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Genetic Essentialism in Family Law

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GENETIC ESSENTIALISM IN FAMILY LAW

Jennifer S. Hendricks[†]

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An irony of the age of reproductive technology is that genes have gained symbolic importance and legal weight at the same time that we have acquired the ability to manipulate, alter, and exchange them. One manifestation of genes' increased importance is the increasing commitment—again, in both law and culture—to genes as the essence, the *sine qua non*, the definitional element of parenthood. This commitment, which I refer to as genetic essentialism,¹ has proceeded apace despite, and in seeming contradiction with, the commodification of reproduction, complete with markets in eggs and sperm. Neoliberal culture, however, does not necessarily register degradation when genes are bought and sold. Markets, competition, and high prices confirm rather than diminish value, if not of the genes themselves than of the owners. To be a parent is increasingly defined as having either produced the gametes or paid for them. “Genetic essentialism” thus refers primarily to the definition of parenthood in terms of genes, but it also encompasses genes' alienability and the consequent fungibility.

Lost in these developments are definitions of parenthood on terms other than genes and contract. My particular concern is the sidelining of gestation as a fundamental form of parenthood. Peruse the legal literature and you will find the term “biological parent” used almost

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1. Cf. Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, and Law*, 12 COLUM. J. GENDER & L. 1, 4 (2003) (“Genetic essentialism asserts that our genes and our DNA are the essence, the core, the most important constituent part of who we are as human beings; therefore genetics should overpower any other factor when defining biological parenthood. Genetic essentialism reduces human beings to the contents of our cells. It ignores the ways our cells and environments interrelate, the ways our physiological system functions as a whole organism, and the ways our minds and hearts affect our being. Additionally, genetic essentialism renders all our ways of nurturing and being nurtured by one another for naught.”).

exclusively as a synonym for “genetic parent,” as if biology required no more than an egg and a sperm to pop a child into existence.²

This essay explores some of the costs of relying on genetic essentialism in family law. It first critiques proposals to adopt genetic essentialism in its strongest form: mandatory genetic testing of every child at birth, with genes defining parenthood unless a contract says otherwise. The essay then suggests an alternative way of thinking about biological parenthood, less as proposal than as counterweight, demonstrating that the choice of genetic essentialism is ideological, not scientific, and that it carries with it substantial costs.

I. MANDATORY GENETIC PARENTHOOD?

Many legal scholars have argued that parenthood should be defined in terms of genes, but the most extended case for mandatory genetic testing comes from Mary Pat Byrn and Jeannette Ives in their article *Which Came First, the Parent or the Child?*³ Byrn and Ives

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2. See R. Alto Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEX. J. WOMEN & L. 265, 293 n. 149 (2004) (“A majority of American courts, newspapers, and academic commentators already use ‘natural’ or ‘biological’ when referring to the ‘genetic’ mother. [examples omitted...] This should not be surprising because many of these judges and commentators are men whose only possible biological links are genetic.”). See, e.g., William J. Giacomo & Angela DiBiasi, *Mommy (and Daddy) Dearest*, 87 N.Y. STATE BAR J. 18, 18 (2015) (“By this surrogacy arrangement, the egg donor and Sherri Shepherd’s husband are the biological parents—they each have a genetic tie to the resulting child.”); Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT’L L. REV. 527, 550 (2013) (referring to “genetic (biological) parents”); Rebecca Mae Salokar, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 F.I.U. L. REV. 473, 492 n. 121 (2009) (“The biological parent is one who is genetically related to the child as a result of conception using that person’s egg or sperm.”); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 35 (2008) (referring to “genetic (biological) parents”); Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 698–99 (2003) (referring to “genetic-biological parents” in contrast to “surrogate” mothers). But see Duane R. Valz, Review of *Children of Choice: Freedom and the New Reproductive Technologies*, 10 HIGH TECH. L.J. 201, 207 (1995) (“In theory, for example, a child could end up with three biological parents (a genetic mother, genetic father, and a gestational mother.”).
 3. Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First, the Parent or the Child?*, 62 RUTGERS L. REV. 305, 338–39 (2010); see also June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent—Child Relationship in an Age of Genetic Uncertainty*, 11 WM. & MARY

make powerful arguments based on the best interests of children.⁴ A regime of mandatory testing, however, would face substantial practical problems, which in turn point to defects in the ideology of genetic essentialism.⁵

