arises.<sup>2</sup> As children are

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\* Associate Professor of Law, Seattle University School of Law. I wish to thank the members of the *Iowa Journal of Gender, Race & Justice* for convening this symposium and for their editorial work on this article. I am also grateful to Seattle University Law School for providing research support for this project and to Dean Kellye Testy in particular. Finally, as always, I would like to thank Stephanie Wilson for her tireless and effective research.

I also offer the following disclosure: I am a mother of two children with whom I have no genetic connection. I have no doubt that my experience raising my children has shaped my views on the subject of this article. I am deeply grateful to my children for all I have learned from them.

1. In some circumstances, claiming the entitlements of parenthood is of paramount importance and hence, parenthood is a status eagerly sought: Individuals compete, legally and/or socially, for the status of “parent.” In other circumstances, the obligations imposed upon a parent may be more salient and so individuals seek to avoid being identified as the parent of a child, denying their parenthood and perhaps promoting the parenthood of another individual. Because courts in the United States consider it highly desirable to have some person identified as a parent and hence, subject to the parental obligations of support, it is often useful to advance the parenthood of another individual if one is denying one's own parenthood.

2. Historically, the search for a child's father was more likely to be problematic than was the search for the child's mother. The mother was the woman who had given birth to the child and, while it might be difficult in some instances to identify who had given birth, once the identification was made, motherhood was established. Identifying the father of a child presented a more complicated problem. ART has complicated the determination of motherhood by separating the genetic contribution a woman makes from the process of pregnancy. In addition, ART has led to the development of a vigorous market for the sale and purchase of genetic materials. Both of these developments have raised new questions about parenthood. See Part III.A, *infra*. At the same time,

created in new ways, we are challenged to articulate tests for legal parenthood that are responsive to these circumstances.

In this Article, I am concerned with how we determine legal parenthood and with the role of one particular factor in that determination: the existence of genetic linkage between adult and child. Why should it matter that one person has provided one-half of the genetic material of another? Does it make that person a parent, or create a presumption in favor of his or her parenthood? Is it one factor among many to be considered? Or is it relevant at all? What should the law be?

I will conduct this inquiry within a very specific framework. This Article is an exercise in lesbian legal theory.<sup>3</sup> In seeking answers to my questions about what should be the law, I will conduct my exploration from a perspective that puts lesbians at the center.<sup>4</sup> I will therefore begin in Part I with a discussion of lesbian legal theory.

Part II will briefly review the existing critique, generated by lesbian legal theory, of genetics as a basis for parenthood. It will also examine the current state of the critique and explain why it is important to now revisit this topic. While the conversation began long ago, there has since been a period of relative silence. During that time the world has changed in two important ways. First, the need for a strong critique of the genetic identification of parents has become more apparent. Second, the high value continually placed on this link is problematic for lesbian survival.

Not only is it necessary to revisit this topic, it is also a particularly opportune moment to do so. This is the subject of Part III. ART has created new ways to become parents. New DNA testing technologies have enhanced our ability to determine genetic linkage. Both of these developments, as well as the proliferation of family forms, have brought with them social changes. The law has struggled, and continues to struggle, to cope with these changes. In short, this is a time of flux when the law is changing shape before our eyes.

Parenthood now exists in many different varieties, and it is therefore important to distinguish the different terms used in this paper. "Social parents" are those who act as parents in the real world in which a child lives, while "legal parents" are those whom the law recognizes as parents and

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modern DNA testing has allowed us to obtain a great deal more information about the genetic relationships between people than was once available. In some ways, this could be seen as simplifying the analysis. *But see* Part III.B, *infra*.

3. See RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) [hereinafter ROBSON, (OUT)LAW]; RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* (1998) [hereinafter ROBSON, SAPPHO]; see also Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoption*, 14 BERKELEY WOMEN'S L.J. 17 (1999).

4. Other scholars have considered the significance of the genetic tie from different perspectives. See, e.g., June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1001 (2003); Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

accordingly vests with legal rights and responsibilities. It might be ideal (and certainly simpler) if being a social parent meant being a legal parent and vice versa. Unfortunately, this is not the case. Sometimes the law fails to acknowledge the parenthood of a child's social parent, while sometimes the legal parent of a child may not function as a social parent in the child's world.

Nonetheless, recognition as a child's legal parent carries great weight in society at large. The law plays a significant role in the social construction of parenthood. Exercising rights over and assuming obligations for a child are among the primary factors defining a person as a social parent. While a person may be able to exercise those rights and assume those obligations without legal recognition or formal legal authority, legal recognition obviously enhances her or his ability to do so. Indeed, the mere fact of legal recognition itself has social meaning, as it provides formal confirmation of a person's status. This is particularly true in the United States, where law is a social institution of primary importance in the lives and ideas of many people. In addition, recognition as a legal parent of a child brings with it the constitutional right to curtail the child's engagement with non-parents.<sup>5</sup> At the same time, recognition as a social parent is not always irrelevant in the eyes of the law. In an individual case, a person's status as a social parent may be influential. Where the social parent can be identified as a psychological parent, such identification can form the basis for a claim to legal parentage.<sup>6</sup>

More generally, the law is responsive to social changes and to shifts in the social definitions of parenthood. For instance, if one considers the evolving meanings of "parent" over time, the legal and social definitions are inextricably entwined. This Article, however, is primarily concerned with the identification of a child's legal parents.

The term "parent" has also been paired with other modifiers. So in addition to "legal parents" and "social parents" there are "natural parents," and "adoptive parents," as well as "surrogate mothers" and "unmarried fathers," to name but a few. In a similar vein, as recent scholarship has struggled with the issues discussed above, reference to "genetic parents" has become common.<sup>7</sup> All humans can, at least in theory, trace their genetic material to two immediate forebears—one male and one female. We often assume that these are the people we refer to as the parents of the child.

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5. See *Troxel v. Granville*, 530 U.S. 57 (2000).

6. A psychological parent is a person who functions as a parent from a psychological viewpoint. As such, it is obviously closely linked to social parenting. Status as a psychological parent has formed the basis for at least practical recognition of legal parentage in some states. See, e.g., *V. C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); see also *In Re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

7. See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents Rights*, 14 CARDOZO L. REV. 1747 (1993).

Clearly, however, there is not a perfect overlap between the people who are the sources of the genetic material and the people who actually function as the child's social and/or legal parents. Adoption and fostering of children are well-known practices throughout the ancient myths and legends of many people. Similarly, the husband who raises a child born to his wife but genetically unrelated to him is a stock figure of history, fiction and drama.<sup>8</sup>

As it is typically used, the term "genetic parents" refers to the individuals who provided genetic material necessary for the creation of a child. The term is not without utility. Discussing the meaning of the genetic tie between those who create children and the children they create without a simple term to refer to the people involved is difficult.<sup>9</sup> Unfortunately, the label "genetic parent" is also obscure and confusing. It prematurely concludes that the person concerned is in fact a parent of some sort. This confuses analysis when the very question posed is whether the person should be considered a parent, for it seems impossible to conclude that a genetic parent is not a parent at all. This confusion complicates the discourse in recent case law and scholarship.<sup>10</sup>

Because the ultimate conclusion of this Article is that claims of parenthood should not turn on genetic linkage,<sup>11</sup> the Article will not employ the term "genetic parent." At the same time, I do need a term to designate those who provide the genetic material for a child.<sup>12</sup> The very need for such a new formulation reveals the contested status of the genetic link. The presence of such a link is simply no longer sufficient to ensure that one is a parent. This Article will use the term "progenitors."<sup>13</sup> The idea that the progenitors of a child may in fact not be those who we would recognize as a child's parents (or conversely, that the parents of a child might not be her or his progenitors) is hardly new. Referring to the progenitors of a child may

8. *Id.* at 1772–85 (identifying stories from the Bible, literature and popular culture that center on this theme).

