Legal Texts, Human Bodies:

Reading Embodiment in the Biotech Age

Roxanne Myktiuk

Submitted in partial fulfillment of the Requirements for the degree of Doctor of the Science of Law in the School of Law

COLUMBIA UNIVERSITY

2013
ABSTRACT

Legal Texts, Human Bodies: Reading Embodiment in the Biotech Age

Roxanne Mykitiuk

This dissertation consists of two separately published articles and one book chapter linked together by their investigation of the legal regulation of reproductive and genetic technologies. In “Fragmenting the Body” I explore how law is to understand the relationship between the person and the body, and the body and its parts in the context of the instrumental uses to which reproductive and genetic material can be put. Drawing on feminist and postmodernist theories, the article critiques the liberal legal conception of personhood and argues in favour of an embodied account of personhood as central to the legal metaphors and categories we should use in analyzing novel social and material arrangements.

“Public Bodies, Private Parts: Genetics in a Post-Keynesian Era” analyzes the use of the new genetics and the role of geneticization in the privatization orientation of the Canadian state from 1990-2002. The chapter defines and explores the relationships among genetics, geneticization and privatization, and demonstrates how a new discourse of health is central to the privatization agenda. The chapter examines three policy/legal initiatives of the Canadian government regulating the new genetics and demonstrates how law operates to further the values and objectives of privatization. Finally, the chapter addresses the gendered impact of the relationship between the new genetics and privatization.
In “Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies” I argue that legal determinations of filiation are normative ideological constructions about how societal relations between children and parents should be ordered. They are based on particular understandings of the relationship between social and biological facts and operate to create asymmetrical relationships between the categories of maternity and paternity. I suggest that developments in reproductive and genetic filiation offer the potential for an expanded understanding of relatedness which does not take the two-parent—one of each sex—model of the family as its normative form.
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VOLUME 2
MARCH 1994

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Cite as (1994) 2 Australian Feminist Law Journal.
ISSN 1320-0968
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Published twice yearly by the
Australian Feminist Law Foundation Inc.
P.O. Box 4337, University of Melbourne
Parkville, Vic 3052

Layout by Mark Davis/text-art, (03) 388 1143.
Printing by David Metcalfe, Pulp & Pigment (03) 4176159.
Cover design and publicity material by
Fiona Wilson and Trish Garner of Screens
Computer services by Bev Tannock
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Sponsors

We are grateful to the following for their support and sponsorship of the Journal: Melbourne Uni-
versity Law School, La Trobe University School of Law and Legal Studies, Shugg & Green, solicitors,
Minter Ellison Morris Fletcher.

Acknowledgements

Thanks to the Advisory Board members for their support and to the many referees who have assisted
in the selection of articles for this issue. We would also like to acknowledge the contribution of the
women in the working group during 1991 which led to the production of this journal, as well as the
friends and colleagues of the Editorial Board members who have given time, advice and support to
this project.
FRAGMENTING THE BODY

Roxanne Mykitiuk

Bodies, then, are not born; they are made.

Bodies as objects of knowledge are material-semiotic generative nodes. Their boundaries materialize in social interaction; 'objects' like bodies do not pre-exist as such.

Donna J. Haraway

We as persons can make our bodies objects. We can discern ways in which we could have been better fashioned. . . . In the future our ability to constrain and manipulate human nature to follow the goals set by persons will increase. As we develop the capacities to engage in genetic engineering not only of somatic cells but of the human germ line, we will be able to shape and fashion our human

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Earlier versions of this paper were presented at the 1993 Law and Society Annual Meeting in Chicago; the 1993 Canadian Law and Society Association Meeting in Ottawa, Ontario and the 1993 Feminist Legal Theory Project Annual Conference in New York City. A number of people provided generous support and helpful comments on drafts of this paper; they include Isabel Karpin, Martha Fineman, Patricia Williams, Isabel Marcus, Annalise Acorn, Ellen Paltiel and an anonymous reviewer of the Australian Feminist Law Journal. I am especially grateful to Jeremy Paltiel for his continuous, patient and devoted contributions to this paper. This paper forms part of the requirements of the J.S.D. degree at Columbia University and was supported by funding from the Social Sciences and Humanities Research Council of Canada, Columbia University School of Law and the Law Society of Alberta, Canada.

nature in the image and likeness of goals chosen by persons. In the end, this may be seen by subsequent taxonomists as a new species.

Tristam Engelhardt

Who is so fond of this body that he would drag it about with him through all eternity if he could get on without it.