Having echoed in their title the classic chicken-or-egg question, Byrn & Ives answer their own question by concluding that the child comes first, then the parent.⁶ This answer treats the child's existence as a fact while treating "parent" as a status assigned by law.⁷ To be a child is merely to exist as a young human being—it can be done in isolation—while being a parent inherently consists of being in relation to another person, the child; parenthood entails rights and responsibilities toward children, created by operation of law, while childhood is merely the early phase of life. The child thus "comes first," existentially or at least legally alone.

Because the child is alone, Byrn and Ives argue that the state, as *parens patriae*, has a constitutional duty to provide for the child's care and rearing.⁸ It does so through the legal category "parent." They further conclude that the people most likely to act in the child's best interests—and thus the people whom the state is obligated to recognize as legal parents—are the genetic parents of a child conceived through sexual intercourse and the intended parents of a child conceived through alternative reproductive technology.⁹ A

L. REV. 1011, 1067–70 (2003) (proposing mandatory paternity testing, with limited waivers, at birth).

4. Byrn & Ives, *supra* note 3, at 322–24.
5. I use *ideology* in the sense of a guiding narrative, a sense which is not necessarily derogatory. The alternative narrative of reproduction that I outline below is also an ideology. Cf. STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Law and ideology* ("*Ideology* refers, in a general sense, to a system of political ideas.>").
6. Byrn & Ives, *supra* note 3, at 342.
7. *Id.* at 307.
8. *Id.* at 324–27.
9. *Id.* at 343. Of course, the attribution of parental status is not based solely on the "best interests of the child," the familiar test for custodial determinations in family law. There are other policies at stake, and the child's interests are only one piece. Moreover, the child is not entitled to the best possible parents. When Byrn and Ives argue that the state must assign as parents the "people most likely" to look out for the child's best interests, *id.* at 342–43, they do not suggest an individual evaluation of a person's potential merits as a parent to a particular child. Rather, the state must assign parenthood *according to a rule* that in most cases is likely to identify parents who have the child's interests at heart. Thus, we assign parenthood in part according to our beliefs about the factual circumstances that would cause an adult to have a special feeling toward a particular child. These beliefs connect to cultural norms. Specifically, we have cultural norms that genetics,

genetic definition serves the best interests of children, they say, because as a general rule people are interested in the welfare of their genetic offspring.¹⁰ In the context of reproductive technology, “intended parents” refers to the people intended at the time of conception; they would be identified in the contracts governing any arrangements for surrogacy or donated gametes.¹¹ Because they have gone to the considerable effort and expense required to reproduce using technology, they too can be trusted to protect the welfare of the resulting children.¹²

Byrn & Ives intend these measures to provide each child with legal parents as quickly and permanently as possible. They do not want children left in legal limbo for the duration of a legal process to determine parentage.¹³ They also want to avoid cases in which the parental status assumed by the adults at the time of the birth is questioned later in the child’s life, such as when a husband discovers years later that he is not the genetic father.¹⁴ In order to ensure accomplishment of these goals, Byrn & Ives propose that we should not only define parenthood in terms genes but also institute mandatory testing, for all children born as a result of sexual intercourse, to make certain that each child is assigned the correct parents at birth.¹⁵

gestation, and use of reproductive technology to create a child all give rise to a duty toward the child and ought to kindle affection and a sense of duty in the heart of the parent. Because the potential parents will in most cases subscribe to the same cultural norm, we can anticipate that assigning parenthood on these bases will generally result in choosing a parent who is motivated to do right by the child. In addition, reliance on a biological connection serves the pluralist interest in insulating the distribution of children from state control.

10. *Id.* at 330.

11. *Id.* at 341-42.

12. *Id.* at 342.

13. *Id.* at 332.

14. *Id.* at 339. For further discussion of such cases, see generally Brandon James Hoover, *Establishing the Best Answer to Paternity Disestablishment*, 37 OHIO N.U. L. REV. 145, 161 (2011); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 840 (2006) [hereinafter Jacobs, *My Two Dads*]; Melanie B. Jacobs, *When Daddy Doesn’t Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004) [hereinafter Jacobs, *When Daddy*]; Niccol D. Kording, *Little White Lies That Destroy Children’s Lives: Recreating Paternity Fraud Laws to Protect Children’s Interests*, 6 J. L. & FAM. STUD. 237, 238 (2004).

15. Byrn & Ives, *supra* note 3, at 338–39.

A regime of mandatory testing, however, would face problems of consent, consequences, and error that should give us pause.

On the question of consent, the state has the power to compel medical treatment of a child, but that power is not *carte blanche* to require medical procedures on a child.¹⁶ Moreover, one cannot simply perform a test on the child to identify the parents; one needs blood from the potential parents as well. Holding parental rights hostage in order to compel consent to the blood draws would raise serious constitutional questions. While courts today sometimes compel DNA testing, they can do so only on the basis of some other evidence of either criminal guilt or denied paternity, coupled with refusal to fulfill the responsibilities of that status.¹⁷ Even in the happy afterglow of a successful birth, more than a few people are likely to have qualms about state-mandated collection of DNA samples on such a massive scale.

Suppose, however, that we have identified candidates for parenthood and they have consented to the tests. Now suppose the lab reports back that the presumed father is not a match for the child. Why might that happen? Perhaps the mother conceived with another man; perhaps, after being unable to conceive, she obtained donated sperm in secret to protect his ego.¹⁸ Reasonable people disagree about whether the child's (or parents') interests are served by forcing this information into the open.¹⁹ But there is another

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16. See generally B. Jessie Hill, *Whose Body? Whose Soul? Medical Decision-Making on Behalf of Children and the Free Exercise Clause Before and After Employment Division v. Smith*, 32 CARDOZO L. REV. 1857, 1875-77 (2011) (arguing that states should be more willing to compel treatment and that the parental reliance on free exercise claims to refuse treatment on behalf of a child may be unfounded).
 17. See, e.g., *State v. Graham*, 318 N.W.2d 853, 855-56 (Minn. 1982) (upholding statute that provide for compulsory blood tests in paternity actions because it was not an unwarranted exercise of police power or a violation of substantive due process, the right to privacy, or the right of bodily integrity); *In re Paternity of D.A.A.P.*, 344 N.W.2d 200, 202 (Wis. Ct. App. 1983) (holding that a court may order an alleged father to submit to a blood test only after determining at a pretrial hearing that there is a probability that paternity can be established and that a determination of paternity in in the best interests of the child); *S.S. v. E.S.*, 578 A.2d 381, 386-87 (N.J. App. Div. 1990), *aff'd* 590 A.2d 1188 (1991) (holding that the court is required to order a blood test if the plaintiff shows an articulable reason for suspecting that the defendant is the father of the child).
 18. Of course, implementation of mandatory testing would affect the likelihood of either happening in the first place, especially the latter.
 19. Compare Byrn & Ives, *supra* note 3, at 330 (seeking to prevent protracted legal disputes about parentage) with Jacobs, *My Two Dads*, *supra* note 14, at 837-38 (“[B]iology alone should not disestablish parentage, but rather, functional parenthood should suffice as the

category of likely explanation: error. DNA tests are widely perceived as infallible, but they are susceptible to multiple kinds of human and inherent error.²⁰ Samples get contaminated or swapped in the lab, and criteria for a match are based on statistics, which means that there is an inherent probabilistic element. While the error *rate* is low, even a very small percentage of a very large number is itself a large number. Massive genetic testing of infants would subject some couples to the pain of being presented with scientific claims of deceit where in fact none occurred. At a minimum, any state considering a testing program should take a hard look at the probable numbers of both false positives and false negatives.