9. Indeed, my unwillingness to employ the term "genetic parents" thus far in the paper has made me particularly aware of the term's utility in that regard.

10. *Rice v. Flynn*, 2005 WL 2140576 (Ohio Ct. App. 2005) (involving a complicated interstate jurisdictional dispute over parentage arising from a surrogacy agreement. The parties are the sperm donor, the unrelated paid egg donor, and the unrelated paid gestational surrogate. The court's analysis of the potential parental rights of the parties is muddled by references to the sperm donor as the "genetic father" and the egg donor as the "genetic mother.").

11. They may, of course, be entitled to recognition as parents for other reasons—like their performance as parents. The fact of a genetic linkage certainly does not disqualify them from parenthood.

12. Identifying and locating this person may be important to a child. Indeed, this person (or more accurately, these people) have a unique relationship with the child. However, neither the fact that it is an important relationship nor the fact that it is a unique one makes it appropriate to call them a child's parent.

13. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1812 (1993) (defining "progenitor" as "an ancestor in the direct line").

assist in clarifying the questions presented.<sup>14</sup>

Finally, it is important to note at the outset that the ongoing struggle over the definition of parenthood is highly politicized. Parents have a privileged status under U.S. law. While parents are not immune from state or third-party intervention in the decisions they make regarding their children, they possess a high degree of autonomy.<sup>15</sup> The well-entrenched doctrine of "family privacy" protects most parental decision-making from outside review. Additionally, parenthood has become one of the pivots around which the debate about access to marriage for lesbian and gay couples now turns.<sup>16</sup> Thus, it is hardly surprising that the U.S. "culture wars" over lesbian and gay rights, the definition of family and the promotion of "family values," include in part the struggle to define who is (and who can be) a parent.<sup>17</sup>

## II. LESBIAN LEGAL THEORY

As I have done before,<sup>18</sup> I take Ruthann Robson's call to develop a lesbian legal theory as my starting point.<sup>19</sup> Lesbian legal theory places lesbians at the center of legal analysis, rather than at the margin,<sup>20</sup> demanding consistent focus on the single question of what will enhance lesbian survival.<sup>21</sup> Put differently, the theory focuses on the question of what the law should be if our goal is to enhance lesbian survival.

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14. An additional clarification may also be helpful. I am not contending that the identification of a child's progenitors is unimportant. It may be important to the child or to the greater society for a number of reasons. Because it may be important, we might seek reforms that ensure that progenitors are identified early in a child's life and with techniques yielding a high degree of certainty. But none of these statements leads to the conclusion that progenitors should be seen as parents. Ultimately, progenitors may indeed be parents, but not because they are progenitors. See Carbone & Cahn, *supra* note 4.

15. See *Troxel v. Granville*, 530 U.S. 57 (2000).

16. See text accompanying notes 51 to 57, *infra*.

17. For example, courts in Virginia and Vermont are currently engaged in an ongoing dispute about the parentage of a child born into a lesbian relationship during a Vermont civil union. The Vermont courts have recognized both women as the child's mother and accordingly have entered various custody and visitation orders. The Virginia courts, relying on a commonwealth law that bars legal recognition of lesbian and gay relationships, have refused to recognize the parenthood of the woman without any biological connection to the child and have accordingly refused to enforce the Vermont court's orders; both the Vermont Supreme Court and a Virginia appellate court have heard the case. See Dionne Walker, *Virginia Appeals Court Hears Lesbian Custody Disputes*, BOSTON GLOBE, Sept. 14, 2005, available at [http://www.boston.com/news/local/vermont/articles/2005/09/14/virginia\\_appeals\\_court\\_hears\\_lesbian\\_custody\\_dispute/](http://www.boston.com/news/local/vermont/articles/2005/09/14/virginia_appeals_court_hears_lesbian_custody_dispute/).

18. Shapiro, *supra* note 3, at 17-18.

19. ROBSON, (OUT)LAW, *supra* note 3; ROBSON, SAPHO, *supra* note 3.

20. See ROBSON, (OUT)LAW, *supra* note 3, at 12-13.

21. See *id.*

That lesbian legal theory can be summed up with a simple question does not mean that it is a simple theory or that its application to any particular topic is plain. To begin with, there is a significant debate over the meaning of the word "lesbian," including whether it is a noun or an adjective.<sup>22</sup> This Article will do little beyond acknowledging this foundational question; it will not attempt to answer it or add to the debate, though I recognize that the term is subject to multiple interpretations. Furthermore, whatever lesbians are, they are clearly neither a monolithic nor a one-dimensional group.<sup>23</sup> Lesbians are of all races, ages, cultures, income brackets, physical abilities, and so on. Thus, one cannot simply imagine "a lesbian" in one's mind and build the theory from there. There is no essential lesbian.<sup>24</sup> Nor is there an essential lesbian identity.<sup>25</sup>

These two difficulties—the inability to define "lesbian" and the absence of any essentially lesbian perspective—might seem to be insurmountable. Acknowledging the difficulties of my project, the centering of lesbians is in my view nevertheless a valuable, if imperfect, thought experiment. Lesbian legal theory does not result in a proscription telling lesbians (whoever we are) what to do or think. Rather, at its best, lesbian legal theory generates information and insights which can inform the choices lesbians make. Ideally, the results of lesbian legal theory should be of interest to those who identify themselves as lesbians and to those who care about lesbian survival. In the end, each lesbian, assuming she accepts the theoretical analysis as sound, should consider for herself whether in a particular instance she wishes to base her actions on the concerns that the theory identifies. In particular instances a lesbian may find the lesbian legal theory concerns to be of secondary importance, subsidiary to and perhaps inconsistent with concerns she may experience as a woman, as a person of a particular color or class, as a person of particular abilities, and so on. Alternatively, a lesbian might find the insights from lesbian legal theory informative, but not dispositive, so that they become part of the basis for choosing a course of action.