Immanuel Kant

I. BODY ACHE

I have been struggling to write about embodiment. Fragments of thoughts and hints of ideas lay scribbled on the scraps of paper that litter my desk. Unable to connect those thoughts with the nib of my fountain pen, I turn to the computer and stare at the blank screen. I now have four computer files—body.doc, sumbody.doc, nobody.doc, and most recently, bodyache.doc—stilted prose which reminds me of all I didn’t want to say and all I will not allow myself to say. Piled high around me, a protective shroud of words and ideas, are the books and articles in which I search for meaning, insights, security: “The Female Body in Western Culture”;4 “The Woman in the Body”;5 “Secrets of Life, Secrets of Death”;6 “Maternal Thinking”;7 “From a Broken Web”;8 “The Absent Body”;9 “The Sexual Contract”;10 “The Foundations of Bioethics”;11 “Conflicts in Feminism”;12

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My body aches. For seven days I have written nothing. I have been crying - agonizing, abusing myself, thinking about death. The demons have come back. Why? I want a baby. I always want a baby when I can’t write. I fantasize about labour, seating pain, tender breasts. Even now I’m not writing what I promised myself I would write - my half baked ideas about what I think about embodiment. “So bake them” I’m told by a sympathetic friend. But these won’t leap out of the pan and into the fire, but flee, taunting, like the gingerbread man. “You can’t catch me.”

I delete the paragraphs on personal embodiment and objectification. They sound trite and too self pitying. It’s now been 2 weeks and I still won’t let myself write. Patsy Cline is still ringing in my ears “I Fall to Pieces”. At least now I know why I’m fixated on fragments.

* * *

We live in a world in which cryo-preserved embryos sit in freezer compartments awaiting implantation into the wombs of women paid to gestate them; where the cancerous cells from the cervix of a poor African-American woman named “Henrietta” have been immortalized as the HeLa cell-line; where the execution of prisoners in China is timed with the pre-operation prepping of patients in Hong Kong who are to receive

19 Helen Bequaert Holmes & Laura M. Purdy (eds), Feminist Perspectives in Medical Ethics, Bloomington: Indiana University Press, 1992.

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their organs; where grandmothers give birth to their grandchildren and where the former head of the Human Genome Project, sponsored by the U.S. National Institute of Health (NIH) and Department of Energy (DOE), waved a single computer diskette at an audience and announced the millennium where every detail of the genetic construction of a human being will be recorded as a string of digital sequences.\(^\text{21}\) The scientific dissection of human biology challenges the integrity of human identity and compels us to examine the meaning and significance of our own embodiment.

While new medical and scientific technologies fragment biological processes, conditions and relationships, we confront a possible fragmentation of our familiar social arrangements which rest upon this biological order.\(^\text{22}\) Not only are new material entities formed or delineated but their existence is often not easily assimilated into existing cultural and social relations, patterns or arrangements. For example, the new reproductive technologies produce cryo-preserved embryos, but what are they according to our current conceptual schemes?\(^\text{23}\) The new technologies also make it possible to separate the genetic, gestational, and rearing aspects of motherhood, resulting in a child with three women with potential claims to the legal status of mother: the woman from whose ovum the child develops, the woman who gestates and gives birth to the child, and the woman who has no biological or bodily connection to the child, but who has an intention to "mother" or "parent" the child and who views herself as, at least in part, responsible for initiating the child's existence.\(^\text{24}\) Which of the three women should be legally recognized as the mother of the child, or should all three? And what is the legal and social status of the woman or women who are denied legal motherhood? Gene therapy holds the promise of replacing a "defective" gene with a new sequence which will repair the defective function or trait. But what is to be considered a defective function or trait?

\(^{21}\) As cited by Alexander Morgan "Which Ills to Bear?: Reevaluating the "Threat" of Modern Genetics" (1990) 39 Emory L.J. 665. Capron, op. cit., n.12. Watson said of a compact disc with the full transcription of base pairs, "Here I have a human being."

\(^{22}\) For a further discussion of the fragmentation and reassembling of the human body and possible concomitant social relationships see: Michael H. Shapiro, "Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters" (1990) 51 Ohio State L.J. 331.

\(^{23}\) Lieber, "A Piece of Yourself in the World" (June 1989) The Atlantic Monthly 76, 77 ("...frozen embryos, unlike those in a uterus or a laboratory culture, are not fully alive. Nothing can live in liquid nitrogen. Nor are they exactly dead, because more than half can return to life when thawed. We have a real category problem," says Dr. Kathleen Nolan, of the Hastings Center.)

\(^{24}\) This "non-biological" mother is in no way a homogeneous figure. She is often the wife or partner of the man who provides the sperm used to fertilize the ovum. While she is not a party to the so-called surrogacy contract, she is the "intended" mother of the future child at the moment the contract is entered into. A non-biological mother might also be the lesbian partner of an inseminated woman (indeed she may have been the inseminator), whom it is expected, at the time of insemination, will also "mother" the child and who, in practice, carries out this role.
Often regarded as an indissoluble whole25, the human body has been invaded, fragmented and refashioned by new medical and scientific technologies. The body, both in its totality and in its parts, is now viewed as a renewable resource and as a generator of profits. The old metaphors of body as machine or body as organic whole have been replaced by the understanding of the body as raw material - a body which, Edith Deleury notes, is malleable, for example through sex selection or the use of gene therapy to select for traits; recyclable, such as in organ or tissue transplantation; transformable, as in the use of human placental tissue in commercially available cosmetics; alienable, when the uterus of a woman can be the object of contract and viewed as the “fetal container” for a child not regarded as “her own”; and even immortalized in regenerative cell lines.26 Almost the entire human body can be used as replaceable raw material for therapeutic and experimental purposes and used in industry for commercial ends.27

25 Within traditional Western intellectual paradigms (primarily philosophical and legal) and even in popular discourse, it is commonplace to speak of “the body” as a fixed, unitary, stable and whole entity. While there have, of course, been historically changing conceptions and representations of the body, these features nonetheless remain constant. Grounded in the discourse of “the natural”, the body is associated with that which is fixed, unchanging and physiologically whole. While scholars over the past 100 years beginning with Marx, then Foucault, Merleau-Ponty and more recently feminist scholars of the body have critiqued this conception of the body, it nonetheless retains a very powerful impact on the popular imagination. If it did not, would there be such publicly expressed anxiety about the medical and scientific “advances” referred to in this paper?


27 Reports about the recent cloning of human pre-embryos have elicited much animated discussion about the possible use of a clone as a source of partial replacement for oneself in the event of a need for a spare kidney or some other required body part; or as a full replacement in the event of one’s death. See for example, David Imaggelman, “In Thine Own Image” Newsweek, cited in The Edmonton Journal, Science & Medicine (Sunday, November 7, 1993); Gary W. Pinder, “Clone Farms: Let’s Bring a Capital Idea to ‘Life’” The Globe and Mail, Facts & Arguments (Thursday, December 9, 1993); Gina Kolata, “Scientist Clones Human Embryos, and Creates an Ethical Challenge” The New York Times (Sunday, October 24, 1993); Editorial, La Stampa, “My Brother, the Organ Bank” cited in “Just What Was Said” The Globe and Mail, (November 1, 1993). What is compelling about these accounts is the complete denial of subjectivity or agency of the “clone” until such time as s/he is to stand in for oneself - and even here, it remains implicit. I assume that the “clone”, if s/he is capable of being an actual replacement rather than a mere material substitute, is a subject and possesses the concomitant characteristics. The lack of agency or subjectivity accorded the “clone” in any other scenario (but that of full replacement) cited in these accounts, suggests how that entity regarded as “body” is deprived of any further indicia of identity.
Moreover, with the recent advances in molecular biology and the current international project to map and sequence the human genome, a competing, or at least, an additional representation of the human body has been created - that of text and information system.\(^\text{28}\) As Donna Haraway describes:

> In the technical-mythic systems of molecular biology, code rules embodied structure and function, never the reverse. Genesis is a serious joke, when the body is theorized as a coded text whose secrets yield only to the proper reading conventions, and when the laboratory seems best characterized as a vast assemblage of technological and organic inscription devices...the body is an artificial intelligence system, and the relation of copy and original is reversed and then exploded.\(^\text{29}\)

Life, is now regarded by some, as a puzzle or a set of instructions encoded at the level of the gene waiting to be broken, deciphered and ultimately re-authored.\(^\text{30}\)

It is a truism that we rely upon systems of classification or categorization to order our thought, our world and our relations - to provide conceptual coherence to the otherwise bumbling mass of confusion. As expressed by George Lakoff:

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\(^{28}\) In a recent newspaper article it was announced that French scientists have produced an almost complete genetic map of the human body. See: Reuters News Agency, "Scientists Produce Map of Human Body" The Globe and Mail, A7 (December 16, 1993). Advocates of the human genome project claim that the mapping and sequencing of the human genome (all of the genetic material on the 23 pairs of chromosomes) will enable us to identify the causes of human disease and some characteristics of human behavior and ultimately enable us to treat such diseases and eradicate "deviant" behavior. For a statement about the aims of the Human Genome Project, see: Jon Beckwith, "Foreward: The Human Genome Initiative: Genetics' Lightning Rod" (1991) 18 Am. J. of Law and Medicine 1; World Medical Association, Declaration on the Human Genome Project, Adopted by the 44th World Medical Assembly (Marbella, Spain, September 1992).

\(^{29}\) Haraway, op. cit., n.1, at 206. See also: Alexander Morgan Capron, op. cit., n. 21, for a brief discussion of the human genome as text.

\(^{30}\) Evelyn Fox Keller also speaks of the shift in twentieth-century biology away from the development and characteristics of living organisms to a conception of life as code. See: Evelyn Fox Keller, "Fractured Images of Science Language, and Power: A Post-Modern Optic, or Just Bad Eyesight?" in Evelyn Fox Keller, n.6, 93, 96-97. She quotes J.D. Bernal who stated: "Life is beginning to cease to be a mystery and becoming...a cryptogram, a puzzle, a code that can be broken, a working model that sooner or later can be made" J.D. Bernal, "Definitions of Life" (January 1967) 3 New Scientist 12-14.
Categorization is not a matter to be taken lightly. There is nothing more basic than categorization to our thought, perception, action, and speech. Every time we see something as a kind of thing, we are categorizing. Whenever we reason about kinds of things, we are employing categories. Whenever we intentionally perform any kind of action, we are using categories. An understanding of how we categorize is central to any understanding of how we think and how we function, and therefore central to an understanding of what makes us human.31

These classifications however, are linguistic and social orderings of material existence and our perceptions of the world. There is nothing inherent about them, though over time they exert a powerful ability to shape our conceptions of reality and to offer explanatory models for making sense of the world. Normative and tangible consequences attach to our systems and pockets of classification. We invest particular classifications with consequences, some with authority, and position ourselves in relation to those meanings.

Law, and in particular legal reasoning, is all about categorizing, characterizing, sorting and fitting complex social phenomena and relations into pre-existing legal pigeon holes.32 Moreover, while science and medicine strive to find discoveries for the future while simultaneously unlocking the secrets of the past, law, with its duty to regulate society, looks mainly to the past to interpret the legal position and significance of novel developments, arrangements and techniques. Law, which is founded on precedent (at Common Law) and basic principles and doctrines, will take analogies from decided cases, past and present, wherever possible. Whereas scientific and medical advances create the possibility of disrupting our schemas of linguistic and social categorization (for some, our conceptions of reality) by fashioning novel material entities, law’s impetus is to resist new orderings and to attempt to assimilate these new entities into current or past conceptual frameworks. Further, law will make authoritative pronouncements to preserve particular kinds of legally sanctioned relations even in the face of novel arrangements. There appears to be an inevitable incongruence between law’s need to preserve stable conceptual categories on the one hand, and the scientific impulse toward the discovery and creation of novel entities and techniques on the other.

The new biological and medical technologies produce and isolate novel material entities, or situate them in different spaces and relationships, fracturing the conceptual orderings and constructs from which social and legal meanings have been derived. For

example, the new technologies make it possible to cryo-preserve embryos and store them 
*ex-utero* for future implantation and gestation. What are they until such time as they are 
*in-utero*, that space in which we are accustomed to situating embryos? And who should 
have control over their use and disposition? Furthermore, recent accounts in the media 
are replete with the story of the "ethical dilemma" created because a 59 year old British 
woman has given birth to twins made possible when donated ova, fertilized with her 45 year old husband's sperm were implanted into her uterus for gestation. In this case, 
the source of public agitation is not with the medical procedure *per se* (it would be quite 
"ethical" where used to "aid" an infertile woman in her mid-twenties to mid-thirties), 
but with the rupture in social relations precipitated by the new technology as it disrupts 
the "natural order".

While such ruptures have been seen by many as disturbing - should they be? In a 
postmodern world where deconstructions and fragmentations are thought to open up 
cultural and political spaces in or from which different ideas and practices may begin to 
emerge, should we be distressed by such fragmentations or breakdowns or should we 
celebrate their arrival? As noted by Shapiro:

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... fragmentation forcefully reveals the incompleteness, the gaps, and the "deficiencies" of the preexisting failed classification systems. Failure and breakdown 
display the nature and limitations of implements and techniques. The same is true

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33 See Michael Valpy, "Searching for Principles in Making Babies" *The Globe and Mail* (Friday, 
December 31, 1993); "Should Older Women Be Mothers?" *The Globe and Mail*, editorial 
(Thursday, December 30, 1993); Margaret Wente, "If Men Can Do It, Why Can't Women" 
*The Globe and Mail*, Women (Saturday, January 1, 1994).

34 It is quite remarkable when the image of Frankenstein is invoked to characterize a 59 year 
old mother at the same time that an increasing number of men celebrate their fatherhood, 
and that of others, when it happens in their 50's and even later. