

Winter 2000

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Recommended Citation

Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 Conn. L. Rev. 523 (2000)
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Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family

JANET L. DOLGIN*

I. INTRODUCTION

An advertisement, placed in elite university newspapers, offered \$50,000 for the ova of tall, smart women.¹ Hundreds of university students answered the advertisement which specified that applicants be at least 5' 10" tall (1.75 meters) and have college board scores of at least 1400.² Interviewed on Central News Network (CNN), the lawyer for the couple who placed the advertisement explained that the intending parents were themselves tall and smart, and thus, understandably wanted tall, smart children.³ Apparently anxious not to leave the wrong impression, the lawyer clarified: "Let me point out," he explained, "this child will be loved, no matter if it's short, tall, smart or not so smart."⁴

The lawyer invoked two assumptions about families. The law has come widely to rely on each assumption in defining and regulating familial matters. First, families can be created at home or in the marketplace. The once sacrosanct distinction between home and work⁵—between love and money—has blurred. However, the implications of the lawyer's second qualifying statement seem to conflict with the implications of his first statement. Those who negotiate bargains in the marketplace insist on getting that for which they bargained. Yet, the lawyer explained that the cou-

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1. See Irene Sege, *A \$50,000 Dilemma on Campus*, BOSTON GLOBE, Mar. 6, 1999, at A1.

2. See CNN Talkback Live, Mar. 12, 1999, available in LEXIS, News Library, CNN File.

3. See *id.*

4. *Id.*

5. See DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 53-54 (1968) (contrasting home with work).

ple who wanted a tall, smart child would love a short, dull child. Thus, the lawyer invoked a second assumption. Once created, familial relationships are distinct from relations in the marketplace. The law, reflecting society, expects families to operate within a moral frame that prizes, even if it no longer guarantees, love and enduring commitment. The couple will love their child, even if it is short and dull because it will be *their* child.

The advertisement for Ivy League egg donors raises a related issue about the constitution of families. Within the so-called traditional family, relationships were understood as firmly grounded in inexorable biological truths. The term "traditional family" refers here to a social construct, forged in the early years of the Industrial Revolution. That family was constructed as the cultural antithesis of the domain of commerce produced by industrialization. It was understood as a domain of love and enduring commitment, distinct in virtually every regard from the universe of commerce, bargained negotiation, and autonomous self-interest. Ironically, this construct of family was actualized most firmly in the United States during the 1950s, just before it was widely challenged by alternative constructs.⁶

Within the traditional family,⁷ the nature of familial bonds was predicated on, and was understood to flow from shared biogenetic substance.⁸ In the 1960s, anthropologist David M. Schneider explained that "[i]f science discovers new facts about biogenetic relationship, then that is what kinship is and was all along, although it may not have been known at the time."⁹ The advertisement for egg donors confirms the continuing truth of that assertion in certain regards and disavows its truth in other regards. The couple wanted a child that would resemble each of them. They relied on understandings about biogenetic substance in seeking such a child. But the ovum from which that child would develop would become *theirs* through money and technology, not through natural or supernatural proc-

6. Anthropologist David M. Schneider, describing the American family at the middle of the twentieth century, referred to the familial arena as one of "enduring, diffuse solidarity." *Id.* at 52. Schneider explained:

Solidarity because the relationship is supportive, helpful, and cooperative; it rests on trust and the other can be trusted. *Diffuse* because it is not narrowly confined to a specific goal or a specific kind of behavior. Two athletes may cooperate and support each other for the duration of the game and for the purpose of winning the game, but be indifferent to each other otherwise. Two members of the family cannot be indifferent to one another, and since their cooperation does not have a specific goal or a specific limited time in mind, it is *enduring*.

Id.

7. The so-called "traditional" family was constructed in the nineteenth century as a product of modern capitalism. See JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 30-31 (1986).

8. See SCHNEIDER, *supra* note 5, at 23 (considering meaning of "blood relationship" as shared "biogenetic substance" in American kinship); see also David M. Schneider, *Kinship, Nationality, and Religion in American Culture: Toward a Definition of Kinship*, in SYMBOLIC ANTHROPOLOGY 63, 65 (Janet L. Dolgin et al. eds., 1977) (discussing common identity of blood relatives arising from "shared physical substance").

9. SCHNEIDER, *supra* note 5, at 23.

ess.

This article considers three broad contexts within which family law is being asked to consider the consequences for families of "new facts about biogenetic relationship."¹⁰ The law's responses to these new facts suggest that Schneider's conclusions about the biogenetic dimension of kinship must be amended in characterizations of contemporary families. In particular, the monolithic ideology¹¹ of families that Schneider assumed at mid-century¹² has been appropriated by various interests, which have misrepresented fragments of it in its entirety. As a result, society and the law invoke certain aspects of the ideology of traditional families in some contexts, but not in others. Other aspects are forgotten almost completely in deference to the contemporary obsession in the United States with the preservation of liberty and choice. Specifically, families can be created through love or money; they can be grounded in biology or intention; they can include children created through donated gametes, children with several biological mothers, children who survived the choices attendant upon genetic testing at the embryonic stage, or no children at all. Yet, it is widely hoped, if not expected, that once formed, these families will resemble one another in placing love and loyalty before all else. Thus, those presuming to favor tradition join those presuming to favor modernity in invoking a similar goal—the actualization of affective, committed, familial relationships.

At the same time, at the edges of the domestic arena, an unfamiliar vision of family emerges. The "genetic" (or medicalized) family¹³ abandons almost completely the presumption that familial relationships should reflect the truths of a moral order. This vision of family represents a radical fragmentation of family ideology. It depends exclusively on biogenetic substance (now "genes" rather than "blood") and expressly disavows that that substance necessarily is, or should be, reflected in the character of social relationships among family members.

Section II of this article considers, respectively, the legal delimitations

10. *Id.*

11. The term "ideology" may include, but is not meant primarily to refer to, a political agenda. The term as used here refers to the pervasive system of underlying, often unarticulated, assumptions about how people act and about how people relate to themselves, other people, and the larger world. This definition follows that found in the work of French anthropologist Louis Dumont:

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

LOUIS DUMONT, FROM MANDEVILLE TO MARX 22 (1977).

12. See generally SCHNEIDER, *supra* note 5.

13. See KAJA FINKLER, THE KIN IN THE GENE (forthcoming 2000) (manuscript at 13, on file with author).

of paternity and maternity that elide biological facts.¹⁴ In both sets of cases, courts displace or expressly reject biological evidence in order to safeguard social dimensions of a traditional model of family relationships. In the cases involving disputes about paternity, courts ignore the results of DNA testing in order to denominate as father, a child's mother's husband. In these cases, courts, anxious to preserve a traditional view of family, refuse to admit DNA evidence that conflicts with that view.¹⁵ Therein the law relies on an old assumption about biology, intended once to substitute for an unknown biological truth, in order to displace that very "truth." In the cases involving disputes about maternity, all occasioned by reproductive technology, the law displaces biological facts as it recognizes intention and choice as fully productive of familial bonds. In these cases, courts invoke traditional ends—the construction of affective family units—to justify decisions that cannot easily be harmonized with traditional assumptions about the domestic arena. And, in these cases, courts privilege the social incidents of traditional family life over conflicting biological facts.

Section III of the article considers a startlingly different understanding of families that is being constructed around new biogenetic facts. This section presents an ideological construct of the "genetic family," as well as the concept of personhood that it fosters. Next, this section reviews the law's evolving response to the new genetics more generally. That response, while diverse in many regards, has uniformly focused on the *flow* of genetic information as the essential subject of regulation. In delimiting a duty—within a wide assortment of social contexts—to reveal or to refrain from revealing genetic information, courts and legislatures begin to sketch an emerging view of personhood both within families and elsewhere.

Section IV analyzes the shifting scope of the increasingly fragmented ideological frame within which the law delimits and regulates diverse family constellations. This section also compares the law's understanding of the notion of privacy within the context of the genetic family to legal understandings of privacy in other family contexts.

In short, this article reviews legal delimitations of paternity and maternity which ignore or elide contemporary understandings of the biological facts of kinship. It then reviews a social construct of family, referred to here as the "genetic family," and examines the law's elaboration of that construct. Finally, the article delimits the challenge that the construct of

14. In each of the cases discussed, the moral and social implications of the biological facts are in dispute. The facts themselves, though sometimes ignored, are not the subject of dispute.

15. In some cases, the law has been ready to denominate the mother's husband as "father" even though a biological father, willing to provide child support, has been or can easily be identified. *See, e.g.,* *Miscovich v. Miscovich*, 688 A.2d 726, 728 (Pa. Super. Ct. 1997) (refusing to admit evidence of DNA analysis and identifying mother's husband as father, even though mother had commenced support action against a third party on behalf of her son), *aff'd*, 720 A.2d 764 (Pa. 1998), *cert. denied*, 119 S. Ct. 1757 (1999). *See infra* notes 30-44 and accompanying text (analyzing *Miscovich*).

the genetic family poses to other constructs of family.

II. THE LAW DISPLACES BIOLOGY IN REGULATING FAMILIES

In the last decades of the twentieth century, United States courts, responding to a series of legal disputes about fathers and mothers, have privileged tradition over modernity, but have simultaneously eroded tradition by predicating it on the ideological foundations of modernity—liberty and choice. Professor Marilyn Strathern has captured this peculiarity:

[I]t would seem we cannot be at both ends of the continuum at the same time. I want to suggest that is exactly where we might be. The suggestion arises from an otherwise perplexing sensation. This is the sense that there seems both *more* 'status' and *more* 'contract' around in the world, or at least in arguments about them. Would it also follow then that one might have both *more* tradition and *more* modernity at the same time?¹⁶

If American lawmakers examined the assumptions behind their own decisions, they would answer Professor Strathern's question affirmatively. Their decisions and rules suggest that it is possible to have both more tradition and more modernity precisely because (it is believed) modernity increasingly equips people to construct the social order, and thus both tradition and modernity, however they choose.

A. *The Paternal Presumption: Biology Notwithstanding*

For centuries before the advent of reproductive technology and DNA testing variously challenged or identified the biological correlates of the parent-child relationship, courts determined paternity by relying on a presumption about biological facts. Under the common law, the husband of a married woman was presumed to be the biological father of her child, and was therein proclaimed that child's legal father.¹⁷ The presumption¹⁸ elided the biological facts in an era in which they were unknowable. The presumption did not apply to cases in which the mother's husband *could not have been* the father of his wife's child—cases in which a man was sterile, impotent, or, in Blackstone's words, "*extra quatuor maria*, [beyond the four seas] for above nine months."¹⁹ The common law presumption

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

17. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 512 (1998).

18. The presumption has been widely adopted in statutory formulation and is still defined in many states as irrebuttable. See *id.*

19. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *457 (J. Chitty ed. 1857). In England, neither the wife nor the husband could be a witness to prove the husband's lack of access to the wife. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (describing common law presumption of legitimacy).

served ostensibly to protect children from the hardship of being defined as illegitimate²⁰ and more generally, to promote the "peace and tranquillity of States and families."²¹

The presumption permitted courts to assume a set of biological facts (and thus a history of relationships) *in order to* safeguard a traditional model of family. Before the advent of paternity testing, courts were able to apply the presumption without confronting biological evidence proving that the presumption failed utterly to reflect the biological facts of paternity.²² As a result, the presumption rarely collided irrefutably with alternative facts. Sometimes, social facts suggested strongly that a woman's husband was not, indeed, the biological father of her child. Sometimes, presumably, the wife alone or the husband and wife knew for certain that the husband was not the biological father of his wife's child. In such cases, courts could put conflicting narratives to rest through application of the presumption of paternity without facing a clear discontinuity between "legal" and "natural" paternity. That the presumption often constituted a legal fiction was obvious, but, as a general matter, the fictive quality of the presumption was modulated by the *possibility* that the presumption's identification of a particular child's father did reflect biological facts.

Beginning in the fourth decade of the twentieth century, blood test evidence became available in paternity cases.²³ These early blood tests served to exclude potential fathers, but did not present courts with evidence that could determine the identity of a particular child's biological father.²⁴ Thus, for many years, the availability of paternity testing rarely discounted completely the presumption that a woman's husband was her child's biological father. In short, reliance on the presumption continued to serve the apparent interests of tradition.²⁵

20. See 1 BLACKSTONE, *supra* note 19, at *455, *459 (declaring that an illegitimate child, or bastard, "cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived").

21. *Michael H.*, 491 U.S. at 125 (quoting JAMES SCHOULER, *LAW OF THE DOMESTIC RELATIONS* § 225, at 304 (3d ed. 1882)).

22. Under the common law, the presumption of paternity could be rebutted only by evidence that the husband was incapable of procreation or that he was apart from his wife during the probable period of conception. See *supra* note 19 and accompanying text. However, "[n]either husband nor wife [could] be a witness to prove access or nonaccess." *Michael H.*, 491 U.S. at 124-25 (quoting SCHOULER, *supra* note 21, § 225, at 306).

23. See Mark Ira Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131, 1135 (1979).

24. See *id.* at 1135-36.

25. The law's contemporary response to artificial insemination is illustrative of the assimilation of new technology to serve familiar interests. Since the 1960s, lawmakers have grounded the paternity of a mother's husband on consent in cases involving artificial insemination. At present, the majority of states in the United States have passed laws that permit and regulate artificial insemination. See, e.g., ALA. CODE § 26-17-21 (1992 & Supp. 1998); CONN. GEN. STAT. §§ 45a-262, 45a-771 to 779 (1999);

In the last decades of the twentieth century, "DNA fingerprinting"²⁶ has enabled paternity testing with results approaching certainty.²⁷ Yet, the advent of accurate paternity testing has not dislodged the common law presumption about paternity. Often, the presumption has manifestly become a substitute for, rather than a presumption about, some underlying biological reality. But, for the most part, the law has been reluctant to disclaim expressly the importance of paternity's biological underpinnings. That is, in cases in which evidence of a man's biological paternity does not harmonize with the law's preference as to legal paternity, evidence of biological paternity has been suppressed, rather than openly acknowledged and *then* discounted.²⁸

In short, in paternity cases—even cases in which legal paternity has clearly differed from biological paternity—courts have quietly accepted choice and its correlates as the arbiters of familial relationships, but have at the same time, disguised that acceptance by insisting on the preeminence of traditional familial forms. In this regard, the law's response to these cases has differed from its response to cases occasioned by the new reproductive technologies—cases in which choice not only serves tradition, but has itself become a centerpiece of the moral order.²⁹

The law's struggle in paternity cases to preserve the fiction of an older moral order—to presume (or at least contend) that legal truths reflect "natural" truths—is increasingly beset with contradictions and ambivalence. That confusion is reflected transparently in a set of cases in which courts have refused to entertain evidence about biological paternity and have, instead, relied on facts about relationships and family constellations

N.Y. DOM. REL. LAW § 73 (McKinney 1988 & Supp. 1998). Section 5 of the Uniform Parentage Act provides that:

[I]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife.

UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987 & Supp. 1999). This rule clearly predicates paternity on consent rather than biology. However, the rule also reflects a traditional understanding of familial relationships. See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 197 (1997).

26. Some commentators have disapproved of the use of the term "DNA fingerprinting," especially in the context of criminal investigations, because it suggests, erroneously, that DNA-based profiles can be used to identify people as accurately as fingerprinting. See RUTH HUBBARD & ELIJAH WALD, *EXPLODING THE GENE MYTH: HOW GENETIC INFORMATION IS PRODUCED AND MANIPULATED BY SCIENTISTS, PHYSICIANS, EMPLOYERS, INSURANCE COMPANIES, EDUCATORS AND LAW ENFORCERS* 146 (1993) (describing DNA based-identifications as "not nearly as unequivocal as fingerprints can be").

27. See IRA MARK ELLMAN ET AL., *FAMILY LAW* 1055-56 (3d ed. 1998) (discussing improved accuracy of DNA paternity tests in identifying a child's biological father).

28. See, e.g., *Miscovich v. Miscovich*, 688 A.2d 726, 729-30 (Pa. Super. Ct. 1997) (refusing to consider DNA evidence because paternity was "established by estoppel").

29. See *infra* Part II.B.

to deny—or, in other cases, to recognize—the paternity of men, apparently able and ready to offer genetic evidence that would support a contrary holding.

For instance, in 1998, in *Miscovich v. Miscovich*,³⁰ the Supreme Court of Pennsylvania affirmed a lower court ruling that ended a seven-year legal effort on the part of Gerald Miscovich to avoid paying for the support of an eleven-year old son, born to Elizabeth Miscovich during the parties' marriage.³¹ The Miscoviches were divorced in 1990.³² In 1992, Gerald subjected himself and the couple's then four-year old child to genetic testing that excluded Gerald as the child's biological father.³³ Within months, Gerald informed his young son of the test results and completely terminated his relationship with the child.³⁴ Elizabeth then sued a third party for support of the young child.³⁵

The trial court refused to order blood testing or to admit the DNA evidence that Gerald had obtained.³⁶ On appeal, Gerald argued that judicial recognition of the DNA evidence was called for, despite the state's presumption of paternity, insofar as the social ends served by the presumption were inapplicable to his case. Specifically, Gerald noted that the presumption should not apply because he and Elizabeth had divorced, and thus no intact family would be preserved by finding him to be his ex-wife's child's father.³⁷

A Pennsylvania appellate court disagreed and concluded that the presumption was applicable.³⁸ That court further ruled that the presumption had not been rebutted by evidence of Gerald's sterility, impotency, or non-access to his wife³⁹—the traditional grounds for rebutting the presumption of paternity. The court did, however, acknowledge a need to reexamine the presumption of paternity given "advancements in technology."⁴⁰ "We need not," the court explained, "blindly apply [the presumption], nor cling to timeworn principles to support the Commonwealth's goal of protecting the family."⁴¹ The court proceeded to outline a series of fact-sensitive rules

30. 688 A.2d 726 (Pa. Super. Ct. 1997), *aff'd*, 720 A.2d 764 (Pa. 1998), *cert. denied*, 119 S. Ct. 1757 (1999).

31. *See id.* at 727-28.

32. *See id.* at 727.

33. *See id.*

34. *See id.* at 728.

35. *See id.*

36. *See id.*

37. *See id.* at 732 (citing *Kohler v. Bleem*, 654 A.2d 569, 576-77 (Pa. Super. Ct. 1995) (stating, *inter alia*, that courts should consider whether the policy supporting the presumption was furthered where the family is not intact and the mother's husband has rebutted the presumption of paternity)).

38. *See id.*

39. *See id.*

40. *Id.* at 730.

41. *Id.* at 730-31.

for application to paternity cases.⁴² Relying on those rules, the court found a set of facts in Gerald's case that argued in favor of presuming Gerald's paternity. The court wrote:

Here, Gerald clearly had an established relationship with his son. . . [H]e did not question it until after the relationship between him and his wife deteriorated. Although the family is not now intact . . . a familial relationship existed at the time the child was born, and more significantly, a parent-child bond was formed. Despite Gerald's unilateral termination of this relationship and his decision to notify the child that he was not his father, we find that a considered application of the myriad factors involved to the facts of this case warrant a finding that the relationship still exists at law.⁴³

After the decision, Gerald continued to pay child support of over \$500 a month. He claimed that, although he was not, and did not want to be, the child's father, he would have hoped for "a limited nonparental role' in the boy's life."⁴⁴

Miscovich, and a number of other cases like it,⁴⁵ represent the willingness of courts to predicate particular familial relationships on a judge's sense of what both the social and biological dimensions of those relationships *should have been*, and in doing that, to contravene, or simply to ignore, apparent facts about both biology and behavior. In such cases, the law strives to sustain a traditional image of family, but in doing that, relies on a presumption that can be conclusively disproved by accurate paternity testing. The legal results include the proliferation of a wide variety of discrete rules about paternity, each delimited for application to a particular

42. The *Miscovich* court, in "attempt[ing] to impose an order" on paternity decisions, first noted the need to distinguish cases involving children born "during or out of wedlock." *Id.* at 729. The court then declared the presumption inapplicable to children born out of wedlock. *See id.* In such cases, the court explained, the "determination of paternity . . . turns on the application of the estoppel principles to the particular facts of the case." *Id.* The establishment of paternity through estoppel principles would, in turn, render "blood tests and evidence to rebut the presumption of paternity irrelevant." *Id.* at 729-30. With regard to children born during marriage, the court continued, evidence from blood tests may not be ordered "if the presumption of paternity has not been rebutted with clear and convincing evidence." *Id.* at 730. However, in cases in which the presumption of paternity has been rebutted, in general, "paternity becomes a relevant fact and blood tests may be ordered." *Id.* That notwithstanding, "a party's right to a blood test must be balanced against competing societal or family interests." *Id.* The court concluded: "Finally, the presumption is irrefutable where the mother, child and husband live together as an intact family, with the husband assuming parental responsibility." *Id.*

43. *Id.* at 733.

44. Margaret A. Jacobs, *Courts Favor Ancient Paternity Rule over DNA Tests*, WALL ST. J., June 2, 1999, at B1.

45. *See, e.g.*, B.H. v. K.D., 506 N.W.2d 368, 374 (N.D. 1993) (denying biological father right to assert paternity when a marital presumption exists). *See also* Jacobs, *supra* note 44, at B1. *But see* Martin v. Martin, 710 A.2d 61, 65 (Pa. Super. Ct. 1998) (holding presumption inapplicable in case in which "no intact family will be preserved by application of the presumption").

sort of paternity case,⁴⁶ and, more broadly, widespread uncertainty about the scope of the moral order represented by those rules.

The rules for determining paternity, as outlined in *Miscovich*, can lead to legal paternity being predicated on biological paternity but not on social paternity; to legal paternity being predicated on social paternity but not biological paternity; and sometimes to the imposition of legal paternity on a man such as Gerald Miscovich, who bears neither a biological nor a social relation to the child for whom the law holds him responsible, as father.

The extent to which the law now defines the father-child relationship without reference to a set of stable, over-arching rules is represented more dramatically still by a series of four United States Supreme Court cases decided between 1972 and 1983 concerned with the rights of unwed biological fathers to be recognized as legal fathers. The cases have generally been interpreted to mean that putative fathers have legal rights if, and only if, they establish significant social relationships with their children.⁴⁷ That interpretation, however, does not explain the differing outcomes in the cases; two of which (*Stanley v. Illinois*⁴⁸ and *Caban v. Mohammed*⁴⁹) granted paternal rights to an unwed putative father, and two of which (*Quilloin v. Walcott*⁵⁰ and *Lehr v. Robertson*⁵¹), declined to recognize an unwed putative father as a legal father. The Court's decisions in these cases do not (despite the Court's claims) reflect a clear difference in the quality of the respective fathers' social paternity.⁵² In each case, the Court proclaimed that an unwed putative father becomes a legal father only through the assertion of a social relationship with his biological child. However, that proclamation does not account for the four decisions. The social connection that the Court actually required in these cases was not simply between the father and his child. Instead, the Court recognized the legal paternity of those fathers who established "families" (marital or non-marital) with their children *and* their children's mothers.⁵³ The law deprives other putative fathers—even those bringing impressive evidence of a

46. For instance, in *Miscovich*, the court attempts "to impose an order on [various legal] . . . concepts [about paternity] in light of the various factual permutations which arise in paternity cases. The rules," the court proclaims, "differ for each scenario." *Miscovich*, 688 A.2d at 729.

47. See, e.g., David L. Batty, Note, Michael H. v. Gerald D.: *The Constitutional Rights of Putative Fathers and a Proposal for Reform*, 31 B.C. L. REV. 1173, 1201 (1990); Elizabeth A. Hadad, Note, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*—Michael H. v. Gerald D., 56 BROOK. L. REV. 291, 314, 319-20 (1990).

48. 405 U.S. 645, 658 (1972).

49. 441 U.S. 380, 393-94 (1979).

50. 434 U.S. 246, 255-56 (1978).

51. 463 U.S. 248, 267-68 (1983).

52. For a fuller analysis of the jurisprudence underlying cases involving the legal rights of unwed fathers, see Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) [hereinafter Dolgin, *Just a Gene*].

53. See *Caban*, 441 U.S. at 382; *Stanley*, 405 U.S. at 646.

genuine commitment to their children⁵⁴—of the right to assert legal paternity.

This reading of *Stanley*, *Caban*, *Quilloin*, and *Lehr* is reaffirmed in light of *Michael H. v. Gerald D.*⁵⁵ In *Michael H.*, a plurality opinion upheld a California statute that precluded a biological father's rebutting the presumption that his child was the legal child of the mother's husband.⁵⁶ The biological father, Michael H., was unable, as a definitional matter, to establish a home with his child and that child's mother because the mother was married to another man at the time of the child's conception and birth, and remained married to that man at the time of the litigation.⁵⁷ The explicit message of *Michael H.*—that a putative father's legal rights to paternity depend on his establishing a home with his child *and* that child's mother—was implicit in the earlier cases.⁵⁸

In short, the unwed father cases (including *Stanley*, *Caban*, *Quilloin*, *Lehr*, and *Michael H.*) suggest an essential confusion underlying the law's understanding of paternity. In these cases, taken as a group, the Court relied expressly on a rule for determining the legal paternity of putative fathers—that a putative father will enjoy paternal rights if, and only if, he effects a social relationship with his child.⁵⁹ But the rule fails to explain the particular decisions rendered by the Court. A somewhat different rule—one left unarticulated by the Court—comes closer to explaining the decisions. But that second rule—a rule grounded in traditional assumptions about the relationship of a man to the mother of his children—serves poorly a generation in which traditional families are almost as often the exception as the rule.⁶⁰

54. In *Lehr*, the Court rejected the petition of Jonathan Lehr to prevent the adoption of his biological daughter by the child's mother's husband. The majority decision ignored the history of the parties detailed in Justice White's dissent. Justice White explained that Lehr had not enjoyed a full social relationship with his daughter, Jessica, only because he had been definitively precluded from such a relationship by the child's mother. See *Lehr*, 463 U.S. at 269 (White, J., dissenting). In fact, Jessica's mother had hidden the child from Lehr who "never ceased his efforts to locate" his daughter. *Id.* After Lehr succeeded in locating Jessica, the child's mother threatened Lehr with arrest if he attempted to see the child. See *id.*

55. 491 U.S. 110 (1989).

56. See *id.* at 128-30.

57. See *id.* at 113-16.

58. See Dolgin, *Just a Gene*, *supra* note 52, at 650-72 (analyzing *Michael H.* and earlier Supreme Court decisions involving unwed fathers).

59. See *supra* notes 47-54 and accompanying text.

60. A cartoon by Litzler, printed in the *New Yorker* in late 1998, features two women in lab coats, holding clipboards, presumably social scientists or statisticians, proclaiming: "Well, it finally happened, statistically speaking. The traditional family is no longer normal." Mark Litzler, Cartoon, WALL ST. J., June 18, 1999, at 19.

Between 1940 and 1993, the rate of children born to unmarried parents increased from 5 percent to 31 percent. See FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER 42 (1999) (citing U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 98, p. 79 (Washington, D.C.: U.S. Government Printing Office, 1996)). Fukuyama notes as well that between 1994 and 1997, the ratio of children born to

Thus, recent cases about paternity—both the unwed father cases and cases such as *Miscovich* involving married men disclaiming the paternity of their wives' children—illustrate the law's striving to preserve a traditional view of family, while simultaneously constructing a series of new, but not altogether consistent, rules that reflect various dimensions of actual contemporary families. Consequently, the continued invocation of the presumption that a man is the biological father of his wife's child serves little beyond rhetorical ends. Moreover, the fictive quality of the presumption in cases in which DNA evidence belies the presumption's biological reality disconfirms a moral order in which the biological dimensions of kinship were expected to serve (because it was assumed that they reflected—or at least *should* reflect) social ends. Still, however, these cases cling to the presumption—though now openly *as illusion*—that the identification and regulation of familial relationships can be anchored in presumptions about underlying biological facts.

Thus, in determining paternity, the law remains committed, at least in theory, to a traditional moral order. That courts often reach holdings that discard, or conflict with, the essential assumptions underlying that order is not taken to diminish the law's express commitment to preserving the domestic arena as one characterized by affective (and, even more felicitously, enduring) bonds of commitment and love. Most important, *Miscovich* and the other cases about paternity, represent the continuing force of nostalgia for tradition.⁶¹

B. *Defining Mother: Biology in the Service of Intention*

The presumption that a man is the father of his wife's children has depended implicitly on the certainty of biological maternity. Inevitably, until the last decades of the twentieth century, a woman who gestated and gave birth to a child was also that child's genetic mother. With the advent of reproductive technology, the possibility of separating maternity into aspects has challenged deeply held social assumptions about biological maternity and about the mother-child bond.

In a number of cases involving gestational surrogates,⁶² courts have

unmarried mothers leveled off. See *id.* at 43 (citing U.S. DEP'T OF HEALTH AND HUMAN SERV., CTR. FOR DISEASE CONTROL, NATIONAL VITAL STATISTICS REPORT 47, No. 4, p. 15 (Washington, D.C.: USHHS, October 7, 1998)).