Ultimately, lesbian legal theory should be useful to lesbians. It should give us (and perhaps those concerned about us) insights to inform our choices. The conceptual problems identified above do not negate the possibility of lesbian legal theory. Rather, they are relevant to understanding the appropriate use of the theoretical insights by making clear limitations of lesbian legal theory and by explaining why lesbian legal theory is not

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22. ROBSON, SAPHO, *supra* note 3, 1–14; *see also id.* at 25–27.

23. *Id.*

24. Many have rightly criticized feminist essentialism. *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

25. *Id.*; *see also* Patricia A. Cain, *Lesbian Perspective, Lesbian Experience and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994).

proscriptive.

Moving from the foundational questions raised above, it is important to observe that "lesbian survival" also is a problematic term. "Lesbian survival" can be understood on at least two different levels, and these levels of understanding can yield contradictory results.<sup>26</sup> On the one hand, "lesbian survival" could focus on the day-to-day survival of any individual lesbian. Those things that promote her survival include those things that ensure her personal safety, her access to medical care, food and shelter, and her ability to maintain relationships with those she loves. Daily survival might require her to deny her lesbianism or to re-characterize her relationships in ways that fit a dominant model.<sup>27</sup>

Alternatively, "lesbian survival" could focus on the collective survival of lesbians as an identifiable social group. The strategies generated by a focus on the individual lesbian may directly conflict with those generated by a focus on the lesbian community. For example, it may enhance the safety and well-being of an individual lesbian to deny that she is a lesbian. Yet this conduct will probably not enhance the survival of the lesbian community since it denies the existence of or membership in that community. Indeed, it may very well undermine communal survival. Similarly, describing one's lover as the equivalent of a spouse may serve the needs of particular lesbians at particular times, but it may not serve the longer term interests of the lesbian community.<sup>28</sup>

In general, this Article will emphasize the focus on the survival of the community of lesbians as a whole, rather than on the individual lesbian. Given the infinite complexity of human existence, it seems that a vast array of actions might, at some point, be defensible as being in the interest of a particular lesbian at a particular time and place. Thus, using this as a focus is not particularly helpful in answering questions about what the law should be. The same is not the case when one focuses on the community. On a community level, it is possible to articulate problems generally and to propose solutions of general, if not universal, applicability. Fortunately, one does not need to resolve all of the questions that can be raised in order to engage in lesbian legal theory. Instead, one needs to keep them firmly in mind. That is precisely what this Article proposes to do.

Finally, there are two features explicitly inherent in the analysis of this Article. First, this is not *lesbian and gay* theory. The theory might generate some useful insights for gay men, but this is neither my intention nor my expectation. Indeed, there is some reason to suspect that, particularly in the area of parenthood, the results of lesbian legal theory may not be useful to

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26. Shapiro, *supra* note 3, at 18–19; ROBSON, (OUT)LAW, *supra* note 3, at 11.

27. Shapiro, *supra* note 3, at 18–19; ROBSON, (OUT)LAW, *supra* note 3, at 11.

28. Didi Herman, *Are We Family?: Lesbian Rights and Women's Liberation*, 28 OSGOODE HALL L.J. 789 (1990).



gay men. This is so because parenthood, as currently practiced in our culture and for a very long time in our history, is deeply gendered. Mothers and fathers are typically expected to play different roles in a child's life and often do play different roles. What makes a man a father is typically different from what makes a woman a mother.<sup>29</sup> For a variety of reasons that are beyond the scope of this Article, fatherhood is far more deeply identified with status as progenitor. As I propose to eliminate the significance of the progenitor status in determining parenthood, my analysis will have different implications for men and women. I want to acknowledge this at the outset and make clear that my project is not to perform an analysis with regard to gay men or with regard to men generally.

Second, and perhaps more controversially, my analysis is not a child centered analysis.<sup>30</sup> Child centered analyses are popular, and for good reason. Children are typically understood to be innocent actors. Therefore, to propose legal reforms centered on their interests is to stand on unassailable ground. Be that as it may, this is not the ground I have chosen. It may be that what serves lesbian survival also serves the well-being of children, but it may not be so. Certainly, before taking action, one might wish to consider the impact of particular legal changes on children. That is a consideration individuals would make in determining the extent to which lesbian legal theory might inform their actions. In the development of lesbian legal theory as it relates to parenthood, however, allowing concern about the well-being of children to enter the analysis will only muddy the waters.

I do not mean to suggest that all lesbians should or will embrace the conclusions that lesbian legal theory generates, if and when those conclusions conflict with the interests of children. Indeed, some or even most lesbians may decide that, whatever their interests may be as lesbians, they prefer a child-centered view. My point here is that lesbians ought to think about how the law might be shaped if lesbians were at the center instead of at the margins.

### III. THE CRITIQUE OF BIOLOGY

Challenging the primacy of the biological link as the defining factor in parenthood was a necessary step in order for lesbians to raise children within

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29. One need only consider the different meanings of the verbs "to mother" and "to father" to see that this is so.

30. For a prime example of a child-centered analysis, see Woodhouse, *supra* note 7. The analysis Professor Woodhouse employs in her article is in some ways analogous to that presented here, centering children instead of lesbians. It is interesting to note that she, too, challenges the primacy accorded the genetic link, finding that it does not serve the well-being of children. She stops short, however, of arguing that it should be irrelevant in the determination of parenthood. See *id.* at 1778; see also Carbone & Cahn, *supra* note 4.

their own families.<sup>31</sup> Human procreation requires genetic material from a man. Yet many, if not most lesbians planning their own families, whether alone or with a partner or in some other configuration, did not want the involvement of a man. Where donor involvement was desired, it was often as an "uncle" or special family friend, not as a parent. Thus, the sperm donor was not intended to be a father.<sup>32</sup> This required, and continues to require the denial of parental rights based purely on genetics.<sup>33</sup> Ensuring the integrity of lesbian families in a world in which courts are often hostile to lesbians requires a general denial that status as a progenitor in and of itself gives a man standing to claim rights as a parent.

A second reason for lesbians to challenge the primacy of genetic linkage was also readily apparent. Just as many lesbians might have wanted to deny the parental role of the sperm donor, many also wanted to affirm the parental role of the "non-biological mother."<sup>34</sup> If two women wanted to raise a child together with each of them recognized, socially and legally, as the child's mother, then they had to develop a model of parenthood that did not depend on biology. There was not the same specific need to deny the significance of biology which, after all, could form the basis for one woman's claim. It did, however, require advancing an alternative and equally powerful basis for parenthood.<sup>35</sup>

More than ten years ago, Paula Ettelbrick called for the development of "lesbian conscious" family law.<sup>36</sup> Ettelbrick noted that "[t]he experience of lesbians having children cannot be addressed by trying to fit them into a family law system that is so resolutely heterosexual in its structure and

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31. There are instances in which the genetic link may actually work for lesbians. If a lesbian becomes a parent in a heterosexual relationship, she may invoke the privileges of being the genetic (as well as the social and the legal) mother in order to protect her relationship with the child at the end of the heterosexual relationship. But it is not clear that these protections, to the extent they exist, depend on her genetic relationship with the child, or that the genetic connection she can invoke will protect her status. See Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996).