Errors can complicate the identification of not only paternity but also maternity. In 2002, a woman in Washington spent sixteen months under suspicion of welfare fraud and perhaps of kidnapping when repeated genetic testing showed her not to be the parent of her three children.²¹ Resolution came only after doctors tested a new infant immediately after watching her give birth; that child, too, was not “hers” genetically. In our universal testing regime, we might conclude that she was a contracted surrogate on the run, trying to keep a baby who wasn’t “really hers.” In fact, this mother was a chimera: her eggs contained one set of DNA inherited from her own parents, while her blood contained a different set.²²

predicate for a legal parentage determination.”); Jacobs, *When Daddy, supra* note 14, at 234-35 (proposing a short statute of limitations for challenges to paternity); Kording, *supra* note 14, at 266 (arguing that genetic testing should be prohibited if a father-child relationship has been established but mandatory if it has not).

20. For a discussion of human errors in DNA matching, see W.C. Thomson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, 48 J. Forensic Sci. 47, 47 (2003). For a discussion of errors arising from comparisons across massive databases, see David H. Kaye, *Trawling DNA Databases for Partial Matches: What is the FBI Afraid Of?*, 19 CORNELL J.L. & PUB. POL’Y 145, 170 (2009).
21. Graham Noble, *Pregnancy No Proof of Motherhood; Woman Was Her Own Twin—and the Twin Was the Mother of Her Children*, LIBERTY VOICE (Jan. 26, 2014), <http://guardianlv.com/2014/01/pregnancy-no-proof-of-motherhood-woman-was-her-own-twin-and-the-twin-was-the-mother-of-her-children/> (last visited 8/1/15). See also Evonne Lack, *Strange But True: One Person Born with Two Sets of DNA (a chimera)*, BABYCENTER BLOG, http://www.babycenter.com/0_strange-but-true-one-person-born-with-two-sets-of-dna-a-chim_10364937.bc (last visited 8/1/15) (discussing persons with multiple sets of DNA).
22. Chimerism can occur when the fetus swaps genes with either the mother or a twin, or when one twin is absorbed into the other. Lack, *supra* note 21.

Biology, then, is not as tidy as genetic essentialism assumes; and arguably, neither are people's family lives. Genetic essentialism assumes that relationships are made up of discrete categories: parent or child, chicken or egg, a genetic tie that either is or is not, a fetus that either is or is not a separate individual from the pregnant woman. On the question of the status of the fetus, genetic essentialism prompts an answer to the question of when separate life begins: at the time of conception. By defining the new child in terms of a set of genes, genetic essentialism suggests the model that currently underlies anti-abortion ideology: that an embryo exists as a new, independent human being as soon as conception occurs. As Reva Siegel documented, the notion of the embryo and fetus as a distinct individual suspended—even trapped—inside the pregnant woman was a foundation of the nineteenth-century campaign to criminalize abortion.²³ Today's abortion opponents continue to proclaim as a scientific fact that life begins at conception.²⁴ They insist that the combination of chromosomes created at conception is the essence of an individual human being, who needs only the opportunity to unfold over the course of nine months' gestation.²⁵ This theory of reproduction "systematically discount[s] women's role in reproducing life."²⁶ More broadly, this ideology underlies the conflict model of pregnancy that has brought us the medical theory of "maternal-fetal conflict" and the assumption that the conflict is between two distinct individuals, the mother and the fetus.²⁷

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23. Reva B. Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 288-89 (1992).
24. See, e.g., Robert John Araujo, *Abortion—From Privacy to Equality: The Failure of the Justifications for Taking Human Life*, 45 HOUS. L. REV. 1737, 1785, 1789 (2009); Charles I. Lugini, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 123 (2006).
25. I discuss this continuity between preformationism and modern anti-abortion rhetoric at greater length in Jennifer S. Hendricks, *Not Of Woman Born: A Scientific Fantasy*, 62 CASE WESTERN RESERVE L. REV. 399, 428-32 (2011).
26. Siegel, *supra* note 23, at 291.
27. As I have previously outlined, "such a conflict is in one sense inherent in every pregnancy. From the perspective of genes (rather than people), the fetus's genes "want" to use as much of the mother's physiological resources as they can, while the mother's genes "want" to invest appropriately in this potential offspring but also to preserve resources for existing and possible future children. The same conflict of interest exists, however, with respect to any particular ovum or sperm, each of which contains genes that "want" to be reproductively successful. A person who uses birth control or seeks an abortion is making a decision not to create a child at a particular time in order to conserve resources

This theory of conflict—of the woman and fetus as distinct individuals—predates genetic essentialism in its modern form. Eighteenth-century preformationists originally believed:

that the form of the fetus was contained within the mother's egg and that the father's semen provided the trigger to stimulate growth. It followed that an egg contained a series of Russian nesting dolls, with all the generations of humanity contained originally in Eve's eggs. This "ovist" view of reproduction, however, was "almost uniformly rejected" once sperm was observed and recognized as the male analogue to the egg. The pre-existing fetus was quickly transferred to the sperm. A famous eighteenth-century illustration of the preformationist view depicts a tiny man squatting in the head of a sperm, his own head either replaced by or enclosed in an oversized bulge. This small creature was believed to take root and grow in the mother "just as the seed does in the field."²⁸

The assumption that the pre-fetus resided in the sperm rather than the egg was based on an axiom adopted by Erasmus Darwin (grandfather of Charles): he found it unacceptable that women could play a greater role in reproduction than men; since the woman provided the food and nurturance of the growing fetus, it must be that man provided the original form of the new individual.²⁹

Far from being invented out of whole cloth, genetic essentialism was an adaption of this preformationist view in response to the discovery of DNA in both eggs and sperm.³⁰ The presence of DNA in

(in a very broad sense of the word) for herself and for her family, including existing and future children." Hendricks, *supra* note 25, at 435 (citing RICHARD DAWKINS, *THE SELFISH GENE* 128–29 (30th anniversary ed. 2006), and Leslie Cannold, *Women, Ectogenesis, and Ethical Theory*, in *ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION* 50, 54 (Scott Gelfand & John R. Shook, eds., 2006) (describing a study participant's expression of the view that abortion is a moral decision based on "an evaluation that continuing the pregnancy would harm her maternal/fetal-child unit"). Cf. Rivka M. Weinberg, *Identifying and Dissolving the Non-Identity Problem*, 137 *PHILOS. STUD.* 3, 4 ("Future people matter a great deal, but merely possible people don't matter at all."), 7 ("[E]xistence *per se* is not an interest that future people have, especially since nonexistence is *not* an alternative for them."), 13–16; I. Glenn Cohen, *Regulating Reproduction: The Problem With Best Interests*, 96 *MINN. L. REV.* 423, 439 (2011) (agreeing with general view that "no one is harmed in not being created") (quoting F.M. Kamm, *Cloning and Harm to Offspring*, 4 *N.Y.U.J. LEGIS. & POL'Y* 65, 72 (2000)).

28. Hendricks, *supra* note 25, at 420 (citing and quoting Nancy Tuana, *The Weaker Seed: The Sexist Bias of Reproductive Theory*, 3 *HYPATIA* 35, 52–54 (1988)).

29. *See id.*

30. *See* Hendricks, *supra* note 25, at 421–22; Jane Maienschein, *Cloning and Stem Cell Debates in the Context of Genetic Determinism*, 9 *YALE J.*

eggs proved that mothers contributed equally the genetic “blueprint.” Today, this belief in equal contribution fits comfortably with a superficial commitment to sex equality. Historically, genetic essentialism emerged as a somewhat grudging acknowledgement that women are as important to reproduction as men. Note, however, that “equal” contributions have been achieved only by ignoring what Erasmus Darwin saw: that women quite clearly contribute more than men in other, non-genetic capacities. Redefining genes as the essence of parenthood enabled society to define men and women as equals by counting only what men do, then admitting (eventually) that women do that too.

In fact, the ideological nature of our current commitment to genetic essentialism is illustrated by the fact that it, too, overstates the male contribution to reproduction. Even if we only care about genes, mothers and fathers are not equal. Both contribute nuclear DNA for the child, but the mother also contributed mitochondrial DNA and therefore has a greater initial role in the genetic makeup of the embryo.³¹ In addition, even after the initial package of chromosomes is fixed, decisions about how the child’s genes will be expressed are made throughout gestation (and beyond), so the mother’s contribution to the child’s genetic makeup continues.³²

This persistent understatement even of the genetic role played by mothers, combined with its roots in preformationism, is why I consider genetic essentialism and its supposed sex equality to be merely the modern mask of a claim to paternal supremacy. By fixating on genes, genetic essentialism limits the scope of the role of “parent” to the parts of that role that men can play. Even then it must disregard evidence that women do more, even of what men do. Given the obvious difference between women’s and men’s biological role in reproduction, it is quite an accomplishment to tell a story—and continue to adapt that story to hundreds of years of scientific discoveries while keeping the basic message the same—that teaches that the male role is more substantial or important, or even equal to the female.

HEALTH POL’Y, L. & ETHICS 565, 574-75 (2009) (discussing “the preformism of genetic determinism”). As discussed above, preformation had sufficient hold on popular imagination in the United States to play a role in the criminalization of abortion in the nineteenth century. See *supra*, text accompanying notes 23, 26 (referring to Reva Siegel’s historical analysis of the criminalization campaign).

31. See W. Nicholson Price, Note, *Am I My Son? Human Clones and the Modern Family*, 11 COLUM. SCI. & TECH. L. REV. 119, 142-43 (2010) (discussing mitochondrial DNA and explaining that, “contrary to common belief, DNA exists in the cell outside the nucleus.”).

32. See Hendricks, *supra* note 25, at 424.

II. A DIFFERENT STORY

Genetic essentialism is a story about biology, the current incarnation of a story that has adapted over time to new scientific discoveries but remains rooted in ideology, not science, as its starting point. One indication of the hegemony of genetic essentialism is the difficulty we have imagining a different story to replace it. What follows is an effort to tell a different story.

Early, single-celled organisms reproduced by mitosis, which turns one cell into two “daughter” cells.³³ In comparison to this straightforward process, sexual reproduction presents a puzzle for evolutionary biologists. From the female perspective, sexual reproduction is quite costly, since it means only half of one’s offspring can themselves reproduce.³⁴ From the male perspective, on the other hand, sexual reproduction is a way to pass on genes without doing the work required to produce an entire new organism.

Although the male strategy could be described as exploitive it has some advantages for the female organisms as well. One advantage was that sexual reproduction shuffled the gene pool. Rather than each organism reproducing itself identically, with occasional mutations, genes would be traded in every generation, allowing for faster, more efficient evolution to adapt to the environment.³⁵ At the same time, the competitive pressure of sexual selection could help eliminate disadvantageous mutations more quickly.³⁶

One could look at this process from the perspective of either sex; traditional, patriarchal ideologies effectively adopt the perspective of the sperm. They trace reproduction through the male line and see women as vehicles through whom genes are passed. As an alternative, we could trace through the female line and regard men as useful vehicles for women to swap genes with each other.

On this view, a woman giving birth is like a cell dividing, with the difference that humans, more complex than single-cell organisms, collect some foreign DNA to mix in before dividing. In addition, because humans are so much bigger than single-cell organisms, the process results not in two daughters but in a parent and a child. The

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33. Strictly speaking, *mitosis* refers to “the division of a single nucleus into two genetically identical daughter nuclei.” NEIL A. CAMPBELL ET AL., *BIOLOGY: CONCEPTS AND CONNECTIONS* G-17 (6th ed. 2009). It is one stage of the overall process of binary fission, which produces the complete daughter cells. *Id.* at 127.
34. Carl Zimmer, *On the Origin of Sexual Reproduction*, 324 *SCIENCE* 1254, 1254 (2009). This phenomenon is known as the “twofold cost of sex.” *Id.*
35. Zimmer, *supra* note 34, at 1256.
36. Alyson J. Lumly et al., *Sexual Selection Protects Against Extinction*, 522 *NATURE* 470 (2015).

process, however, can still be seen less as one individual creating another but as one individual becoming two.

This story suggests a different answer to the question, Which came first, the parent or the child? Indeed, it suggests a different interpretation of the question, especially the word *child*. As noted above, Byrn & Ives treat *child* as referring to a young human being. In my story, *child* is the gender-neutral form of *son* or *daughter*, as in *daughter cell*. As with the word *parent*, a relationship with another person is inherent in the word *child*. To ask which came first is thus a contradiction: the parent and the child can exist only in relation to each other; thus, they come into being simultaneously.

While Byrn & Ives say the child is born and then assigned legal parents, my model says the child and the initial parent are created simultaneously, over the course of nine months of pregnancy, followed by further legal assignments. Rather than envisioning a juridical person who comes into being and *then* is assigned legal parents by the state, we could see these two steps as simultaneous. This way, the born child is never without a legal parent. The act of birth both creates the child as a legal person and creates the formerly pregnant woman as the child's mother. Birth transforms a single legal person into two legal people, a parent and a child.

What might we gain by entertaining this alternative to genetic essentialism? First, we would move away from the notion that the embryo is a distinct individual from the time of conception and perhaps move toward recognizing the truth of Mary Anne Warren's observation, "There is room for only one person with full and equal rights inside a single human skin."³⁷ This woman-centered account of reproduction recognizes that the embryo gradually transforms from self to other and thus the bankruptcy of maternal-fetal conflict as a principle in moral reasoning. At the same time, it recognizes that the process of one person dividing into two people has significance beyond the contribution of initial genetic material. Gestation and birth provide an additional, and to some extent independent, basis for women to claim parental rights to children.

This sort of talk about gestation as a basis for claiming parental rights tends to raise feminist concerns about stereotyping women as mothers.³⁸ Genetic essentialism is attractive to modern sensibilities in

37. Mary Anne Warren, *The Moral Significance of Birth*, 4 HYPATIA 47, 63 (1989).

38. See Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 F.S.U. L. REV. 645, 688–92 (2014) (discussing feminist concerns about the "new maternalism" in the context of an argument for a labor and intent theory of parental rights) (citing Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229 (2012)).

part because of its superficial sex parity: it seems to avoid suggesting that women are more closely or inherently bound up with children than are men. It is worth noting, however, that crediting one sex with a greater reproductive role does not in fact lead inexorably to that sex's subordination, or even to that sex being assigned more responsibility for child rearing. For most of western history, men have claimed a greater, more important role in the creation of offspring than they in fact play, and their historical claims provide the foundation for genetic essentialism. Somehow, none of this led Erasmus Darwin, or anyone else at the time, to suggest that men ought to change a few more diapers. Either story about reproduction can be used to rationalize sex-based subordination, and it is the genetic essentialist story that demonstrably traces its roots to patriarchal ideology.

Still, it is true that a downside to my story about reproduction is that it can be taken to suggest that gestation creates a unique bond between mother and child that is superior to other kinds of parenthood. That is why I offer it as a counterweight to genetic essentialism rather than as a replacement for all other paths to parenthood. If I were in charge of the rules for establishing parenthood, a child's birth mother would be her initial, automatic parent.³⁹ The mother could maintain that status on her own, relinquish it through adoption, or invite others to join her by forming a parental relationship with the child; and certainly, the other genetic parent would have a special claim to do so.⁴⁰ Under this system, the child is assured of a parent immediately upon birth, but that parent remains free to choose among a variety of possible family forms; the system thus avoids the heteronormativity of genetic essentialism.

When the birth mother brings in additional parents, they attain legal parenthood through doctrines such as the biology-plus-relationship test for genetic fathers and second-parent adoption or de facto parenthood for non-biological parents.⁴¹ All of these paths

39. Cf. E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 99 (2006) (describing the gestational mother as the "initial constitutional parent").

40. For a more doctrinal presentation of a proposed system of rules, see Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Essentialism* (work in progress, on file with author).

41. For details on the biology-plus-relationship test, see Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 433-44 (2006). For details on de facto (or psychological) parent doctrine, see Emily B. Gelmann, *What About Susan? Three's Company, Not A Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents Consent*, 30 WIS. J.L. GENDER & SOC'Y 57, 62 (2015); Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute's Treatment*

involve a commitment to providing care for the child that is loosely comparable to gestation. I do not claim that the birth mother is uniquely able to parent the child. Rather, my claim is that by the time of birth she, and only she, has provided the sort of parental care that in other contexts serves to establish legal parenthood. She should therefore be recognized as the initial legal parent. I do not claim that becoming a parent by giving birth is “worth” *more* than other paths, but I do think we need to remember that it also is *not less*.

One feature that gestational parenthood shares with all these other paths to parenthood—and genetic essentialism lacks—is the particularity of the relationship between the parent and child. Relationship-based paths to parenthood are unavoidably particular, concrete, and personal. That is, gestational parenthood is not an abstract connection to the idea of a child, or even the idea of a child who shares one’s genes. That is why, for example, I believe the claims of a birth mother outweigh the claims of other prospective parents to whom she may have “signed over” the child before the birth. The pain of wanting and expecting a child, only to be denied at the last moment, can be severe, but it is still founded on desire for “a child” that has only an abstract relationship to attachment to “this child.”

To illustrate what I mean by an individuated relationship, consider the case of *Fasano v. Perry-Rodgers*.⁴² *Fasano* involved two couples who were both undergoing in vitro fertilization at the same clinic. Donna Fasano successfully became pregnant; Deborah Perry-Rogers did not. However, it turned out that Fasano had mistakenly been given some of the Perry-Rogerses’ embryos. When she gave birth to two boys, one was genetically related to her and her husband while the other was the genetic son of the Perry-Rogerses. The case presented the question of how to determine parenthood in pure form, since unlike in surrogacy cases there was no contract, and Fasano had never agreed to gestate a child for anyone else. After a bitter custody battle, the court declared that each boy was the legal child of his genetic parents, with no rights to visitation or other legal status for the other couple.⁴³ Despite rhetorically claiming that genetics were not determinative, the court reasoned in the register of genetic essentialism that Fasano’s “nominal parenthood” of the second child should have been corrected “*before the development of a parental*

of De Facto Parents, 25 J. AM. ACAD. MATRIM. LAW. 477, 485-88 (2013); William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 264 (2010); Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1111-15 (2010).

42. 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

43. *Id.* at 26-27.

relationship,” which the court assumed could only have happened after the birth.⁴⁴

One interesting feature of *Fasano* is that it provides an opportunity to test some intuitions about how we think about the children in these disputes. Consider, for example, that the rule the court adopted would presumably have applied even if there had been only one child, one who was genetically linked to the Perry-Rogerses. Many people feel at least a twinge of relief that, in the actual case, Fasano gave birth to “twins.” Despite the tragic circumstances, at least she ended up with a baby, as did the Perry-Rogerses. For some people, the fact that there were two babies tilts the equities against the Fasanos. It seems selfish for them to have tried to keep both. For once, King Solomon didn’t have to split the baby, because there were enough to go around. This seemingly happy outcome may even have helped the court reach the conclusion that it did.

This common reaction to the facts of *Fasano* is a good indication that some part of us views babies as fungible commodities. Most parents of multiple children insist that their children are not interchangeable in their hearts. The loss of a child is not diminished by the consolation that one still has one left. The parent of multiple children has not divided her love into pieces, safely storing each in a separate basket to spread the risk of loss.⁴⁵ Why would we expect Donna Fasano to feel differently? I think part of the answer is that we too readily discount the parental relationship formed through gestation. Genetic essentialism elevated the Perry-Rogerses abstract desire for a *child* of their genes above the concrete, blood and flesh relationship between *the child* and Fasano.

Fasano, then, illustrates what is lost when parenthood is defined through the lens of genetic essentialism, an ideology that places ownership and control of one’s genes above the more tangible and emotion-based ties that arise from a parent’s direct, physical caretaking for a child, including through gestation. Genetic essentialism does not flow from historically recent scientific discoveries about reproduction. Rather, it is the modern face of a male supremacist ideology that predates and has merely adapted to the current state of our knowledge of biology. While genetic connections will likely always be meaningful to parents and children alike, they need not be the *sine qua non* of parenthood.

44. *Id.* at 25 (emphasis in original).

45. Cf. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 496–99 (2005) (explaining the use of horcruxes).