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

62. The term "gestational surrogate" refers to a woman who gestates and gives birth to a baby to whom she has no genetic connection. Indicatively, in cases in which the gestator is also the intending mother, (the woman who, from the start, plans to socialize the resulting child), she is referred to as a "gestational mother" and the "genetic mother" is referred to as an "egg donor." See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal. 1993) (labeling the case in which "a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own" as "a true 'egg donation' situation").

had to consider the comparative significance of various biological and social components of maternity. The results suggest a startling readiness to displace completely the biogenetic component of family bonds as courts expressly privilege parental intention over biological connections in determining maternity.

The first such case, *Johnson v. Calvert*,⁶³ decided in California in 1993, involved a dispute about the parentage of a child conceived from the egg of one woman but gestated and born to a second woman.⁶⁴ The case arose out of a dispute among Anna Johnson, Mark Calvert, and Crispina Calvert. The Calverts, a married couple, unable to have children without medical assistance because Crispina's uterus had been surgically removed, entered into a contract with Anna Johnson.⁶⁵ Under the contract, Anna agreed to gestate and give birth to a child conceived from Mark's sperm and Crispina's egg, and at the child's birth to surrender all maternal rights to the Calverts.⁶⁶ The contract provided further that the Calverts would pay Anna Johnson \$10,000 in a series of installments.⁶⁷ Johnson became pregnant soon after the agreement was signed. In the sixth month of her pregnancy, she wrote to the Calverts informing them that she would refuse to surrender maternal rights if they did not immediately pay the entire balance due.⁶⁸ As a result, in September 1990, several months before the birth of the baby (Christopher), his genetic parents and his gestational mother were in court disputing his parentage.

Before *Johnson*, a court had never been asked to determine a child's "natural" mother in a case in which the biological facts were certain. Moreover, a court had never before been asked to decide the maternity of a child with two biological mothers.⁶⁹

A number of conceptual options were open to the courts. Arguably, as the trial court in fact concluded, the child's genetic mother was its "real,"

63. No. X-633190, slip op. (Cal. App. Dep't Super. Ct. Oct. 22, 1990), *aff'd sub nom.* Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 1991), *aff'd sub nom.* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. denied sub nom.* Baby Boy J. v. Johnson, 510 U.S. 938 (1993).

64. See generally Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. LAW. REV. 225 (1998) [hereinafter Dolgin, *An Emerging Consensus*] (analyzing *Johnson*, as well as several related California cases, in greater detail).

65. See *Johnson*, 851 P.2d at 778.

66. See *id.*

67. See *id.*

68. See *id.*

69. Both the Calverts' and Johnson's briefs to the court respectively stressed each woman's biological preeminence. For instance, the Calverts urged the state's intermediate appellate court to recognize the significance of "human blood lines." Brief for Respondents at 49, Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 1991) (No. X-633190). Anna Johnson, in turn, defined herself as the baby's biological mother and referred to the "mixing of blood between [pregnant] mother and baby." Appellant's Reply Brief at 8, Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 1991) (No. S023721) [hereinafter Johnson Reply Brief to Court of Appeal]. Similarly, Dr. David Chamberlain, who testified for Johnson at trial, described Johnson and the baby as "intimately attached and biochemically related." *Id.* at 6-7 (citing transcript R.T. Vol. III p. 621).

and thus, its legal mother.⁷⁰ The courts could have defined the birth mother as the "real" mother. State statutory law, however, gave some support to each possibility.⁷¹ Or, perhaps, as an amicus brief by the American Civil Liberties Union argued, both mothers were "real," and thus legal mothers.⁷²

All three state courts that heard the case identified the Calverts as baby Christopher's parents. Not surprisingly, in a dispute raising novel questions and presenting unprecedented facts, each court grounded its holding in a different reading of the facts and of the law. The trial court relied on a reading of the biological facts that privileged genetics over gestation in defining maternity.⁷³ The intermediate appellate court affirmed the lower court's ruling, but relied on a reading of California statutory law.⁷⁴ Finally, the state supreme court affirmed the rulings of the two lower courts, but on entirely different grounds. Concluding that neither the biological facts nor existing statutory law offered clear guidance, the court relied on parental intentions to establish parentage. The court wrote:

[A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the *natural* mother under California law.⁷⁵

In that conclusion, the court expressly displaced biology with intention as the essential ground of "natural" maternity. Intent suggests choice and negotiation, and thus appears to assimilate a determination about maternity to the rules of the marketplace. Nothing could have been further from the court's express design. The court described Crispina Calvert's intentional maternity as effecting an enduring, loving relation between herself and baby Christopher, a relation as certain and powerful as any predicated on a biological bond.⁷⁶ Mimicking the legal presumption that a child's best interests are served by granting custody to a biological parent, the court determined Crispina Calvert to be the *better* mother. "[T]he interests of children, particularly at the outset of their lives," the court declared, "are

70. See *Johnson*, No. X-633190, slip op. at 4-5 (concluding that Crispina Calvert was the child's "genetic, biological and natural mother").

71. See *Johnson*, 851 P.2d at 780. The intermediate appellate court relied on statutory law to identify Crispina Calvert as Christopher's legal mother. In fact, however, as the state supreme court explained, statutory law (written at a time before it was possible to separate biological maternity into aspects) could be read as establishing both the genetic mother and the birth mother as legal mothers. See *id.*

72. See *id.* at 781 n.8.

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

74. See *Anna J.*, 286 Cal. Rptr. at 373-78.

75. *Johnson*, 851 P.2d at 782 (emphasis added).

76. See *id.*

[un]likely to run contrary to those of adults who choose to bring them into being."⁷⁷

Finally, the court was explicit that its reliance on intention should not be read to suggest a preference for the genetic, over the gestational, aspects of maternity in defining legal maternity. The court's reliance on parental intent was not a pretext for formulating a rule that would, in fact, find a child's genetic parents to be that child's "natural" (*real*) parents. The court explained: "under our analysis, in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law."⁷⁸

The next year, just such a case arose in New York. In response, a New York court relied on the model established in *Johnson*. The New York case, *McDonald v. McDonald*,⁷⁹ involved questions about the parentage of twin girls, conceived from the ova of one woman but gestated by another woman. Commenced as a divorce action, the case developed out of a dispute between Robert McDonald, the biological father of the girls, and Olga Benitez McDonald, the gestational mother.⁸⁰ The facts in *McDonald* present a mirror image of those in *Johnson* in that Olga, the intending mother—the woman who from the start intended to be a social mother—gestated and gave birth to the children but conceived them through the use of donated ova.⁸¹ At trial, Robert urged the court to grant him custody because, among other things, he was the "sole genetic parent among the parties."⁸² The court rejected Robert's argument and proceeded to recognize Olga as the natural mother *because* she was the intending mother.⁸³ The court asserted:

In the case at bar, we have a true 'egg donation' situation, and we find the reasoning of the Supreme Court of California on this issue to be persuasive. Accordingly, the Supreme Court, Queens County, correctly held that in the instant 'egg donation' case, the wife, who is the gestational mother, is the natural mother of the children, and is, under the circumstances, entitled to temporary custody of the children with visitation to the husband.⁸⁴

77. *Id.* at 783 (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397).

78. *Id.* at 782 n.10.

79. 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

80. *See id.* at 478.

81. *See id.* at 480.

82. Brief for Plaintiff-Appellant at 18-19, *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (No. 91-08907) [hereinafter *McDonald Appellant Brief*].

83. *See McDonald*, 608 N.Y.S.2d at 480.

84. *Id.* (citation and footnote omitted). Arguably, the denomination of Crispina Calvert as Christopher's "natural" mother followed from parts of California statutory law that regulate the identification

Neither the decision in *Johnson* nor that in *McDonald* represents a broad judicial willingness routinely to privilege intention over biology in determining parentage. Rather, in each case, the court invoked the intentions of the disputing parties after concluding that it was impossible to reach a determination about parentage through reference to biology. For each court, both sides made cognizable claims to biological parentage. Thus, both *Johnson* and *McDonald* suggest that courts should look to intentional parentage to resolve an apparent biological "tie" but not to grant parentage to someone lacking any biological connection to the child involved.

That limitation on the reach of intentional parentage was abandoned in *In re Marriage of Buzzanca*,⁸⁵ a 1998 California case. *Buzzanca*, like *McDonald*, involved a divorce between the intending parents of a child conceived in vitro and gestated by a woman not related genetically to the child she carried and bore.⁸⁶ However, unlike the parents in *McDonald*, neither John nor Luanne Buzzanca, the intending parents in *Buzzanca*, was related biologically to the child, a girl named Jaycee, born in 1995.⁸⁷ The Buzzancas had entered into a contract with a gestational surrogate, Pamela Snell. Snell agreed to gestate and give birth to a child for Luanne and John.⁸⁸ The Buzzancas arranged for Snell to become pregnant through use of an embryo created from the sperm and ovum of anonymous donors.⁸⁹

Buzzanca differed from the majority of cases occasioned by reproductive technology in that custody of the child was sought by too few, rather than by too many, potential parents. John, who separated from Luanne before Jaycee's birth and who was anxious to avoid a support obligation for Jaycee, claimed that he was not a legal party to the surrogacy agreement because he had not signed the surrogacy contract until after conception of the baby.⁹⁰ The gestational surrogate, Pamela Snell, filed for custody during the proceedings between the Buzzancas, but later withdrew her claim.⁹¹ The trial court, faced with at least six potential parents—John,

of a child's "natural" parent. In New York, however, no such statutory provision compelled the *McDonald* court to define Olga McDonald as the twins' "natural" mother. See *id.* at 479-80.

85. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). For a more complete description and analysis of *Buzzanca*, see Dolgin, *An Emerging Consensus*, *supra* note 64, at 243-53.

86. See *Buzzanca*, 72 Cal. Rptr. 2d at 282.

87. See *id.*

88. See Donna Foote, *Family: And Baby Makes One: In a Bizarre Clash of the Law and Fertility Techniques, Jaycee is a Child Without a Parent*, NEWSWEEK, Feb. 2, 1998, at 70.

89. See *id.* John Buzzanca had been diagnosed with a low sperm count, and Luanne Buzzanca suffered from endometriosis. The couple had not succeeded in becoming pregnant through use of artificial insemination and in-vitro fertilization. See *id.* at 68.

90. See *Jaycee B. v. Superior Court*, 49 Cal. Rptr. 2d 694, 696-97 (Cal. Ct. App. 1996) (declaring trial court had jurisdiction to compel John to contribute child support for Jaycee pending decision on question of parentage).

91. See Davan Maharaj, *Case May Redefine Fatherhood in State*, L.A. TIMES, Sept. 14, 1997, at B1, available in LEXIS, News Library, Lat File.

Luanne, Pamela and her husband, the sperm donor and the egg donor⁹²—only one of whom (Luanne) sought parentage or custody—concluded that Baby Jaycee was a child without parentage.⁹³

On appeal, a state appellate court reversed, concluding that the Buzzancas' parental status was established at Jaycee's birth by reason of their parental intentions.⁹⁴ The decision dramatically expands the importance of intentional parenthood as delineated in *Johnson* (on which the *Buzzanca* court ostensibly relied).⁹⁵ In *Johnson*, the court depended on parental intentions to define parentage in a case in which the intending parents and the surrogate with whom they were in dispute, all bore a biological relation to the child.⁹⁶ The *Buzzanca* court, in contrast, applied the *Johnson* intent-standard to define as parents—indeed as “natural parents”—two people who had no biological connection to the child involved.⁹⁷

Buzzanca clearly postulates a form of parentage *ab initio* that does not depend on bonds grounded in biology. Unlike adoptive parentage, which depends on the termination of the rights of a biological parent (or parents), the sort of parentage delineated in *Buzzanca* assumes no previous parent. That difference is reflected in the *Johnson* and *Buzzanca* courts' use of the term “natural” parent to refer to parties whose parentage was grounded, from the start, on the intention to be a social parent.⁹⁸

As a group, the gestational surrogacy/gestational motherhood⁹⁹ cases (*Johnson*, *McDonald*, and *Buzzanca*) suggest a new stress in social and moral definitions of parentage.¹⁰⁰ Each court substituted parental “inten-

92. Arguably, the spouses of the sperm and egg donors could also have had cognizable claims to the parentage of Jaycee. Although the Buzzancas apparently believed the egg and sperm donors were unidentifiable, they may well have been identified. See *48 Hours: The Family Tree; Child Born to In-vitro Fertilization May Have Been Created from Stolen Embryo* (CBS television broadcast, May 14, 1998), available in LEXIS, News Library, CBSnews File. Jaycee was conceived at a California infertility clinic associated with University of California-Irvine. That clinic was closed in 1995 after it was revealed that patients were receiving gametes retrieved from other clinic patients who had not consented to such donations. See *id.* In 1998, Jaycee's genetic parents were identified by a lawyer attempting to trace the “stolen” gametes. See *id.* Both the person identified as Jaycee's genetic mother and the person identified as her genetic father are married to other people. See *id.*

93. See *Buzzanca*, 72 Cal. Rptr. 2d at 283. Trial court Judge Robert Monarch declared:

So I think what evidence there is, is stipulated to. And I don't think there would be any more. One, there's no genetic tie between Luanne and the child. Two, she is not the gestational mother. Three, she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she's not the legal mother.

Id.

94. See *id.* at 288-89.

95. See *id.* at 288.

96. See *supra* notes 75-78 and accompanying text.

97. See *Buzzanca*, 72 Cal. Rptr. 2d at 290 (quoting *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993)).

98. See *id.* at 285-86.

99. See *supra* note 62 (considering different uses of the terms “gestational surrogate” and “gestational mother”).

100. See *infra* Part II.C (expressly considering moral implications of these cases).

tions" for biology in anchoring parentage. The substitution is surprising in that intention is the correlate of choice and, as such, would seem ill-fitted to safeguard traditional understandings of parentage, grounded on a conception of inexorable truths.¹⁰¹ Yet, that was the express aim of these courts. In effect, the courts presumed that the forms through which families are created need not implicate their operation. Each court elided (as in *Johnson* and *McDonald*) or expressly disregarded (as in *Buzzanca*) biological facts *in order to* safeguard other aspects of a traditional understanding of parentage. In doing that, each court described parental intentions as providing a firm foundation—quite as firm as that provided by biology—for the actualization of loving, enduring parent-child relationships.¹⁰²

The recognition of intention, and thus choice, as central to the construction of family relationships is not limited to cases occasioned by reproductive technology. The law has focused on the autonomy of individual family members in determining the rights and duties of *adult* family members vis-a-vis one another. Beginning in 1969, legislatures began widely to provide for no-fault divorce.¹⁰³ At about the same time, courts began to recognize and enforce antenuptial agreements and cohabitation agreements.¹⁰⁴

These changes represent a clear shift away from a family law system committed to a vision of families as holistic, hierarchically structured social units with identities encompassing and superseding the identities of individual members. Only rarely have courts been anxious to re-envision the parent-child bond in similar terms, but that has begun to occur in the context of disputes occasioned by reproductive technology.¹⁰⁵ The rapid development of that technology, and the confusion it has engendered about the implications of biological parentage, have compelled, or at least encouraged, courts to seek alternative visions of the parent-child relationship as well as of relationships among adults within families. *Johnson*, *McDonald*, and *Buzzanca*, among other cases, expressly represent judicial readiness to premise even the parent-child relationship on bargained

101. See Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1308-12 (1994) (suggesting fragility of attempt to safeguard traditional families through reliance on conceptual instrument of intention).

102. See *infra* Part II.C.

103. See MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 45-46 (1999) (considering shift to no-fault divorce rules).

104. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970); *Scherer v. Scherer*, 292 S.E.2d 662, 666-67 (Ga. 1982); *Osborne v. Osborne*, 428 N.E.2d 810, 815-16 (Mass. 1981); see also Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 511, 515-16 (1988) (noting that in enforcing cohabitation agreements and antenuptial agreements, courts rely heavily on standard principles of contract law).

105. See *infra* note 106 (referring to cases involving children "divorcing" their parents).

choices.¹⁰⁶

C. "Families-of-Choice"

In cases involving disputes about biological and legal paternity as well as in those involving disputes about gestational and genetic maternity, courts have justified their holdings as being most likely to protect families as moral units, characterized by diffuse enduring solidarity. Moreover, each court disentangled the biological and social dimensions of familial relationships precisely to safeguard families as moral units—as units of enduring love and solidary commitment. However, in their willingness to overlook or displace the biological "facts of family," these courts have dismantled the frame within which the traditional families they presume to preserve were once delimited.¹⁰⁷

In short, the gestational surrogacy/gestational motherhood cases differ from the cases involving paternity in abandoning the *presumption* that families are grounded on biological truths. However, *Miscovich*, *Johnson*, *McDonald*, and *Buzzanca* all testify to the power of nostalgia for tradition in family matters. Each of these courts set out to safeguard the moral dimensions of family life. Each court associated that notion with traditional family life. But the *Miscovich* court located tradition in the social force of the marital tie,¹⁰⁸ while the *Johnson*, *McDonald*, and *Buzzanca* courts located tradition by recognizing maternal intentionality as a substitute for biological maternity.¹⁰⁹ The *Miscovich* court presumed a *biological* connection between a man and his wife's child in order to preserve a traditional family unit, and in doing that, ignored the biological *facts* presented by Gerald Miscovitch.¹¹⁰ In contrast, courts in cases occasioned by gesta-

106. A number of cases outside the context of reproductive technology show a similar shift in the law's approach to parent-child relationships. For instance, a few courts have been willing to premise custody (though rarely parentage) on considerations that ignore, or that conflict with the implications of relevant biological facts. See, e.g., *Bennett v. Jeffreys*, 356 N.E.2d 277, 284-85 (N.Y. 1976) (granting custody to non-parent despite presence of fit parent, due to "extraordinary circumstance[]" of non-parent having cared for child for long period); *Painter v. Bannister*, 140 N.W.2d 152, 154, 158 (Iowa) (granting custody to maternal grandparents despite readiness of "fit" widowed father to raise child), *cert. denied*, 385 U.S. 949 (1966). Moreover, in a few more recent cases, state courts have granted young children standing to question their own parentage. See, e.g., *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992), *rev'd sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). Though overturned on appeal, the Florida trial court granted eleven year-old Gregory standing to contest his biological mother's parentage. See *Id.* at *1. In a second Florida case, a trial court granted standing to a child to challenge a prior court stipulation about her parentage. See *Twigg v. May*, No. 88-4489-CA-01, 1993 WL 330624, at *3 (Fla. Cir. Ct. Aug. 18, 1993).

107. For an anthropologist's analysis of the concept of "families-of-choice," see KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

108. See *supra* notes 38-44 and accompanying text.

109. See *supra* notes 100-02 and accompanying text.

110. See *Miscovich v. Miscovich*, 688 A.2d 726, 730-33 (Pa. Super. Ct. 1997), *aff'd*, 720 A.2d 764 (Pa. 1998), *cert. denied*, 119 S. Ct. 1757 (1999).

tional surrogacy (*Johnson*, *McDonald*, and *Buzzanca*) were unable to ignore the reproductive facts.¹¹¹ Each dispute was defined by the novelty of those facts. Moreover, in each case, discerning the implications of those facts constituted the central judicial task. These courts did, however, elide the biological facts. The courts in each gestational surrogacy case self-consciously substituted knowledge ("intent") about biological facts *for those facts* in defining maternity.¹¹² Then, each court presumed that the creation of family units need not implicate their operation.

In the families that Schneider portrayed in the 1960s,¹¹³ the biological and social dimensions of kinship were inextricably connected. Each dimension implicated, and depended upon, the other. Biological bonds were understood to ground social bonds in inexorable natural, and thus, in moral, truth. Schneider wrote:

The biological elements in the definition of kinship have the quality of symbols. That blood relatives share biogenetic substance is a symbol of unity, of oneness, and this is symbolically interchangeable with the symbol of love. . . . [B]iological unity is the symbol for all other kinds of unity including, most importantly, that of relationships of enduring diffuse solidarity.¹¹⁴

In confronting the challenges that DNA fingerprinting presents to assumptions about paternity and that gestational surrogacy presents to assumptions about maternity, the law reflects and fosters an ideology of family that prizes autonomous individuality. The law, like the larger society, views the domestic arena in terms once reserved for life in the marketplace. Biology becomes less important as contract and its correlates (choice, intention, and promise) become more important. But at the same time, the law masks that process by continuing to rely on the terms, though not the broad design, of traditional family life.

III. GENETIC IDEOLOGIES: TESTING THE LIMITS OF CHOICE

A new variant—more accurately, a new conception—of family¹¹⁵

111. See *Johnson v. Calvert*, 851 P.2d 776, 781-82 (Cal. 1993); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 479-80 (N.Y. App. Div. 1994); *In re Buzzanca*, 72 Cal. Rptr. 2d 280, 286, 288-89 (Cal. Ct. App. 1998).

112. See *Johnson*, 851 P.2d at 782; *McDonald*, 608 N.Y.S.2d at 480; *Buzzanca*, 72 Cal. Rptr. 2d at 286, 288-89.

113. Schneider described the culture of American families and not their demography. Thus, he was concerned with the symbols that defined families and with the family as a symbol. He did not suggest that actual families necessarily conformed to that model. See SCHNEIDER, *supra* note 5, at 1-6.

114. *Id.* at 52-53. Schneider defined "enduring diffuse solidarity" as sociological jargon for what Americans most usually referred to as "love." *Id.* at 50.

115. The reification implicit in the notion of a "genetic family" as a variant of family should not be read to suggest that the "genetic family" can be described demographically (as can, for instance, the so-called "family-of-choice").

poses an unfamiliar challenge to existing conceptions of family—to families understood as holistic, solidary communities, as well as to families understood as collections of autonomous individuals, free to choose their own relationships through bargained negotiation. This new perception of family, referred to in this article as the “genetic family,” is being elaborated largely in medical contexts through the notion of genetic diseases. In understandings of the genetic (or medicalized)¹¹⁶ family, biology can be neither ignored nor displaced. It alone determines the scope of the familial unit.

A. *The Ideology of the Genetic Family*

As an ideological construct, the genetic family reflects the older eugenics movements of the first half of the twentieth century,¹¹⁷ as well as a more widespread view of biology as destiny. However, the elaboration of the ideology of genetic inheritance and of its institutional counterpart, the human genome project,¹¹⁸ are transforming the construct of the genetic family into a social unit subject, as such, to genetic testing, diagnosis, and discrimination. In consequence, the genetic family develops a reality of its own. Its development further fragments the ideology within which families are understood, and challenges the presumption that society can safeguard traditional families *or* modern families—so-called families-of-choice—as units of love grounded in loyalty and solidary commitment.

The biological dimensions of the traditional family that Schneider described operated within, and informed, a larger moral frame.¹¹⁹ Even as courts have ignored or elided the biological dimension of family in recent decades, they have struggled to preserve the sense of a moral order associated with the traditional family and grounded in biogenetic substance. That concern has directed courts as they have assessed both the significance of DNA fingerprinting in paternity cases and the comparative importance of genetics and gestation in surrogacy cases.¹²⁰ That concern—preserving the social dimensions of traditional family relationships—is threatened by the

116. See FINKLER, *supra* note 13, at 14.

117. The start of the so-called “modern” eugenics movement is associated with Francis Galton, who suggested that the human species could be improved through application of methods applied to the breeding of plants and animals. Galton’s theories gained widespread popularity in the United States, Britain, and Germany in the first half of the twentieth century. See Daniel J. Kevles, *Out of Eugenics: The Historical Politics of the Human Genome*, in *THE CODE OF CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT* 3, 4-11 (Daniel J. Kevles & Leroy Hood eds., 1992) (describing history of eugenics movements).

118. The Human Genome Project (HGP) is the joint effort of sixteen nations to discover and map all human genes. See BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 1001-02 (3d ed. 1997). The HGP is funded in the United States by the Department of Energy and the National Institutes of Health. See *id.* at 1001.

119. See SCHNEIDER, *supra* notes 5-6, 12 and accompanying text (portraying ethnography of American kinship at mid-twentieth century).

120. See *supra* Part II.A-B.

genetic family. The genetic family is defined through tests and diagnoses, developed as part of the new genetics.¹²¹ The moral frame, within which traditional family life was understood, disappears—to be replaced with the construct of the gene. Genetic information alone becomes relevant. Genes suggest nothing about social relationships. They are simply data. As such, they neither represent nor demand particular *moral* links among the people they describe. The notion of the gene as the arbiter of personhood could replace culture, morality, religion, and history—indeed time itself—with mapped sequences of DNA.¹²²

Recognizing human nature as “fixed by our genes” abdicates responsibility in favor of a predetermined biological self.¹²³ Thus, ultimately, the force of amoral genetic data will likely deflect even the illusion that choice provides salvation.¹²⁴ Moreover, the ideology of genetic inheritance challenges the lingering presumption that family relationships, even if predicated on choice, differ in some essential regard from relationships in the marketplace. Genetic families exist neither in the marketplace nor in the home. They inhabit the interstices between home and work. As the ideology of genetic inheritance and the construct of a genetic family become increasingly relevant in non-domestic settings (medicine, employment, insurance), the family enters the marketplace in a new guise.

A peculiar irony follows. Just as family law disavows the traditional presumption that the social correlates of family life flow from inexorable biological truths, biological understandings of personhood and of family gain increased significance in the marketplace. In the world of work, the temptation to make decisions about individuals and about their genetic family members solely on the basis of biological data can become compelling.

Moreover, the construct of a genetic family portends a new conception of personhood that could, at least in theory, substitute for both the person in traditional families of hierarchically arranged statuses and for the autonomous individual who populates families-of-choice. Genetic information can be used to describe individuals and groups. However, the groups so described are understood according to the metaphor of the individual.

The notion of one human genome—a notion suggested in the appella-

121. The Human Genome Project is expected to allow scientists to identify genes responsible for thousands of diseases. Screening tests already exist for genes associated with many diseases including breast cancer, Huntington's Disease, and Goucher's Disease. See JEREMY RIFKIN, *THE BIOTECH CENTURY: HARNESSING THE GENE AND REMAKING THE WORLD* 26-27 (1998).

122. Ruth Hubbard and Elijah Wald describe the human genome project as “reductionism at its most extreme.” HUBBARD & WALD, *supra* note 26, at 3.

123. R.C. LEWONTIN ET AL., *NOT IN OUR GENES: BIOLOGY, IDEOLOGY AND HUMAN NATURE* 6 (1984).

124. In fostering a-responsibility, the new genetics may briefly facilitate the yearnings of a society already convinced that moral anchors impede the proliferation of choice.

tion, Human Genome Project—is a statistical construct that represents no one's actual genome. Statistical license allows the human genome to stand for "human nature," and thus for any person's genome although, in fact, the actual genomes of particular people differ by millions of bases.¹²⁵ Inherent to the Human Genome Project is a concept of a "normal" genome, the so-called "human genome."¹²⁶ The level of social value attached to genetic information thus depends on context. Sub-groups and individuals can be defined as deviant insofar as maps of their genomes vary from that of the "human" genome map.

As a result, knowledge about a group's genome map can implicate individuals, assumed on other grounds to belong to the group. Equally, genetic information about an individual can implicate familial, racial, ethnic, and national groups to which that person belongs. The potential for invidious discrimination is clear. Anecdotal accounts already exist, describing discrimination against groups on the basis of genetic information about an individual.¹²⁷ One mother reported that her family's health insurer canceled the family's coverage after a doctor described her six-year old son on an insurance claim form as suffering from fragile X syndrome, a hereditary condition that involves mental retardation, even though none of the child's siblings had been diagnosed with fragile X.¹²⁸

Equally, knowledge of a group's genome map can implicate group members. Professors Dreyfuss and Nelkin note that "[i]f it is accepted that genetic endowment determines the propensity to commit bad acts, then hereditary traits, which often reduce to ethnic group membership, may one day be considered evidence of the commission of a crime."¹²⁹ The possibility becomes increasingly serious as more and more genetic conditions are associated with ethnic and national groups.¹³⁰

The ideological implications are astonishing. The notion of the genetic family encourages shifts in the locus of social value from the autonomous

125. See Evelyn Fox Keller, *Nature, Nurture, and the Human Genome Project*, in *THE CODE OF CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT* 281, 294 (Daniel J. Kelves & Leroy Hood eds., 1992).

126. See *id.* at 298-99 (considering notion of "normal").

127. See Geoffrey Cowley, *Flunk the Gene Test and Lose Your Insurance*, *NEWSWEEK*, Dec. 23, 1996, at 48 (noting "recent" study by Virginia Lapham of Georgetown University reporting 22% of respondents in genetic disease support groups had experienced insurance discrimination and 13% experienced employment discrimination; and noting 1996 study by Lisa Geller of Harvard Medical School reporting 200 cases of genetic discrimination against healthy people).

128. See *id.*

129. Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 *VAND. L. REV.* 313, 331 (1992).

130. Sickle-cell anemia is associated with people of African American descent; thalassemia with people of Southeast Asian, Greek, Italian and Ashkenazi Jewish descent; idiopathic torsion dystonia, Gaucher Disease, and BRCA1, a breast cancer gene, with people of Jewish descent. See Stephen Aaron Silver, Note, *Beyond Jaffee v. Redmond: Should the Federal Courts Recognize a Right to Physician-Patient Confidentiality?*, 58 *OHIO ST. L.J.* 1809, 1860 n.233 (1998).

individual to that of larger wholes. Thus, the new genetics and the genetic family—or the genetic race and the genetic ethnic group—provide for the collapse of autonomous individuality, and its replacement by larger wholes, each envisioned according to the metaphor of the autonomous individual. As a result, the autonomous individual can be rendered irrelevant.

In defining “genetic information,” a few state legislatures have recognized that an individual’s genome can be used to implicate family members.¹³¹ The Ninth Circuit also recognized this possibility in *Norman-Bloodsaw v. Lawrence Berkeley Laboratories*.¹³² In that case, the circuit court found that pre-employment testing of African American applicants for the sickle-cell trait constituted a violation of Title VII of the Civil Rights Act.¹³³

Generally, however, lawmakers have assumed the autonomous individual as the subject of protective legislation concerning genetic information. In consequence, they have not widely focused on the implications of genetic information for familial, and larger groups. In a few judicial cases, however, those implications become manifest.

B. *Legal Responses to the New Genetics: Autonomy and the Genetic Family*

Francis S. Collins, Director of the Human Genome Research Institute, has pressed lawmakers to calm popular fears about the implications and consequences of the human genome project. Those fears, Collins explained, interfere with ongoing research.¹³⁴ Collins has also acknowledged the specific threat posed to privacy within family contexts by the discovery and communication of genetic information. Commenting to the press in early 1999, Dr. Collins made the concern explicit. “Would I want to know,” he asked, “my future spouse’s DNA?”¹³⁵ In answering his own

131. See, e.g., N.M. STAT. ANN. § 24-21-2(D) (Michie Supp. 1999) (defining “genetic information” as “information about the genetic makeup of a person or members of a person’s family”); OR. REV. STAT. ANN. § 659.700(5) (LEXIS Supp. 1998) (defining “genetic information” as “information about an individual or family”); S.C. CODE ANN. § 38-93-10(2) (West Supp. 1998) (defining “genetic information” as “information about genes, gene products, or genetic characteristics derived from an individual or a family member of the individual”); TENN. CODE ANN. § 56-7-2704(a) (LEXIS Supp. 1998) (precluding insurance provider from requesting or requiring disclosure of “genetic information about the individual or family member of the individual”).

132. 135 F.3d 1260 (9th Cir. 1998).

133. See *id.* at 1271-72.

134. See Monique K. Mansoura & Francis S. Collins, *Medical Implications of the Genetic Revolution*, 1 J. HEALTH CARE L. & POL’Y 329, 344 (1998) (citing Francis S. Collins, Statement Before the Congressional Task Force on Health Records and Genetic Privacy, Preventing Genetic Discrimination in Health Insurance (July 22, 1997), <http://nhgri.nih.gov/Policy_and_publicaffairs/Legislation/stearnsh.html>).

135. Ronald Kutulak, *Genetics Reshaping Medicine: The Future Is Now for the Powerful New Tool*, CHIC. TRIB., Feb. 21, 1999, at 1, available in LEXIS, News Library, Chtrib File.

query, Collins sided with privacy and acknowledged a view of spouses as autonomous individuals in relation to each other. "Only," he responded, "if my spouse was willing to tell me. . . . Would I want love to reign supreme? You bet. The autonomy of the individual, even in marriage, ought to be preserved."¹³⁶

The law has widely shared Collins' concern with protecting privacy. For the most part, lawmakers have refrained—at least outside the context of the abortion debate¹³⁷—from directly limiting the development of genetic research¹³⁸ or its practical applications.¹³⁹ Accordingly, most attempts to draft protective legislation have concentrated on safeguarding privacy from a threat perceived as implicit in the discovery and proliferation of genetic information, and on precluding potentially discriminatory uses of that information.¹⁴⁰ State legislatures have, for instance, begun to

136. *Id.*

137. Congress has prohibited the use of funds appropriated to the Department of Health and Human Services for research that involves embryonic destruction for non-therapeutic purposes. See 110 Stat. 3009-243 (1996).

138. In this regard, legislative responses reflect what Larry Gostin describes as "the current mood in academic bioethics." Laurie Garrett, *Long Island: Our Future/Chapter 2: Health and Medicine/Tomorrow's Cures/Healing from the Inside/Scientists Forecast a Revolution in Medical Care as Surgery Gives Way to Manipulating DNA and Restoring Damaged Cells*, NEWSDAY, Feb. 7, 1999, at H03, available in LEXIS, News Library, Newsdy File. That mood frowns on curtailing research as a limitation on personal freedom.

139. Legal responses to the 1997 announcement that Ian Wilmut had cloned a sheep are indicative. Even following the widely heralded recommendation of the National Bioethics Advisory Commission to ban human cloning for a period of years, see CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997) [hereinafter NBAC REPORT], Congress passed no legislation.

The technology that allows cloning is a product of research in molecular biology. Immediately, President Clinton directed the National Bioethics Advisory Commission to review the legal and social implications of cloning and to prepare a report. See Judy Mann, *The Brave New World of Cloning*, WASH. POST, Feb. 28, 1997, at 3, available in LEXIS, News Library, Wpost File. The NBAC Report was published in June 1997. Although Congress did not effect the Report's recommendations, many bills were proposed in the few years following the realization of animal cloning. See, e.g., Emily Ramsey, *Legal Responses to the Potential Cloning of Human Beings*, 32 VAL. U. L. REV. 433, 436-41 (1998) (describing bills about cloning introduced in House or Senate). Similarly, state legislatures considered many bills about cloning but few enacted laws. Both California and Rhode Island banned human cloning for five years. See CAL. BUS. & PROF. CODE § 2260.5 (West 1998); R.I. GEN. LAWS § 23-16.4-1 (1998). See also MICH. COMP. LAWS § 333.20197 (1998) (MICH. STAT. ANN. § 14.15 (20197) (1998)) (prohibiting attempts to clone humans but allowing a registrant to engage in scientific research or cell-based therapies).

Some commentators have claimed that proposed and existing statutory rules do interfere with research, but that has rarely been the express goal of those sponsoring such bills. One representative of the biotechnology industry is quoted to have said: "Some of the legislation [aimed at limiting the dissemination of genetic information] would virtually stop genetic research or severely limit our ability to conduct clinical trials." Meredith A. Jagutis, *Insurer's Access to Genetic Information: The Call for Comprehensive Federal Legislation*, 82 MARQ. L. REV. 429, 430 (1999) (citing Robert Pear, *Statutes Pass Laws to Regulate Use of Genetic Testing*, N.Y. TIMES, Oct. 18, 1997, at A1 (quoting Carl B. Feldbaum, president of the Biotechnology Industry Organization)).

140. See *infra* notes 146-49 and accompanying text (reviewing legal responses to the human genome project).

promulgate rules delimiting the use and dissemination of genetic information, and to define legal obligations—of doctors, employers, insurers, researchers, and others—with reference to such rules.¹⁴¹

Models for these statutes stem from the world of commerce. Obligations to reveal or refrain from revealing information have long been central to the ethic of the marketplace. Such rules have reflected, and presumed to safeguard, the ideology of autonomous individuality by presuming that once informed, social actors are equipped to make their own choices and to effect their own bargains. So, for instance, rules concerned with the protection or dissemination of information are central to the governance of the corporate world.¹⁴²

Other models on which the law now relies in regulating the new genetics stem from tort law,¹⁴³ and still others from the doctrine of informed consent in medical contexts.¹⁴⁴ Legal responses to the new genetics have largely involved the promulgation of rules that limit or preclude the use and dissemination of genetic information.

A few courts, however, have reflected an opposite concern and in doing that, have begun to elaborate the construct of a genetic family. These courts have ordered the *revelation* of genetic information. Their decisions illustrate the limits of the larger effort to protect genetic privacy and suggest that the law, despite its express goals, may facilitate a construct of family that abrogates the autonomy of individual family members as certainly as it abrogates the possibility of traditional family life.

141. See *supra* note 131 and accompanying text..

142. Many securities laws rest on the notion that corporate morality depends centrally on the dissemination of information. See, e.g., Rule 10b-5, 17 C.F.R. § 240.10b-5 (1999). The rule, promulgated pursuant to the grant of authority given to the Securities and Exchange Commission by Section 10(b) of the Securities Exchange Act of 1934, provides in part:

It shall be unlawful for any person, directly or indirectly, by the use of any means of instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, . . .

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

15 U.S.C. § 78j(b) (1994).

143. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342-46 (Cal. 1976) (imposing duty on psychologist to warn intended victim that psychologist's patient was threatening to kill her); *Calwell v. Hassan*, 925 P.2d 422, 428-32 (Kan. 1996) (refusing to impose duty on physician to warn patient with sleep disorder not to drive because no "special relationship" existed).

144. See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (1972) (overturning directed verdicts for defendants in case brought by patient alleging failure of doctors to warn him adequately of risks of pending surgery).

The doctrine of informed consent was comparatively unimportant to the doctor-patient relationship until the middle of the twentieth century. Jay Katz described "disclosure and consent" as "obligations alien to medical thinking and practice." JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 1 (1984).

In short, legislatures responding to the new genetics have widely focused on protecting the privacy of the autonomous individual—the direct subject of genetic testing and diagnosis. For the most part, legislatures have not focused on the implications of the new genetics for familial, ethnic, and other groups that may be defined in genetic terms. More particularly, legislatures have largely ignored potential development of a construct of genetic families.¹⁴⁵ Even more, the express legislative effort to safeguard individual privacy (arguably a necessary step in protecting against harms that can effect *groups* defined in genetic terms) has been marked with ambivalence. Resulting statutory schemes provide inadequate protection against the potential harmful consequences of the dissemination and use of genetic information.

1. *Safeguarding Privacy*

State¹⁴⁶ and federal¹⁴⁷ legislators have promulgated a set of diverse rules, aimed at protecting privacy and precluding discriminatory uses of genetic information adequately enough to still public alarm but not so completely as to eviscerate the particularistic and varied goals of science, government, and industry.¹⁴⁸

145. See *infra* notes 146–49 and accompanying text.

146. See, e.g., ARIZ. REV. STAT. ANN. §§ 20-448 to 20-448.02, 20-1379 (West 1990 & Supp. 1998); CAL. CIV. CODE § 56.17 (West Supp. 1999); CAL. HEALTH & SAFETY CODE § 1374.7 (West Supp. 1999); CAL. INS. CODE §§ 742.405–407, 10123.3–35, 10123.9, 10140, 10140.1, 10143, 10146, 10148–10149.1, 10198.9, 10705, 11512.7–11517 (West 1993 & Supp. 1999); W. VA. CODE ANN. §§ 33-15-2a, 33-16-1(a), 33-16-1(k) (Michie 1996 & Supp. 1998); WIS. STAT. ANN. §§ 111.372, 631.89, 632.746, 632.748 (West 1995 & Supp. 1998).

Over 150 bills involving genetic testing were considered by state legislatures in 1997. See Jagutis, *supra* note 139, at 435 (citing David Gollaher, *All Can Use Gene Tests . . . Except Poor Screening Helps Insurers and (Surprise-) Patients with Risks and Money*, SEATTLE POST-INTELLIGENCER, Jan. 11, 1998, at E1).

147. Many bills were presented in the 105th Congress. None were passed. Dorothy C. Wertz reports that 110 bills with the phrase “privacy of genetic information” in them were considered by the 105th Congress. Dorothy C. Wertz, *Legislative Update: Genetic Privacy Bills*, 3 GENE LETTER 2, February 1999, <<http://www.geneletter.org/0299/legislativeupdate.htm>> (on file with author). In considering these bills, legislators disagreed about how to define “genetic information” and “genetic testing.” See *id.*

148. Some states prohibit discrimination only through use of genetic test results and not through use of genetic information understood more broadly. Genetic information can be obtained in other ways, such as through medical histories. See, e.g., TEX. REV. CIV. STAT. ANN. § 9031 (West Supp. 1999) (prohibiting discriminatory use of genetic test results but not of genetic information obtained from medical histories).

Other statutes apply to certain sorts of insurance, but not to other sorts. See, e.g., OKLA. STAT. ANN. tit. 36, § 3614.1 (West 1999) (prohibiting insurance companies from requesting or requiring genetic tests from any individual with accident and health insurance policies). See also Kourtney L. Pickens, Comment, *Don't Judge Me by My Genes: A Survey of Federal Genetic Discrimination Legislation*, 34 TULSA L.J. 161, 169 & n.73 (1998) (noting Oklahoma legislature's refusal to include limits on other insurers' right to use or require genetic information in life insurance bill, and citing *Statelines Oklahoma: Passes Genetic Discrimination Bill*, AMERICAN POLITICAL NETWORK, May 28, 1998, at 8). Even New Jersey's Genetic Privacy Act, among the most comprehensive of state laws prohibiting

The legislative effort, as a whole, has been complicated by uncertainty about whose freedom to protect as the interests of the citizenry clash with the divergent interests of employers, insurers, healthcare professionals, and researchers. Variations in statutes from state to state reflect different conclusions about how to balance conflicting claims to liberty, including privacy, presented by interested parties.¹⁴⁹

In attempting to limit the risk inherent in allowing insurers, the government, employers, and healthcare professionals and organizations to use genetic information, legislators have depended on two broad approaches. The first defines individuals as owners of genetic information pertaining to them.¹⁵⁰ This approach has been strongly opposed by representatives of the biotechnology industry.¹⁵¹ Indeed, industry lobbyists persuaded Governor Christine Whitman to veto a bill that contained such a provision.¹⁵² Whitman's veto was aimed at the means the legislature had selected to safeguard privacy—not at the aspiration *per se*.¹⁵³ Even repre-

genetic discrimination, does not protect people against discrimination by life insurance companies. See N.J. STAT. ANN. § 17B:30-12 (West 1998); see also Bob Groves, *New Jersey Has Yet to Implement Genetic Privacy Law: Health-Care Community Awaiting State Confidentiality Regulations*, THE RECORD (Bergen County, N.J.), May 29, 1998, at A5, available in LEXIS, News Library, NJrec File.

Some states prohibit discriminatory uses of genetic information by employers but provide exceptions for genetic information thought to indicate a potential occupational hazard. See Pickens, *supra*, at 170; Sally Lehrman, *California Protects Workers with Predisposition to Diseases*, BIOTECHNOLOGY NEWSWATCH, July 20, 1998, at 1, available in LEXIS, News Library, Biotec File.

Even more important, most people not insured by Medicare or Medicaid are insured by employer-related health insurance plans. Under the Employee Retirement Income Security Act (ERISA), these plans are exempt from state insurance laws. See 29 U.S.C. § 1144(b)(2)(b) (1994). However, under the so-called "deemer" clause, self-funded plans are not subject to state insurance rules. See FURROW ET AL., *supra* note 118, at 815 (describing ERISA's savings clause and "deemer" clause).

149. In constitutional jurisprudence, privacy claims have been subsumed within the Fourteenth Amendment's liberty protection. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (noting "roots" of "a right to personal privacy" in Fourteenth Amendment, and in several other Amendments).

150. See, e.g., COL. REV. STAT. ANN. § 10-3-1104.7(1)(a) (West 1999) ("Genetic information is the unique property of the individual to whom the information pertains."); GA. CODE ANN. § 33-54-1(1) (Harrison 1998) ("Genetic information is the unique property of the individual tested."); 1997 La. Acts 1418; see also Michael S. Yesley, *Protecting Genetic Difference*, 13 BERKELEY TECH. L.J. 653, 657 (1998).

151. See Yesley, *supra* note 150, at 657. The National Law Journal noted in 1998 that defining genetic information as individual property could interfere with the profits of biotechnology companies. See *Cloning Laws Are Overbroad*, THE NAT'L L.J., June 29, 1998, at A8.

152. The legislative vote on the bill, with the ownership provision intact, had been unanimous. See *A Plethora of Genetic Privacy Bills Floods State Legislatures*, 8 BIOWORLD TODAY 69, Apr. 10, 1997, available in LEXIS, News Library, Allnws File [hereinafter *Genetic Privacy Bills*].

Whitman justified her veto by noting that the creation of ownership interests in genetic information by those to whom the information pertains would impede scientific work. See Sandra N. Hurd, *States Restrict Employers' Use of Genetic Tests*, EMPLOYMENT TESTING L. & POL'Y REP., Feb. 1997, at 17, available in LEXIS, News Library, Emptst File.

The New Jersey Legislature amended the bill. It became law two months later without the provision defining genetic information as private property. See *Whitman Signs Comprehensive Genetic Privacy and Anti-Discrimination Bill*, 22 HEALTH LEGIS. & REG. 47, Nov. 27, 1996, available in LEXIS, News Library, Allnws File.

153. See *supra* note 149 (noting privacy claims as sub-category of liberty claims).

sentatives of the biotechnology industry have approved of efforts to safeguard genetic privacy so long as the mechanisms used to accomplish that end do not interfere significantly with the industry's scientific and commercial goals.¹⁵⁴

A second legislative approach to safeguarding genetic privacy has relied on the informed consent doctrine as an alternative to ownership rules.¹⁵⁵ The specifics of such statutes vary broadly. For instance, some states have predicated genetic testing by insurers on the informed consent of those tested, but have not precluded consideration of test results in insurance companies' decision making.¹⁵⁶ Other statutes, pertaining specifically to life insurers, compel insurance companies to obtain informed consent before conducting genetic tests, but do not preclude insurers from withholding coverage from those who refuse to consent to testing or whose test results indicate genetic predispositions to disease.¹⁵⁷

To many, the informed consent approach is preferable to others in that it balances the interests of those anxious to collect or use genetic information against the interests of those anxious to safeguard genetic privacy. The doctrine is attractive at least in part because it placates concerns about variations of privacy while interfering less with the goals of industry and science than rules defining genetic information as property. In fact, if not in theory, informed consent rules often function largely as a "moral trump."¹⁵⁸

Moreover, the capacity of any informed consent rules to protect privacy are even less clear in contexts involving questions about genetic privacy than in many other medical contexts. In the current climate, in which genetic essentialism¹⁵⁹ flourishes, consenting to the collection, use, and communication of genetic information may prove to be tantamount to consenting to privacy's demise. This was suggested, though perhaps unwittingly, by the sponsors of The Genetic Confidentiality and Non Discrimi-

154. Carl Fedlbaum, president of the Biotechnology Industry Organization, proclaimed in 1997: "Genetic Privacy is essential to our industry, but we need to be very careful how genetic privacy laws are written in order to protect research." *Genetic Privacy Bills*, *supra* note 152.

155. See, e.g., Yesley, *supra* note 150, at 664 (concluding that informed consent is adequate to protect privacy in the context of genetic information, though not perhaps with regard to actual body cells; and noting that "[t]he value of intangible genetic data about an individual is probably not comparable to the value of an individual's cells from which a commercial product is derived").

156. See, e.g., N.Y. INS. LAW § 2612 (McKinney Supp. 1999).

157. See, e.g., MINN. STAT. ANN. § 72A.139(5) (West 1997). See also Yesley, *supra* note 150, at 658-59.

158. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 386 (1985). West has suggested, in a different context, that informed consent is most likely to "insulate[] . . . situations from moral criticism" thereby "render[ing] them, without more, morally attractive." *Id.*

159. Rochelle Cooper Dreyfus and Dorothy Nelkin define "genetic essentialism" as the view that "personal traits are predictable and permanent, determined at conception, 'hard-wired' into human constitution." Dreyfus & Nelkin, *supra* note 129, at 320-21.

nation Act of 1997,¹⁶⁰ an act that placed informed consent rules at its core. In introducing the bill to the United States Senate, one of its sponsors described the human genome project as promising access to "the most private information that any individual can have,"¹⁶¹ and another sponsor described the project as providing "a blueprint of a human being's most personal and potent information."¹⁶²

Those consenting to the revelation and use of genetic information are, in effect, consenting to the communication of data that may be interpreted to suggest personal proclivities, habits, inhibitions, daydreams, and intuitions, as well as the state of individuals' health, the state of their parents', siblings', and children's health, and the mode of their deaths. Few consents proffered in such a context will be truly informed.

Even more, neither an approach that depends on ownership rules nor one that depends on informed consent requirements protects against the misuse of genetic information about one individual in contexts that may harm others, defined as genetically similar. Genetic information can be located at the level of the individual or of groups (familial,¹⁶³ racial,¹⁶⁴ ethnic, religious). Thus, neither an approach that defines genetic information as property nor one that predicates genetic testing on informed consent can thereby protect the privacy of others assumed likely to share that person's genome. The implications of that concern become manifest in a few judicial decisions that rely on a construct of genetic families¹⁶⁵ and therein presume the locus of privacy to be the genetic family rather than its individual members.

2. *The Genetic Family: Eviscerating Privacy*

The most far-reaching of the decisions that elaborate the construct of a genetic family is *Safer v. Pack*.¹⁶⁶ In that case, a New Jersey court delimit-

160. S. 422, 105th Cong., §§ 101, 201, 302 (1997). The bill conditioned collection of DNA samples for genetic analysis, *see id.* § 101, and dissemination of genetic information, *see id.* § 201, on the written consent of the individual whose DNA was to be collected. The bill specified that an individual consenting to disclosure of genetic information be informed about a variety of matters including the identity of the person authorized to disclose, the "specific genetic information to be disclosed," the identity of the entity to which the information would be disseminated, and the "purpose of the disclosure." *Id.* § 302.

161. 143 CONG. REC. 30, S2140 (daily ed. Mar. 11, 1997) (statement of Sen. Domenici).

162. *Id.* (statement of Sen. Dodd). The second sponsor announced an intention to balance the interests of privacy with those of industry by imposing "strict informed consent procedures." *Id.*

163. *See infra* Part IV (discussing construct of genetic family). *See also* Silver, *supra* note 130, at 1857 n.224 (describing discrimination against family on basis of genetic information); Dreyfuss & Nelkin, *supra* note 129, at 331 (noting that hereditary traits "often reduce to ethnic group membership").

164. *See, e.g.,* Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260 (9th Cir. 1998) (prohibiting testing of African American job applicants for sickle-cell trait).

165. *See infra* Part III.B.2 (considering construct of genetic family in judicial decisions).

166. 677 A.2d 1188 (N.J. Super. Ct. App. Div. 1996).

ited a genetic family within which the notion of privacy, as understood in the West for over 200 years, was essentially eviscerated. *Safer*, although revolutionary for the construct of family on which it depended, reflected existing case law in imposing a duty on a physician to reveal information about a patient's genetic condition to family members.

In 1981, in *Schroeder v. Perkel*,¹⁶⁷ almost a decade before the initiation of the human genome project and over a decade before *Safer* arose, the parents of Ann Schroeder sued their child's pediatrician. The parents argued that the doctor, in failing to inform them that their infant child suffered from cystic fibrosis, a genetic condition, had denied them the right to make an "informed choice" about "whether to assume the risk of a second child."¹⁶⁸ They claimed that they had been denied their procreative right to preclude the birth of additional children who might suffer from the same illness.¹⁶⁹ Indeed, the couple, Marion and John Schroeder, had a second child. That child, a boy named Thomas, suffered, as did his older sister, from cystic fibrosis.¹⁷⁰

The pediatricians defended themselves on the ground that the Schroeders' infant daughter, Ann, was their patient, and, for that reason, they owed no duty to the child's parents.¹⁷¹ The New Jersey Supreme Court disagreed:

A physician's duty thus may extend beyond the interests of a patient to members of the immediate family of the patient who may be adversely affected by a breach of that duty. Here, the physicians had not only a duty to Ann, but an independent duty to Mr. and Mrs. Schroeder to disclose to them that Ann suffered from cystic fibrosis. The wrong allegedly committed by defendants was the failure to disclose material information. The defendants should have foreseen that parents of childbearing years, such as Mr. and Mrs. Schroeder, would, in the absence of knowledge that Ann suffered from cystic fibrosis, conceive another child.¹⁷²

Schroeder, decided before the availability of genetic tests for cystic fibrosis,¹⁷³ extended the reach of the law in permitting Marion and John

167. 432 A.2d 834 (N.J. 1981).

168. *Id.* at 836.

169. *See id.*

170. *See id.*

171. *See id.* at 838.

172. *Id.* at 839-40. Justice Handler, in dissent, would have also recognized a cause-of-action in the Schroeder's second-born child, Thomas, against the defendant-doctors. *See id.* at 844 (Handler, J., dissenting). The majority declined to recognize that cause-of-action because the New Jersey Supreme Court had previously refused to recognize claims for wrongful life and diminished parental capacity, and also because the Schroeders did not assert this claim on appeal. *See id.* at 840.

173. *See id.* at 836 (stating that cystic fibrosis cannot be detected in a fetus, but could be detected in a baby through the method known as the "sweat test").

Schroeder to sue doctors whom they had engaged to treat not themselves, but their child. The decision does not, however, upset common-sensical understandings of a pediatrician's duties since, as a practical matter, the doctor of an infant child must, and routinely does, communicate information about patient health and disease to the patient's parent or guardian. *Schroeder* did, however, provide a precedent for *Safer* which required a physician to reveal information about a patient to that patient's child.¹⁷⁴

a. *Pate v. Threlkel*

Between *Schroeder* and *Safer*, the Florida Supreme Court decided *Pate v. Threlkel*.¹⁷⁵ The *Pate* court recognized a duty on the part of a defendant doctor to provide explicit information about the consequences for family members of a patient's genetic condition, and granted a third-party relative standing to commence suit against the physician.¹⁷⁶ Thus, the court allowed Heidi Pate to bring suit against her mother's doctor, despite the fact that Heidi had no professional relationship with that doctor.¹⁷⁷

The case was commenced in 1990, after Heidi Pate was diagnosed with medullary thyroid carcinoma, a hereditary condition.¹⁷⁸ Three years earlier Dr. James Threlkel had treated Heidi's mother for the same condition. Although Heidi was not a patient of Dr. Threlkel, she argued that he and the other defendants¹⁷⁹ should have informed Heidi's mother of the hereditary nature of the mother's disease.¹⁸⁰ Heidi asserted that had she been aware of the character of her mother's condition in 1987, her own condition would have been diagnosed at that time and would likely have been curable.¹⁸¹

Dr. Threlkel asked the court to dismiss the complaint against him on the ground that he owed no duty to Heidi Pate.¹⁸² In a brief to the Florida Supreme Court, defendant Shands Teaching Hospital & Clinic, where Heidi's mother had been a patient, and the Florida Board of Regents asserted:

There is no compelling medical, societal or public policy reason to expand a physician's duty to third party non-patients. To do so would fundamentally change the foundation of the physician-patient relationship beyond which no court in Florida has gone.

174. See *Safer v. Pack*, 677 A.2d 1188, 1192 (N.J. Super. Ct. App. Div. 1996).

175. 661 So. 2d 278 (Fla. 1995).

176. See *id.* at 282.

177. See *id.*

178. See *id.* at 279.

179. Heidi, along with her husband James Pate, who claimed loss of consortium, sued Dr. Threlkel along with Dr. Pfaff and Shands Teaching Hospital & Clinics. See *Pate v. Threlkel*, 640 So. 2d 183, 183 n.1 (Fla. Dist. Ct. App. 1994).

180. See *id.* at 183.

181. See *id.*

182. See *id.* at 184.

Appellants' requested change would add an unpredictable and unmanageable burden on healthcare providers . . . for the health and welfare of people who are not patients of that healthcare provider . . .¹⁸³

Both the trial court and the Court of Appeal of Florida agreed with the defendants. The Supreme Court of Florida, however, reversed, concluding that Heidi was not precluded from bringing suit by the lack of privity between herself and the defendant doctors and clinic.¹⁸⁴ Justice Wells, writing for the state supreme court, stated:

[W]hen the prevailing standard of care creates a duty that is obviously for the benefit of certain identified third parties and the physician knows of the existence of those third parties, then the physician's duty runs to those third parties. Therefore, . . . we hold that privity does not bar Heidi Pate's pursuit of a medical malpractice action. . . . [U]nder the duty alleged in this case, a patient's children fall within the zone of foreseeable risk.¹⁸⁵

Although the court allowed Heidi's suit to proceed despite the lack of a professional relationship between herself and the defendants, the implications of the holding were expressly limited. Heidi was allowed to bring suit.¹⁸⁶ She was not, however, free to argue that the defendants had a duty

183. Answer Briefs of Appellees Shands Teaching Hospital & Clinics, Inc. and Florida Board of Regents at 7-8, *Pate v. Threlkel*, 661 So. 2d 278 (Fla. 1995) (Nos. 92-02776, 92-1277-CA).

184. See *Pate*, 661 So. 2d at 282.

185. *Id.*

186. See *id.* *Pate* represents the first Florida decision to recognize the right of a family member to bring suit against a physician whose patient suffered from a hereditary condition. The holding was not, however, entirely unprecedented outside Florida. In a limited line of cases beginning with *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), state courts began to impose a legal duty on healthcare professionals to warn third-parties. *Tarasoff* imposed a duty on a psychotherapist who had failed to warn Tatiana Tarasoff that his patient, Prosenjit Poddar, had expressed an intention to kill Tatiana. See *id.* at 345-47. The case was brought by Tatiana's parents after Tatiana was murdered by Poddar. See *id.* at 340-41. Other cases have followed in other jurisdictions. After *Tarasoff*, a number of state courts imposed a duty on healthcare professionals to disclose medical information in cases initiated by third parties. See, e.g., *Bradshaw v. Daniel*, 854 S.W.2d 865, 872 (Tenn. 1993) (imposing duty on physician to warn that wife of patient with Rocky Mountain Spotted Fever was at risk of getting the illness; the suit was commenced by the patient's stepson after his mother died of the illness). See also L.J. Deftos, *Genomic Torts: The Law of the Future—the Duty of Physicians to Disclose the Presence of a Genetic Disease to the Relatives of Their Patients with the Disease*, 32 U.S.F. L. REV. 105, 111-29 (1997) (reviewing "duty to warn" cases).

For the most part, courts have only applied the doctrine reluctantly. See, e.g., *Vause v. Bay Med. Ctr.*, 687 So. 2d 256, 264 (Fla. Dist. Ct. App. 1996) (limiting *Pate* as precedent, by noting that liability in cases involving a duty to disclose medical information is extended "in only very limited circumstances absent privity between the patient and the doctor"). Moreover, in cases involving medical information, courts have rarely extended the duty beyond the requirement that the patient him or herself be warned.

to share genetic information about their patient with that patient's children or with other relatives. The court wrote:

To require the physician to seek out and warn various members of the patient's family would often be difficult or impractical and would place too heavy a burden upon the physician. Thus, we emphasize that in any circumstances in which the physician has a duty to warn of a genetically transferable disease, that duty will be satisfied by warning the patient.¹⁸⁷

b. *Safer v. Pack*

On this issue, the decision of the New Jersey appellate court in *Safer v. Pack*¹⁸⁸ broke with tradition. *Safer* extended to a doctor the obligation to inform a patient's family—in particular, a patient's child—about a patient's genetic disease.¹⁸⁹

Like *Pate*, *Safer* was commenced by a child of a physician's patient against that physician. And like the plaintiff in *Pate*, the plaintiff in *Safer* suffered from the hereditary condition for which her parent had been treated.¹⁹⁰ In 1990 Donna Safer was diagnosed with colon cancer. Twenty-six years earlier, when Donna was ten-years old, her father, Robert Batkin, died of the same illness.¹⁹¹ In 1992, Donna brought suit against the estate of Dr. George Pack,¹⁹² who had treated Donna's father during the seven years that Robert Batkin was ill.¹⁹³

The trial court dismissed Donna Safer's complaint, concluding that a physician had no "legal duty to warn a child of a patient of a genetic risk."¹⁹⁴ Moreover, the trial court distinguished Donna's case from earlier cases involving infectious diseases that threatened family members.¹⁹⁵ With genetic illnesses, the trial court explained, "the harm is already present within the non-patient child . . . The patient is taking no action in which to cause the child harm."¹⁹⁶ This conclusion reflects a more widespread confusion about how legally to categorize genetic illnesses which, from one perspective, exist from birth—indeed, before birth—but which may

In a 1979 decision, a New Jersey court noted that in future cases, a court could be compelled to consider the scope of the limits on physician-patient confidentiality. See *McIntosh v. Milano*, 403 A.2d 500, 514 (N.J. Super. Ct. App. Div. 1979).

187. *Pate*, 661 So. 2d at 282.

188. 677 A.2d 1188 (N.J. Super. Ct. App. Div. 1996).

189. See *id.* at 1192.

190. See *id.* at 1190.

191. See *id.*

192. Dr. Pack died in 1969. See *id.*

193. See *id.* at 1189-90.

194. *Id.* at 1190 (quoting trial court's decision).

195. See *Deftos*, *supra* note 186, at 132-34 (summarizing and analyzing "duty to disclose" cases).

196. *Safer*, 677 A.2d at 1191.

never be manifest.¹⁹⁷

On appeal, a state appellate court disagreed with the trial court, and defined genetic conditions to create a duty to warn because "the individual or group at risk is easily identified."¹⁹⁸ The court explained: "[T]he duty [is appropriately] seen as owed not only to the patient himself but . . . it also 'extend[s] beyond the interests of a patient to members of the immediate family of the patient who may be adversely affected by a breach of that duty.'"¹⁹⁹

In this regard, the *Safer* court took express exception to the holding of the Florida Supreme Court in *Pate*: "We decline to hold as the Florida Supreme Court did in *Pate v. Threlkel* . . . that, in all circumstances, the duty to warn will be satisfied by informing the patient."²⁰⁰ The court explained that even if evidence provided at trial showed that Robert Batkin had instructed Dr. Pack not to inform his family of the hereditary nature of his condition, the doctor might be required to ignore those instructions. Especially, the court suggested, after Batkin's own death.²⁰¹

The holding in *Safer* is both unprecedented and controversial.²⁰² It differs from other cases in requiring a healthcare professional to warn a family member about the condition of another, adult, family member. A few cases, such as *Schroeder*, imposed a duty on physicians to warn patients' parents about the genetic conditions of their children or potential children.²⁰³ Those cases do not redefine the scope of privacy within fa-

197. A Nebraska case, decided in 1994, expressly raised the issue of how to categorize genetic conditions without the manifestation of symptomatology. See *Katskee v. Blue Cross/Blue Shield*, 515 N.W.2d 645 (Neb. 1994). In *Katskee*, the Nebraska Supreme Court decided that Sindie Katskee's family history of ovarian and breast cancer rendered her ill (even though she did not have cancer) and thus entitled her to coverage under her medical insurance policy for removal of her uterus, ovaries, and fallopian tubes. See *id.* at 651-52. In considering whether or not to categorize Katskee's condition as an illness under the terms of her insurance policy, the court faced a series of vexing questions about the significance of time to the definition of illness. See *id.* at 652-53. If, for instance, Katskee's familial history rendered her "ill," then might not another patient with a similar history be excluded from medical insurance coverage on the grounds that she suffered from a pre-existing condition? See *id.* at 653.

198. *Safer*, 677 A.2d at 1192. Given the character of the proceeding as an appeal of a summary judgment motion, the appellate court accepted the plaintiff's claims that when Dr. Pack treated Robert Batkin, the prevailing standard of care required a doctor to warn of the hereditary character of an illness such as that from which Robert Batkin suffered. See *id.* at 1191.

199. *Id.* at 1192 (quoting *Schroeder v. Perkel*, 432 A.2d 834, 839 (N.J. 1981)).

200. *Id.*

201. See *id.* at 1193.

202. In 1996, New Jersey promulgated a genetic privacy law that allows physicians to warn relatives of patients about a genetic condition only if the patient has consented to the disclosure or has died. See Groves, *supra* note 148, at A05.

203. See, e.g., *Schroeder*, 432 A.2d at 839-40 (imposing duty on child's doctor to warn parents of hereditary nature of child's illness so that parents would have been able to make informed choice about decision to have subsequent children). See *supra* notes 167-73 and accompanying text (considering *Schroeder*).

miliar contexts as dramatically as *Safer* does.²⁰⁴ *Schroder* reflects traditional understandings of the parent-child relationship. In contrast, *Safer*, in holding Dr. Threlkel responsible for informing a child about a parent's condition, completely disrupts traditional understandings of the parent-child relationship.

Thus, *Safer* suggests something far more extraordinary than any of the earlier cases. *Safer* is unusual, though not unique, among "duty to disclose" cases in restricting the reach of the shield that generally protects defendants from suits by remote plaintiffs.²⁰⁵ *Safer* is remarkable, however, insofar as it reconstructs the locus of familial privacy.

IV. THE FRAGMENTATION OF IDEOLOGY: PRIVACY, TRADITION, AUTONOMY, AND THE "GENETIC FAMILY"

Safer depends on assumptions about the character of family connections—and thus about the locus of privacy in familial contexts—that are foreign, though in different regards, to understandings of both traditional families and of modern "families of choice." *Safer* assumes a family within which each unit (each person) replicates every other unit, and within which each unit (each person) replicates the larger family within which these units co-exist.

In this, the genetic family constructed in *Safer* differs from the construct of the traditional family and from that of the modern family-of-choice. It differs from the traditional family in that it does not prize hierarchy, holism, or community. Within the genetic family, any unit (any person) or combination of units can exist without reference to any others. In distinction, each of the roles that constitute the traditional family become meaningful only in light of the larger hierarchy of family roles. Equally, the genetic family differs from the construct of a family composed of autonomous individuals, linked together through choice and design. Within the modern family, the unit of value is the individual. In distinction, the unit of value in the genetic family is the whole (itself variously defined) *as well as* the parts (insofar as they mirror the whole and each other). In the genetic family, the private individual, the locus of social and thus familial value in families-of-choice, is displaced through its replication in the larger genetic family, and in each of that family's *other individuals*.

204. Commentators have pondered the extent of the duty imposed by *Safer*. One group of authors asks whether *Safer* suggests a duty on physicians to inform patients (and the families of patients) suffering from genetic conditions about new tests and treatments over time. See Gary N. McAbee et al., *Physician's Duty to Warn Third Parties About the Risk of Genetic Diseases*, 102 PEDIATRICS 140 July 1, 1998, available in 1998 WL 17465264.

205. See Deftos, *supra* note 186, at 107 ("Genomic concepts of privity and privilege will dissolve the third-party shield that often protected defendants from remote plaintiffs.").

A. *The Locus of Privacy*

Differences between the construct of a genetic family and other constructs of family are especially significant with regard to claims about privacy. The genetic family undermines privacy associated traditionally with family autonomy as well as privacy associated with individual autonomy.

Within the traditional family, understood as a small universe of fixed, hierarchically structured roles, the assumed locus of privacy was the familial whole, represented by the family's patriarchal head. The law reflected that view through its commitment to preserving family autonomy²⁰⁶ against state intervention.²⁰⁷ In fact, that task generally involved safeguarding the patriarch against the discontents of other family members.²⁰⁸ The handling of private matters within familial contexts was mediated by the hierarchy of roles and relationships. The right of a husband to know about his wife, and of parents to know about their children, was not understood as a right belonging to autonomous individuals, but as a right inherent to the family as a structured whole. Family law widely reflected this aspect of traditional family privacy. It was reflected as well in the few cases brought before the 1970s involving questions about the scope of a third-party's right to disclose information about one family member to another. In 1963, a Louisiana court held that a doctor and two insurance companies were not obligated to protect a woman's medical records from her husband's review.²⁰⁹ In so holding, the court explained that a wife's privacy is her husband's privacy in that he is "head and master of the community."²¹⁰ Similarly, in 1966, a New York court recognized the right of a physician to reveal medical information about his patient to her hus-

206. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1963) (refusing to intervene in dispute initiated by a wife alleging that husband failed to provide adequately for her).

207. While invoking the notion of "family autonomy," the law, in fact, intervened in family matters in a wide variety of contexts. Among other things, the law defined marriage, delimited the duties of spouses to each other, and outlined the scope of parental authority. As Frances Olsen has written, "[s]tate intervention in the family is an ideological, not an analytic concept." Frances Olsen, *The Myth of State Intervention in the Family*, in *FAMILY MATTERS* 277, 281 (Martha Minow ed., 1993).

208. In *McGuire*, the wife complained that the husband "was the boss of the house and his word was law." *McGuire*, 59 N.W.2d at 337. Despite the husband's substantial resources, the couple's home was "not equipped with a bathroom, bathing facilities, or inside toilet." *Id.* There was no kitchen sink, and according to the wife the "pipeless furnace" had not worked properly for a number of years. See *Id.* at 337-38. The court refused to entertain the wife's complaints about her husband even though, in the court's view, the husband's behavior was unimpressive. See *Id.* The court concluded: "The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf." *Id.* at 342. The case must be interpreted in light of the difficulty of obtaining a divorce as a resident of Nebraska in the early 1950s.

209. See *Tooley v. Provident Life & Accident Ins. Co.*, 154 So. 2d 617, 618 (La. Ct. App. 1963).

210. *Id.* Ironically, the revelation of the wife's medical records to the husband in *Tooley* assisted the husband in obtaining a divorce. See Deftos, *supra* note 186, at 113 (discussing *Tooley*).

band.²¹¹

In the last three decades of the twentieth century, the law began to assume a different view of the right to privacy in family contexts. As society replaced families understood as hierarchical, holistic communities with families understood as associations of autonomous individuals, the locus of familial privacy shifted from the familial community, represented by its *pater*, to individuals, viewed as autonomous agents of moral authority. The law reflected this shift.²¹²

In 1972 in *Eisenstadt v. Baird*,²¹³ the Supreme Court symbolized and furthered the recognition of individuals within families as the locus of value, and thus of privacy, in a decision that extended the right to use contraception from married couples to single people. In *Eisenstadt*, the Court openly disaffirmed any understanding of families as more than the individuals who compose them.²¹⁴ The Court proclaimed: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²¹⁵

211. See *Curry v. Corn*, 277 N.Y.S.2d 470, 471 (N.Y. Sup. Ct. 1966). See also *Deftos*, *supra* note 186, at 113 (discussing *Curry*). *Curry* was brought by a woman against her doctor. See *Curry*, 277 N.Y.S.2d at 470. The wife claimed that she was "injured in mind and body" after her doctor revealed information about her medical condition to her husband. *Id.* The parties were apparently divorcing, and the wife claimed that the information of concern was transmitted to the husband "with the intent and expectation" that he would use it in the pending divorce action. *Id.* (quoting pleadings). The New York court asserted that in such a case, as before a marriage, parties have a "right to know the existence of any disease which may have bearing on the marital relation." *Id.* at 471. However, the court cited with approval the conclusion of the Louisiana court in *Tooley* that a husband has a right to know about his wife's medical condition because "[h]e is head and master of the community and responsible for its debts." *Id.* at 472 (quoting *Tooley*, 154 So. 2d at 618).

212. For the most part, this shift has implicated adults within families far more than children or the parent-child relationship, though to a degree the law has begun to recognize children as autonomous individuals in at least a limited set of circumstances.

Confusions about children and about the parent-child relationship are widespread in contemporary legal responses to the family. In some cases, the law has refused to recognize children's autonomy. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 620-21 (1979) (upholding Georgia statute allowing parent or guardian to effect "voluntary commitment" of child to state mental hospital). In other cases, the law has recognized the autonomy of minors at least to a limited extent. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 650 (1979) (declaring unconstitutional Massachusetts statute that failed to provide minor girls seeking abortion with judicial by-pass option to parental veto); *Gregory K. v. Ralph K.*, No. C192-5126, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992) (granting child standing to initiate termination of his biological mother's parentage), *rev'd sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). The trial court opinion in *Gregory K.*, although reversed on appeal, was widely publicized and debated. The story even became the subject of a made-for-television movie. See Andrew L. Shapiro, *Children in Court—The New Crusade*, NATION, Sept. 27, 1993, at 301, 301.

213. 405 U.S. 438 (1972).

214. See *id.* at 453.

215. *Id.* at 438 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

Eisenstadt, and other cases that followed,²¹⁶ suggest a displacement of traditional notions of family privacy. In subsequent decades, the stress on individual privacy within family law has intensified, though, at the same time, the effort has been hedged with ambivalence.²¹⁷

The construct of the genetic family precludes both the privacy of the autonomous individual and that of the familial whole, associated with a patriarchal head. Information about any member of a genetic family is indistinct from information about any other. In consequence, privacy vanishes. *Safer*²¹⁸ and to some, though a lesser, extent *Pate*,²¹⁹ suggest that within families, secrets are obsolete. Neither the prerogatives of the *pater familias* nor the privileges of autonomous individuality can protect secrets against the outside professional, ordered by court decree, to tell each about the others. In short, the perceived links between Donna Safer and her father threaten traditional understandings of family. But, equally, they threaten the family defined as a collection of autonomous individuals.

Moreover, the obligation imposed on Dr. Pack to provide Donna Safer with information about her father, was unconnected to any other understanding of the relationship that did or might have pertained between the daughter and her father. It was predicated only on the possibility that Donna and her father shared a genetic trait making them both susceptible to colon cancer. The links connecting Donna to her father—or any member of a genetic family to any other—are a-moral links that neither define nor depend upon the scope and meaning of social relationships among family members.

The genetic family defined in *Safer* is a unit almost completely unfamiliar to family law,²²⁰ as it is unfamiliar to society more broadly. It depends neither on the strictures and presumptions of tradition nor on the choices of modernity. It exists outside both history and time. It reflects the amorality of the genes that define its scope. Within family settings, it threatens tradition and modernity far more broadly than either threatens the other.

216. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (granting limited right to abortion); *Carey v. Population Serv., Int'l*, 431 U.S. 678, 699 (1977) (holding unconstitutional New York statute forbidding sale of nonpharmaceutical contraceptives to minors); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (precluding states from granting to woman's husband right to veto decision to abort a pregnancy). But see *infra* note 217.

217. Beginning in the 1980s, the Supreme Court returned to the rhetoric of traditional family privacy in a number of decisions implicating the rights of family members vis-a-vis each other and the state. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) (upholding Georgia sodomy statute and finding no connection between the "claimed constitutional right of homosexuals to engage in acts of sodomy" and traditional privacy protections); *Michael H. v. Gerald D.*, 491 U.S. 110, 131-32 (1989) (upholding California statute that presumes mother's husband to be father of her child).

218. See *supra* Part III.B.2.b.

219. See *supra* Part III.B.2.a.

220. *Safer* was not decided as a "family law" case. However, the decision has important implications for the potential scope of familial relationships.

B. *Varieties of Family Ideology*

Arguably, the conceptual challenge need not become real. In resolving the dispute brought to court by Donna Safer against her father's doctor, the New Jersey court was concerned with Donna's family in one essential regard—that relevant to the specific medical condition from which Donna suffered and from which her father, before her, had suffered. Arguably, the construct of the genetic family on which *Safer* depends carries relevance in only a limited set of contexts and thus need not compete with, or upset, alternative conceptions of family. It is imaginable that the conceptual contradictions between the construct of the genetic family and other constructs of family will be resolved through contextualization. But that seems unlikely.

It becomes increasingly difficult to distinguish conclusively between medicalized contexts and other contexts. The ideology of genetic inheritance not only affects ill people, it also affects people as they seek employment, apply for health insurance, and consider potential spouses.²²¹ Moreover, the concept of medicalization assumes increasing importance within the society,²²² as a wider and wider set of habits, talents, and behaviors are popularly associated with a genetic base. Moreover, the concept of genetic disease becomes increasingly salient in medicalized contexts.

The genetic family delimited in *Safer*²²³ merges, in a host of actual contexts with other constructs of family. For example, a case involving gestational motherhood might involve preimplantation genetic testing and diagnosis. Thus, the intentional and gestational mother might be provided with genetic information about her future child, and inevitably as well, about that child's genetic family. In such a case, would the woman denominated as "mother" under *Johnson* and its progeny²²⁴ be obliged to inform another mother—a genetic mother—that she, her parents, her siblings, or her future children are predisposed to genetic illness?²²⁵ Similarly, a case involving genetic testing for a familial condition might alert geneticists that a man is not the genetic father of his child.²²⁶ When con-

221. Within certain communities of Orthodox Jews, prospective spouses are advised to be tested for tay-sacks disease before marriage. See Lee S. Goldsmith, *Science Outpaces the Law in Genetic Testing*, N.J. L.J., May 5, 1997, at 32.

222. See FINKLER, *supra* note 13, at 251-52 (describing concept of "medicalization" as a "twentieth century phenomenon").

223. See *supra* Part III.B.2.b.

224. See *supra* Part II.B.

225. See *Olson v. Children's Home Soc'y*, 252 Cal. Rptr. 11, 12-13 (Ct. App. 1988) (holding adoption agency not liable to genetic mother of child for failure to disclose to her information about genetic condition of her biological child).

226. Asked about just such a case, two-thirds of geneticists questioned in the United States reported that they would refrain from informing the man. See Dorothy C. Wertz, *Society and the Not-So-New*

texts merge, where does one set of rules end and the other begin?

The question holds broad significance for a family law system that relies heavily on context to mediate conflicting rules about family life. So, for instance, the Pennsylvania court in *Miscovich* self-consciously refused to consider facts about biological paternity in order to presume a child's mother's husband to be the child's father.²²⁷ Yet, in other sorts of family disputes in which paternity is at issue—contexts, for instance, in which a child's parents are unmarried—courts rely without reservation on the results of DNA fingerprinting to impose support obligations on biological fathers, even in the absence of any social relationship between the biological father and his child or between that father and the child's mother.²²⁸ Similarly, the California court in *Johnson* concluded that in contexts of gestational surrogacy and gestational motherhood—contexts in which the courts perceived a biological “tie”—reference to maternal intention can substitute for biology in determining, and in anchoring, motherhood.²²⁹ And even in *Buzzanca* which appears to test *Johnson*'s limits by relying on intention to denominate a biological third party as a child's mother, the context—that of gestational surrogacy—appears to limit the implications of the decision.²³⁰ The law can thus apparently rely, at least for a time, on the construct of intentional maternity without openly challenging more familiar notions of maternity, grounded in what was once called simply “biology.”

Yet, it is unlikely that contextualization can long mediate among such conflicting presumptions about family life. The construct of the genetic family becomes especially problematic to a legal system hesitant to abandon a conception of families—however composed—that implicitly associates family life with moral ends.

The genetic family insists only on one thing—the recognition of biological information. In that, it upsets a society and a legal order committed to the position that autonomous choice can sustain a moral frame within which family life is distinguished from life in other social domains. Thus, the construct of the genetic family poses several specific challenges to other constructs of family.

Although some constructs of family privilege biological over social

Genetics: What Are We Afraid of? Some Future Predictions from a Social Scientist, 13 J. CONTEMP. HEALTH L. & POL'Y 299, 314 (1997).

227. See *Miscovich v. Miscovich*, 688 A.2d 726, 730 (Pa. Super. Ct. 1997), *aff'd*, 720 A.2d 764 (Pa. 1998), *cert. denied*, 119 S. Ct. 1757 (1999).

228. See, e.g., *Gomez v. Perez*, 409 U.S. 535, 537-38 (1973) (per curiam) (holding that Texas violated Equal Protection Clause by denying children of unmarried parents the right to same sort of paternal support given children of married parents); *Nebraska ex rel. J.R. v. Mendoza*, 481 N.W.2d 165, 170-74 (Neb. 1992) (allowing state to sue biological father for support despite willingness of step-father to acknowledge paternity).

229. See *Johnson v. Calvert*, 851 P.2d 776, 782-83 (Cal. 1993).

230. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998). See also *supra* notes 85-97 and accompanying text (considering *Buzzanca*).

dimensions, and others privilege social over biological dimensions, all but the genetic family, assume the *familial* content of the relationships specified. So, for example, the court in *Miscovich* privileged the social over the biological dimensions of family, therein presuming a biological fact in the effort to preserve a traditional understanding of family.²³¹ And the courts in *Johnson*, *McDonald*, and *Buzzanca* privileged intention over biology in order to ensure loving family relationships.²³² In contrast, the court in *Safer*, in requiring Dr. Pack to inform Donna of her father's, and thus of her own, illness, assumed nothing about the relation that might or should pertain between the daughter and her father.²³³

Similarly, the genetic family challenges other constructs of family in that it does not depend on, and does not reflect, distinctions between a world of the home and a world of the marketplace. Or more accurately, it is indifferent to distinctions between these social domains. In other contexts, courts have predicated family ties on money and bargain, but have insisted that families, once formed, not assimilate life at home with life at work. That insistence is patent in *Miscovich*. There, the Pennsylvania Supreme Court concluded that, once denominated and reflected in behavior, the paternal relationship continues as a matter of law even if the man has no biological connection to the child, and even if the man has terminated the social relationship between himself and the child.²³⁴ Similarly, and quite as insistently, courts deciding gestational surrogacy and gestational motherhood cases have struggled to deflect the implication that grounding parenthood on intention assimilates life at home to life at work. Thus, in *Johnson*, for instance, the court concluded that Crispina Calvert, because she was the intending mother, would be a good mother.²³⁵ The genetic family, in contrast, is unconcerned with distinguishing the world of home from the world of work.

Finally, and perhaps most significant, the construct of the genetic family does not place social value firmly at the level of the autonomous individual or at the level of the communal whole. It is concerned with neither the familial choices of individual family members nor with structured rules and ordered forms that delimit the scope of "traditional" family life. Within the genetic family, social value can be placed variously at the level of particular people or at the level of larger familial, ethnic, or racial groups.

The ideological implications of the construct of a genetic family are broad and startling. As a conceptual matter, the genetic family—or the

231. See *Miscovich*, 688 A.2d at 730.

232. See *supra* Part II.B.

233. See *supra* Part III.B.2.b.

234. See *Miscovich*, 688 A.2d at 730.

235. See *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (concluding that children's interests will be served by parents who *intended* to raise those children).

genetic race or ethnic group—replicates its units, each of which replicates each other unit. Thus, any level of value is potentially as significant as any other. In this, the genetic family may presage unintended consequences in a world that prizes autonomous individuality—the subordination of the individual to the whole. That result, the French anthropologist Louis Dumont has explained, “results from the attempt, in a society where individualism is deeply rooted and predominant, to subordinate it to the primacy of the society as a whole.”²³⁶ Within such a universe, privacy, as defined for over two centuries in the West, would vanish altogether. *Safer*, quite unintentionally it would seem, intimates that possibility.

V. CONCLUSION

Family law reflects the fragmentation of family ideology. Largely, that process occurs in protection of individualism and choice. Insofar as the right to choose is now presumed to serve variously the interests of modernity or of tradition, the debate about family has become a debate about self-conscious choices.

As society has endeavored to define families, first without supernatural anchors, and then without natural anchors, a commitment—not always merely rhetorical—to the preservation of a traditional *notion* of family survives. Thus lawmakers assume that the mode through which families are created bears no inevitable consequence for the relationships that will pertain among members of the families that result.²³⁷ They assume that family members can *choose* modernity or that they can choose tradition²³⁸ and thereby ensure the preservation of families as permanently solidary as those assumed to have existed before modernity disrupted enduring community. Further, they assume that families can be anchored in biology, in love, in intentions, or in all at once.

For the most part, the technological and practical consequences of the new genetics, including gestational surrogacy and DNA fingerprinting, have furthered social and legal readiness to fragment the ideology of family in deference to autonomous choice. In this, the law relies variously on the unanchored elements of an ideology once taken to have defined traditional families. That reliance masks the extent of family law's service to individualism and choice.

236. LOUIS DUMONT, *HOMO HIERARCHICUS* 12 (1977) (emphasis omitted).

237. See *supra* notes 100-02 and accompanying text (describing judicial reliance on parental intention as familial anchor).

238. In 1997, Louisiana gave couples planning marriage the option of choosing “covenant marriage” and thereby agreeing that marriage can only be terminated “when there has been a complete and total breach of the marital covenant commitment.” 1997 La. Acts 1380. That statute indicates the fragility of the effort it represents. Once a mode of domestic life is predicated expressly on choice, any one choice can easily be displaced by other choices.

The limits of family law's ability to disguise—or at least to blur—the centrality of individualism and choice are tested as researchers report cloning human DNA in the ova of cattle,²³⁹ as university women of a certain height and intelligence are offered astronomical sums to give their ova to others,²⁴⁰ and as hospitals set up “adoption plans” for frozen embryos.²⁴¹ Even as the law's ability to sustain the illusion of preserving tradition while serving modernity wanes, other possibilities emerge.

At the edges of a broad commitment to freedom, and thus choice, the law faces the medicalized family, and begins to elaborate its variant: the genetic family. At least in the first instance, this family serves neither individualism nor choice. It reflects the amorality of the DNA through which it is delimited, and to which it can be reduced.²⁴² Unlike the notion of biogenetic substance as traditionally defined, DNA is indifferent to the content of family life. This construct of family differs from others in abandoning even the pretense that contemporary families should be modeled on nostalgic images of traditional families within which, it is presumed, enduring love and absolute loyalty were assured.

American law may not long continue to provide—at least not sanguinely—for a construct of genetic family that threatens individualism as forcefully as it threatens holistic community. But the construct of the genetic family suggests that ultimately the debate about tradition and modernity—the contemporary debate about family—could find its apparent antagonists joined in opposition to a construct of family that precludes them both and that undermines the very notion of a domestic sphere.

239. See Peter Kendall, *The Beast in the Dish; Lab Grows a Scientific and Ethical Quandary*, CHI. TRIB., Dec. 13, 1998, at 1, available in LEXIS, News Library, Chtrib File.

240. See Joseph Berger, *Yale Gene Pool Seen as Route to Better Baby*, N.Y. TIMES, Jan. 10, 1999, at 19.

241. See Charles Bullard, *Embryo Adoptions Are Raising Questions*, DES MOINES REGISTER, Jan. 18, 1999, at 1, available in LEXIS, News Library, Dmoirg File.

242. See FINKLER, *supra* note 13, at 295.