32. See, e.g., *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993). Preferred terminology follows this pattern. The provider of sperm is a "donor" and not a "father." Similar language, avoiding words based on parentage, are used in ART generally, for example, the use of "carrier" instead of "surrogate mother."

33. The law has for some time accommodated this need, driven not by concern for lesbian families, but by the establishment of ART as a viable and valuable industry. See generally Part III, *infra*.

34. This is a potentially problematic term. See Shapiro, *supra* note 3, at n.27.

35. See Nancy Polikoff, *This Child Does Have Two Mothers, Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990). Professor Polikoff's article is one of the ground-breaking and foundational articles in lesbian-centered family law.

36. Paula Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993).

presumptions.”<sup>37</sup> As a part of her new system of family law, Ettelbrick clearly challenged the primacy of biology as a defining factor of parenthood. “Rules that presume that the biological connection between parent and child outweighs all other claims to parenting . . . eliminate the possibility that the relationship between a non-biological lesbian mother and the child she is raising with her partner will ever be recognized.”<sup>38</sup>

Ettelbrick recognized the need to reject biology as the ultimate criteria for determining parenthood. She saw with striking clarity the problems that lingering faith in biological supremacy would create:

In a lesbian family context, biology must be separated from the determination of who is a parent. In custody or visitation disputes with the non-biological mother, where both have clearly agreed to share parenting, the biological lesbian mother should not have the legal advantage solely because of the legal privilege that her genetic link provides her. Insistence that biological mothers retain that privilege defies the very agreements entered into by a great number of lesbian co-parents themselves, whose desire it is that both of them be recognized by law. . . . Giving legal preference to the biological lesbian mother will maintain an unequal, and in this context an inequitable, status between the two women. The biological mother retains the power of knowing that the existing legal system will back her up, at least vis-à-vis the non-biological mother.<sup>39</sup>

Ettelbrick wrote at a time when lesbian parents were significantly disadvantaged in many ways. Lesbians, both legal and social mothers, were denied custody of and/or visitation with their children because they were lesbians.<sup>40</sup> The legally protected status of a parent rarely applied to both child-rearing lesbian partners. In addition, the institutions of society with which families must interact (schools, doctor’s offices, government offices of various kinds and so on) were determinedly oblivious to these “non-traditional” families.

Much has changed since Ettelbrick wrote. Today, there is a well-documented lesbian baby boom. Custody rules are now more typically lesbian-neutral. Second-parent adoptions, while still unavailable universally, are now commonplace in a large number of communities. Schools, doctors’ offices, and various institutions routinely acknowledge the complex family

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37. *Id.* at 514.

38. *Id.* at 516.

39. *Id.* at 546–47 (footnotes omitted). Somewhat surprisingly, Ettelbrick proposes a set of criteria that continue to grant primacy to the progenitor. *Id.* at 547–51. She emphasizes, for example, the need to be sure of the “biological mother’s” consent to the co-parenting relationship. *Id.* at 550. Ettelbrick recognizes the distinction she is drawing, but perhaps it is one that should still be open to question.

40. See Shapiro, *supra* note 31.

configurations of many children. In a number of cases, courts have in fact recognized the parental status of lesbians who have raised children with their partners without a completed adoption.<sup>41</sup>

Additionally, the prohibition against same sex marriage is under pressure. Massachusetts now permits lesbians couples to marry, as do a number of foreign jurisdictions, including Canada and, most recently, South Africa.<sup>42</sup> Cases challenging the prohibition on marriage are pending in Washington, New York, New Jersey and California.<sup>43</sup> Vermont, California, Hawaii, and Connecticut have created institutions analogous to marriage—institutions such as civil unions, domestic partnerships, or a recognized status as a reciprocal beneficiary.<sup>44</sup> Additionally, the California legislature recently approved legislation that would permit marriage between people of the same sex.<sup>45</sup> Thus, there is increased legal recognition for at least some lesbian families.

While all of this has been happening, those in power have neglected the lesbian critique of biology as the defining factor of parenthood. Yet there are continuing problems of built-in inequality attributable to the presumed significance of the genetic tie. Even after a second parent adoption is completed and a second woman's claim as a parent is recognized, a preference for the mother who can claim genetic linkage remains. In common speech, she is often referred to as the "real" mother.<sup>46</sup>

More troubling is the frequency of intra-lesbian custody cases.<sup>47</sup> These

41. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004).

42. Kevin Bourassa & Joe Varnell, *It's a Quiet Thing: Equal Marriage Is Law*, EQUAL MARRIAGE FOR SAME-SEX COUPLES, July 21, 2005, <http://www.samesexmarriage.ca/legal/qui210705.htm> (describing the passage of Canadian legislation permitting marriage equality for same-sex partners); *Lesbian Marriage Gets the Nod*, NEWS24, Nov. 30, 2004, [http://www.news24.com/News24/South\\_Africa/News/0,2-7-1442\\_1628956,00.html](http://www.news24.com/News24/South_Africa/News/0,2-7-1442_1628956,00.html) (describing the decision by South Africa's Supreme Court of Appeal to recognize the rights of same-sex partners to marry). Massachusetts Trial Court Law Libraries, Mass. Law about Same-Sex Marriage, <http://www.lawlib.state.ma.us/gaymarriage.html> (last visited Mar. 5, 2006) (compiling caselaw and statutory laws on same-sex marriage rights applicable to Massachusetts).

43. It is also true, of course, that many states have adopted constitutional amendments prohibiting same-sex marriage. The perception that these amendments are necessary, however, is fueled by the perception that there is growing pressure to permit same-sex marriage.

44. Same-Sex Marriage, Wikipedia: the Free Encyclopedia, [http://en.wikipedia.org/wiki/Same-sex\\_marriage](http://en.wikipedia.org/wiki/Same-sex_marriage) (last visited Mar. 5, 2006) (listing Vermont, California, Hawaii, and Connecticut as states offering legal recognition of same-sex couples).

45. California's governor vetoed the legislation.

46. This is precisely the type of inequity Ettelbrick foresaw. See text accompanying notes 36–39, *supra*.

47. These intra-lesbian custody cases outnumber the more conventional cases on the docket of the National Center for Lesbian Rights (NCLR). See National Center for Lesbian Rights, NCLR's Docket: Family Law / Parenting Cases (Feb. 2005), <http://www.nclrights.org/cases/pr.htm>. NCLR is the only national legal organization focused exclusively on issues of concern to lesbians. It is

cases most commonly begin with the assertion by a genetically-related mother that she alone is the parent of the child.<sup>48</sup> Our continued attachment to genetic linkage as a component of parenthood supports the sense of entitlement underlying the genetically related mother's assertion of these claims and thus likely increases the frequency with which they occur.<sup>49</sup>

These intra-lesbian cases should be of concern to all of us. We live in a time when extreme political polarization has placed lesbians in jeopardy in many states and in many contexts. Yet at this very time the National Center for Lesbian Rights (NCLR), the only national lesbian rights organization, is forced to devote significant resources to intra-lesbian custody disputes. Diminishing the significance we attach to genetic linkage might help embed a more egalitarian ethic among separating lesbian parents. At a minimum, lesbian custody cases might come to resemble heterosexual custody cases, where the disputants focus on the particulars of the case rather than on broad assertions about the invalidity of one party's claim.

Several other implications of loosening the genetic tie are worth noting. The diminishing importance of the genetic link could well lead to a loosening of the attachment to the "only two parents" model. This model has been under pressure due to the social developments discussed below.<sup>50</sup> Adherence to the "only two parents" model has been based in large part on the formulation that every child has two and only two progenitors, one of each sex. The equation of progenitors with parents has made imposition of the "only two parents" model seem "natural." If instead we understand that the child has two progenitors, but that those progenitors are not necessarily the child's parents, this understanding might loosen the hold of the "only

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obviously problematic that significant resources must be devoted to intra-lesbian litigation, particularly given the degree to which legal needs outstrip legal services for so many lesbians. Equally troubling, anti-lesbian organizations like the Alliance Defense Fund have undertaken representation of genetically related lesbian mothers in these intra-lesbian cases. See Alliance Defense Fund, Same-Sex "Marriage," <http://www.alliancedefensefund.org/issues/TraditionalFamily/samesexmarriage.aspx>. See also Press Release, Alliance Defense Fund, ADF Asks U.S. Supreme Court to Hear "Psychological Parenting" Case (Feb. 2, 2006), <http://www.alliancedefensefund.org/news/story.aspx?cid=3672>.

48. In a small number of instances, the cases begin with an assertion that the genetically unrelated mother is obliged to pay child support. See, e.g., *Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005). Though less common, these cases are also troubling. The defendant's denial of parental status and hence, obligation, rests on the absence of a genetic link to the child as well as on other factors.

49. Here, too, Ettelbrick was prescient. See text accompanying notes 36–39, *supra*. I do not mean to suggest that there would not be custody disputes between lesbian parents were it not for our continuing attachment to genetic linkage as a component of parenthood. But it is notable that in cases involving heterosexual couples both of whom have genetic contentions, contestants rarely assert that their opponent is not a parent. These conventional custody cases are fact specific and do not establish broad rules disqualifying classes of people from recognition as parents. By contrast, the intra-lesbian custody cases discussed here have broad ramifications for lesbian survival generally.

50. See also Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

two parents" model, and allow the law to accommodate itself more closely to social reality.

Finally, the most visible lesbian legal issue of the moment is, of course, access to legally-recognized marriage.<sup>51</sup> From the moment the Massachusetts Supreme Judicial Court recognized the right of lesbians and gay men to marry,<sup>52</sup> this issue has consistently been on the front pages of newspapers across the country. The legal arguments for and against gay or lesbian marriage are interwoven with assumptions, arguments, and the existing law about lesbians as parents.<sup>53</sup>

Whatever standard of review<sup>54</sup> a court elects to use, the state must offer some justification for restricting access to marriage apart from anti-lesbian bias. One primary justification offered has to do with children and the asserted superiority of a heterosexual marital household.<sup>55</sup> Lesbian and gay advocates counter with the observation that significant numbers of lesbians and gay men already have children. That observation is then coupled with the popular belief that children fare better in married rather than unmarried households to support the conclusion that marriage between lesbians and between gay men (or at least between those who are parents) should be permissible.<sup>56</sup>

In response, those defending marriage restrictions attempt to articulate some particular benefit from being raised by married, *biological* parents. In other words, the importance of parents possessing a genetic relationship to their children is offered as a justification for restricting marriage access.<sup>57</sup> Thus, challenging the importance of the genetic tie is an important aspect of the marriage cases.

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51. See generally Julie Shapiro, *Reflections on Complicity*, 9 N.Y. CITY. L. REV. 1901 (2005).

52. Goodridge v. Department of Public Health, 798 N.E. 2d 941 (Mass. 2005).

53. See Shapiro, *supra* note 51, at 1919–21.

54. I mean here strict scrutiny, intermediate scrutiny, or rational basis scrutiny.

55. Kathy Belge, *Lesbian and Gay Marriage: Both Sides of the Issue*, LESBIAN LIFE, <http://lesbianlife.about.com/cs/wedding/a/marriage.htm> (last visited Mar. 5, 2006).

56. There is obvious (and sometimes savored) irony in using a position generally promoted by social conservatives as the linchpin of an argument in support of marriage access for lesbians and gay men. The assertion that it is better for children if their parents are married is controversial. Those who do not accept it tend to be on the socially liberal end of the political spectrum; for social conservatives, the assertion is an article of faith.

57. The initial response to such an argument is usually that, even if it were true, permitting lesbians and gay men to marry would not weaken this link, nor would it deter heterosexual couples with children from marrying.

#### IV. CHANGING TECHNOLOGY AND CHANGING SOCIAL PATTERNS HAVE CREATED OPPORTUNITIES FOR CHANGE

Apart from the fact that there is a need to revisit this area, it is also an opportune moment for this task. The last three decades have brought advances in reproductive and genetic technologies, and have wrought far-reaching changes in how we think about the definition of parents within social and legal contexts.<sup>58</sup> Hardly a month goes by without some widely publicized case presenting curious facts in new contexts that raise questions of parenthood.<sup>59</sup>

Two separate branches of technology are critical in this legal area. First, reproductive technologies have allowed for the creation of children in ways previously unthinkable—children born from donor sperm, donor eggs and from embryos created outside the uterus and then implanted into the uterus of a genetically unrelated woman. We may well stand on the threshold of even more radical developments—cloning, for example—which might allow us to create children without even using genetic material from two different pre-existing people. Even without considering the future, the changes we have already seen have raised controversial issues aplenty.

The second area in which technology has raised new and disruptive questions is the area of genetic mapping and testing. We are now able to identify those individuals who have in fact provided the genetic materials for the creation of a child with a very high degree of precision. This in turn has allowed us (and sometimes requires us) to assess the reliability of the assumptions about genetic relationships we have made for many, many years. The following sections will briefly discuss each of these technologies and identify the challenges they raise for the legal system. In addition, the sections will consider some of the basic responses of the legal system.

##### *A. Reproductive Technologies*

The past thirty years have seen both the development and proliferation of technologies for assisted reproduction. Of these, Artificial Insemination

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58. I have considered these developments in an earlier publication. See Julie Shapiro, *Changing Ways: New Technologies and the Devaluation of the Genetic Connection to Children*, in *FAMILY LAW AND FAMILY VALUES* (Mavis Maclean ed., 2005).

59. See, e.g., *Rice v. Flynn*, 2005 WL 2140576 (Ohio Ct. App. 2005). The case involved competing claims of parenthood between one man and two women which led to adjudication by both Pennsylvania and Ohio courts. The man contacted the women through a surrogacy agency; one woman was to serve as an egg donor, the other as a surrogate. Neither woman originally intended to be a parent, although both filed claims for custody after the birth of triplets. Both courts seem to readily assume that the sperm donor is unquestionably a parent while the two women must compete for the remaining parental role. This unreflective assumption evidences the deeply gendered nature of parenthood. Because he is the only male, the sperm donor must be the father. The question is then reduced to which of the two women is the mother.

by Donor (AID) is the least technologically complex and the most common. While alternative insemination has been available for quite some time, the enhanced ability to store sperm for significant periods of time, coupled with the development of a lucrative commercial market for such services, has dramatically increased availability of this technology. If the sperm used to inseminate a woman is obtained from her husband, who then functions as the social father of the child created, alternative insemination poses little challenge to our thinking about traditional parenthood. All of the methods that might be used to determine the parents of the child lead to the same two individuals in such a case.

However, alternative insemination frequently utilizes sperm obtained from a donor (most typically an anonymous donor) who is intended to have neither a legal nor social connection to any resulting child. A woman using such a service might be a single woman seeking to have and raise a child by herself, a woman who is a part of a heterosexual partnership in which her male partner intends to serve as a parent to the child but is himself unable to provide sperm, or a woman who is part of a lesbian relationship, whose female partner intends to serve as parent to the child. Notably, in each of these instances, the donor is not intended to function as a parent, despite the fact that the donor will have a genetic link to any child produced by the insemination.

The legal response to the use of reproductive technology is epitomized by the Uniform Parentage Act (UPA).<sup>60</sup> The 2002 version of the UPA clearly provides that a sperm donor is not the parent of any resulting child.<sup>61</sup> Thus, under the UPA, the legal significance of the genetic link is entirely erased for children born of ART. Consistent with the conclusion that parental rights do not inhere in being a sperm provider, sperm is freely bought and sold, just as blood and hair can be. Indeed, a substantial industry focused on the provision of sperm has developed.

While AID may be the most common form of ART, other more complex technologies are also readily available, such as in vitro fertilization (IVF). IVF depends on the ability to "harvest" eggs from a woman's ovaries. The eggs are then fertilized and the fertilized eggs are then placed in a woman's uterus. The woman then gestates and gives birth to the child. The egg donor and the birth mother may or may not be the same person. The woman intending to raise the child may be the egg donor, the birth mother,

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60. UNIF. PARENTAGE ACT (UPA) § 702 (2000). The original version of the UPA, published in 1973, was adopted in some form by most of the states. A new version was published in 2000, and some of the significant sections of the UPA were revised again in 2002. These newer versions have yet to be adopted by more than two or three jurisdictions. Nevertheless, many state codes contain provisions similar to those found in the 2000 or 2002 UPA drafts.

61. UPA § 702 provides: "A donor is not a parent of a child conceived by means of assisted reproduction." Note that this section applies to women who donate eggs as well as men who donate sperm. *Id.*



or a third person. If one woman occupies all three roles, then as with the case of the sperm donor/social father, the technology poses little challenge to our thinking. It is simply a different path to the same end of a unified social and genetic parent. If two or more women are involved, however, then society and the law must determine the status of the women involved—the egg donor, the surrogate mother, and the intended parent.

Most obviously, the egg donor can be viewed in a position analogous to a sperm donor.<sup>62</sup> This suggests that the legal analysis of the egg donor's status would proceed along similar lines as that for a sperm donor—in particular, reaching the general conclusion that she is not a parent, despite the existence of a genetic link. Again, it seems likely that the development of a profitable market for the purchase and sale of eggs may help explain our readiness to discount the genetic link in this instance.

Ultimately, removing the “genetic link” requirement from the definition of parenthood is necessary for the creation of a market for reproductive materials. In the United States, the selling of children or the selling of parental rights is widely agreed to be unacceptable. If selling reproductive materials is to be acceptable (and profitable), it cannot be equated with selling parental rights. At the same time, the extensive and highly publicized markets for reproductive materials<sup>63</sup> reinforce the sense that no parental right inheres in the genetic material itself. Thus, these new technologies, driven by market forces, have devalued and in some instances erased the legal and perhaps even social significance of the genetic link between an adult and a child.

### *B. Genetic Mapping and Screening*

Advanced techniques now enable us to establish, with a high degree of certainty, which individuals actually provided the genetic material that created a child. Not only are such techniques technologically feasible, they have become increasingly visible, as it is now common for popular television talk shows to entertain viewers with the spectacle of men being confronted with the results of DNA testing of those they believe (or deny) to be “their” children. These developments undermine the significance of the genetic link requirement in a distinctive way.<sup>64</sup> We are now confronted with

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62. *Id.* The positions are analogous in that in each case the donor has provided his or her genetic material for use by another for the purpose of creating a child. The analogy fails to take into account the difference in the process by which the sperm and the eggs are collected and the impact of the donation on the donor. While these differences are reflected in the market price for sperm as opposed to eggs, they are generally ignored in considering the parental status of sperm and egg donors. The new UPA treats all donors, male and female, the same. Donors are not parents. *Id.*

63. Major newspapers and magazines frequently contain ads soliciting either buyers or sellers.

64. Paradoxically, the same technology can also reinforce the importance of the genetic tie.

a disjunction between social and legal parenting and the genetic tie. Once, we would have had no reason to address this discontinuity, content that the social and legal parent also possessed a genetic link to the child. Now, we must come to terms with it.<sup>65</sup> This forces us to consider whether our incorrect assumption about the genetic tie means that our legal or social conclusions about the identity of a child's parents are also incorrect. Sometimes those conclusions are indeed incorrect, but sometimes they are not. That is, sometimes we conclude that we were right all along about who the parent of the child was, and that therefore the genetic tie is not the critical factor.<sup>66</sup>

Of course, the idea that people might parent a child to whom they have no genetic link is hardly a new one.<sup>67</sup> Adoption and fostering are ancient practices in which adults parent a child knowing they are not genetically linked to the child. Nevertheless, in the United States today, adoptive parents and foster parents must follow specific steps in order to gain legal recognition of their parenthood.<sup>68</sup> They stand in contrast to "natural" parents who presumably derive their status not from the operation of the law but from nature itself.

The defining characteristic of natural parents is their genetic connection to their children. Thus, it is disruptive to discover that perceived "natural parents" have in fact no genetic ties to their children. Do they cease to be parents in the eyes of society or the law? This is the question thrust upon us by genetic testing. At a minimum, it forces us to re-evaluate the real importance of a genetic link between parent and child.<sup>69</sup>

The capacity to read our genes may also change the significance of the genetic link in another way. Once, knowing one's genetic origins was

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Because they make it possible to know, they can make people more secure in their claim to be parents.

65. This is most typically a problem with regard to fatherhood. But it is not exclusively so. There are instances in which babies have been switched, whether inadvertently or otherwise, in the hospital and each has gone home with a set of parents not genetically related to them. When genetic testing reveals to us the genetic reality we must confront the same disjunction.

66. This is reflected in the changes made in drafts of the UPA between 2000 and 2002. In the 2000 version, the UPA relied on marriage or genetic certainty to establish paternity for children conceived through sexual intercourse. Thus, section 204 did not presume fatherhood for a man who held out a child as his own. UNIF. PARENTAGE ACT § 204 (2000). But the 2002 draft was changed to include section 204(a)(5), a provision providing for a presumption of paternity premised on "holding out" or acting like a father. UNIF. PARENTAGE ACT § 204 (a)(5) (Supp. 2005).

67. See generally Woodhouse, *supra* note 7.

68. See, e.g., Adoption, WASH. REV. CODE ANN. § 26.33 (2005); Adoption, IOWA CODE § 600.1-600.25 (1999).

69. There are in fact a small number of legal cases involving switched infants. In general, the legal definition of parenthood has followed the genetic link. But courts have not reached this conclusion without some difficulty. And in at least one case, the newly ordained legal parents agreed to leave the child with her social parents, suggesting the limited importance of the genetic tie. See Justin Blum & Michael Shaw, *Of One Mind on Two Children*, WASH. POST, Aug. 5, 1993, at B1.

important for, among other reasons, the ability it gave one to construct a medical history. We could make certain inferences about the potential health risks a child faced from information about the health of his or her genetic ancestors. Thus, if three closely related relatives had breast cancer at an early age, the likelihood that a child might be at a greater risk of early onset of breast cancer increased.

Soon, however, technology will allow us to know our own genetic codes. Instead of constructing probabilities about our own genetic proclivities from the histories of our ancestors, we will be able to directly examine our genes for risk factors. Thus, a pragmatic reason for valuing the genetic link (or at least information about the genetic link) may dissolve.

### *C. The Changing Social and Legal Scene*

As technologies have emerged and evolved, social struggles over the meaning of family have continued. The myth of the nuclear family may indeed have always been a myth, but its status as such has become increasingly clear over the last thirty years. Rising divorce and subsequent remarriage rates have vastly increased the number of "blended families."<sup>70</sup> The incidence of children born outside of marriage is also high.<sup>71</sup> In the last twenty years there has also been a significant surge in the number of lesbians and gay men raising children, whether in one-parent or two-parent families.<sup>72</sup> While lesbian and gay people have undoubtedly always raised children (typically children born into an earlier heterosexual relationship) there are now growing numbers of planned lesbian and gay families—often made possible through some of the new technology discussed above.<sup>73</sup> These families have also gained heightened visibility, in part as a result of the culture wars over their existence and legal recognition.<sup>74</sup>

For all of these reasons, there are increasingly large and visible numbers of people who act like parents, who are socially recognized as parents, and who have sought and perhaps even won legal recognition as parents, but yet have no genetic link to their children. They may describe themselves as step-parents or non-biological mothers or adoptive parents, but they are all

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70. HEATHER JUBY, *A STEP FURTHER: PARENTHOOD IN BLENDED FAMILIES* (2001), <http://sociology.uwo.ca/sociology/ftsc/Gratton%20et%20al.%202001%20PAA%20Paper.pdf>.

71. ELIZABETH TERRY-HUMEN, *BIRTHS OUTSIDE OF MARRIAGE: PERCEPTIONS VS. REALITY* (Apr. 2001), [http://www.childtrends.org/Files/rb\\_032601.pdf](http://www.childtrends.org/Files/rb_032601.pdf).

72. *Same-Sex Adoption*, FINDLAW.COM, <http://family.findlaw.com/adoption/same-sex-adoption/same-sex-adoption-intro.html> (last visited Mar. 5, 2006).

73. *Id.*

74. David Crary, *Step by Step, Nontraditional Families Gain Greater Legal Recognition and Rights*, SFGATE, Aug. 3, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/08/03/national1215EDT0445.DTL>.

parents. With increasing frequency they are appearing on soccer fields, at PTA meetings, and at doctor's offices, as well as on television sitcoms, magazine covers and best seller lists.

One notable instance is *Michael H. v. Gerald D.*<sup>75</sup> The case affirms the use of an ancient irrebutable presumption in favor of the paternity of a mother's husband, even in the face of strong scientific evidence that the husband was not the biological father.<sup>76</sup> Once the presumption might have served as a way to ensure certainty in cases where there was no way to determine parentage for sure. This is no longer the case, as DNA testing clearly allows us to determine status as a progenitor with certainty. Thus, the case must be read as an assertion that biology is not, at least in this case, related to parenthood, or, if it is related, it is subsidiary to other factors. Gerald D., who had no genetic relationship with the child, was found to be the child's legal father.<sup>77</sup>

The changes discussed above are reflected not only in social practice, but in case law as well. The law has struggled to keep up with changing technology and social forces. In many instances, legal recognition has lagged significantly behind social recognition, but in a notable number of cases, the law has recognized parents without any genetic connection to their children.<sup>78</sup> Similarly, there are a number of cases in which the presence of the genetic tie does not entitle the person to parental status.<sup>79</sup>

Beyond the cases involving lesbian parentage, cases illustrating the increasingly contested relationship between genetics and parenthood can be found in other areas of family law. In *In re Nicholas H.*, the Supreme Court of California recognized a man who was not (and had always known he was not) the progenitor as the child's father.<sup>80</sup> Despite the absence of a genetic relationship and his awareness of that absence, he had served as the child's social parent for most of the child's life.<sup>81</sup> The court awarded the man custody of the child over the objections of the child's mother, finding that the lack of a genetic relationship with the child was less important than the presumption of fatherhood that arose from his social relationship with the child.<sup>82</sup> In seeking custody, the child's mother advanced the progenitor<sup>83</sup> of

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

76. *Id.*

77. *Id.*

78. See, e.g., *supra* note 41.

79. *Gerald D.*, 491 U.S. at 115; *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

80. *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002).

81. *Id.*

82. *Id.*

83. This is an instance in which the use of the term "biological father" can hardly advance

the child (who had never served as the social parent of the child) as an alternate candidate for parenthood. *In the Interest of T.S.S.*, decided by the Texas Supreme Court, provides an interesting contrast.<sup>84</sup> A man who had served as the social father of a child for ten years learned that he was not the progenitor of the child, and sought an order terminating his parental relationship with the child.<sup>85</sup> The Texas court found him to be the father of the child despite the absence of any genetic linkage. The court noted that "[a]lthough DNA testing may provide a bright line for determining the biological relationship between a man and a child, it does not and cannot define the human relationship between a father and child."<sup>86</sup>

Where the law has preferred genetic forebears to social parents, it has occasionally faced criticism. For example, several years ago, courts in Michigan and Illinois were confronted with remarkably similar cases.<sup>87</sup> In both cases a child had been placed with a planned adoptive family shortly after its birth, and the birth mother relinquished her rights to parenthood.<sup>88</sup> Then, in both cases, several years after placement, the genetic father (in each case the original mother's then-boyfriend) stepped forward to claim parental rights, in conjunction with the original mother's reassertion of her own claim.<sup>89</sup> In neither case had the man's genetically based parental rights been properly terminated.<sup>90</sup> In both cases, the courts observed that the intended adoptive parents had functioned in every way as the child's social parents for the majority of each child's life.<sup>91</sup> However, neither court found a way to deny the overwhelming significance of the new male claimant's genetic link to the child.<sup>92</sup> In both cases, therefore, the courts declared the genetic progenitors to be legal fathers entitled to assert custody rights as against the adoptive parents (the social parents) of the child, and in both instances,

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the clarity of the analysis.

84. *In the Interest of T.S.S.*, 61 S.W.3d 481 (Tex. 2002).

85. *Id.*

86. *Id.* (quoting *Stitham v. Henderson*, 768 A.2d 598, 606 (Me. 2001)). In *re Nicholas H.* and *In the Interest of T.S.S.* do arise in distinctly different contexts. In the California case (*In re Nicholas H.*), a man sought to be declared the father of a child who would otherwise, in the view of the court, have no suitable home. Thus the court was undoubtedly predisposed to find him the father. In the Texas case (*In the Interest of T.S.S.*), a man sought to terminate his obligation to support a child where there was no other available candidate, giving the court reason to deny his request.

87. *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993); *In re Kirchner*, 649 N.E.2d 324 (Ill. 1996).

88. *Baby Girl Clausen*, 502 N.W.2d at 657; *Kirchner*, 649 N.E.2d at 325–26.

89. *Baby Girl Clausen*, 502 N.W.2d at 658; *Kirchner*, 649 N.E.2d at 327.

90. *Baby Girl Clausen*, 502 N.W.2d at 658; *Kirchner*, 649 N.E.2d at 332–39.

91. *Baby Girl Clausen*, 502 N.W.2d at 685–86; *Kirchner*, 649 N.E.2d at 339.

92. *Baby Girl Clausen*, 502 N.W.2d at 684–85; *Kirchner*, 649 N.E.2d at 333–34.

custody of the child was indeed transferred.<sup>93</sup>

Local and national media closely followed these cases, and as the time for the change in custody drew near and as avenues for legal appeal were exhausted, the press coverage mounted.<sup>94</sup> The coverage vastly favored leaving the children with the families they had known and minimized the significance of the genetic tie that was the basis for the legal result. Public outcry following the cases led both states to enact altered statutes in their aftermath, and the new statutes reflected an increased recognition of social parents and decreased status for those with genetic connections to children who have not functioned as social parents.

## V. CONCLUSION

The importance of a genetic link in defining parentage is already diminishing. It would promote lesbian survival if it continued to do so. As the importance of genetic linkage in establishing parental status diminishes, an alternate explanation for determining parental status must rise to take its place. Courts continue to face the necessity of identifying the parents of a child, and will need to do so in the future.<sup>95</sup> Among the possible alternatives for establishing parental status are intention and function; each are worthy of consideration and analysis, but both are beyond the scope of this Article.

Moving away from reliance on a genetic link to define parenthood also raises the possibility of increasing numbers of fatherless and even parentless children.<sup>96</sup> As long as parenthood is conferred by genetic relationship, all children have parents, though it may be difficult to identify them and they may not perform their social roles. On the other hand, if parenthood does not depend on genetics, but instead depends on either function or intention, or some combination of both, the prospect of parentless children is manifest.

That prospect might seem to be a problem of such magnitude that it immediately disqualifies any theory that could produce such a result. It is not theory that creates fatherless or parentless children, however, it is the social reality that there are children for whom no one functions as a parent or intends to do so. While this is indeed distressing, it is not remedied in any

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93. *Baby Girl Clausen*, 502 N.W.2d at 691-93; *Kirchner*, 649 N.E.2d at 340.

94. John O'Connor, *Dramatizing the Battle to Bring up Baby Jessica*, N.Y. TIMES, Sept. 24, 1993, at D18; Don Terry, *Storm Rages in Chicago Over Revoked Adoption*, N.Y. TIMES, July 15, 1994, at A1.

95. It is challenging, but interesting, to try to imagine a world without parents or perhaps one with a vastly different notion of parenthood. Courts are unlikely to enter that world any time in the near future, however.

96. In the United States there is already considerable anxiety about fatherless children. Generally, fatherless children are those who have no male playing the role of social father, and a significant part of the concern arises from the fact that those children often live in poverty and may well end up requiring public support.

real way by identifying the progenitor and labeling him or her as a legal parent. Calling someone a parent does not make them function as such. The real problem is the absence of any individuals willing to perform the role.

Even so, these concerns are not the concerns of lesbian legal theory. Lesbian legal theory demands that we begin and end by considering what will enhance lesbian survival.<sup>97</sup> Lesbian survival is enhanced by de-emphasizing genetic linkage as a characteristic of parents. This does not mean that the genetic linkage would retain no force in the law or in our lives—it obviously does, and in all likelihood will continue to do so. Adopted children sometimes search out their progenitors, often overcoming substantial difficulties.<sup>98</sup> This demonstrates the social importance of genetic linkage. It does not, however, demonstrate that those sought out are social “parents.”

The presence of genetic linkage should be of no relevance in determining parenthood. The law might choose to give genetic linkage some legal significance, perhaps by creating certain kinds of legal obligations tied to genetic linkage. For example, the law could create an obligation to provide a family medical history to a child by virtue of the fact of genetic linkage. Obligations can nonetheless be recognized absent parental status.

Decoupling biology from parenthood increases the options available to lesbians.<sup>99</sup> Lesbian legal theory demands that we critically assess the choices we make. The ways in which people, and in particular, lesbians, understand the significance of genetic linkages need to be called into question. It is time to sever the linkage between status as a progenitor and status as a parent.

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97. Shapiro, *supra* note 3, at 17, 18 n.8 (quoting Ruthann Robson, *Convictions: Theorizing Lesbians and Criminal Justice*, in *LEGAL INVERSIONS* (Didi Herman & Carl Stychin eds., 1995)).

98. See, e.g., Bob Bazet, *Adopted: My Story*, <http://adoption.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=adoption&zuh=http%3A%2F%2Fwww.seniornet.org%2Fgallery%2Fpatscott%2Flifestyles%2Fadoption%2Fbazet.htm> (last visited Mar. 5, 2006).

99. For those who think it is important for a child to know her or his genetic origins, this may have wider benefits. Currently, concerns about legal and or social claims from the donor drive many lesbians to choose anonymous donors who can never be identified. If we decoupled parenthood, these concerns would be diminished. Knowing the donor would not present another candidate for parenthood, whether legal or social. Therefore, it might be easier for some to choose a known donor, thus allowing the child knowledge of her or his progenitor.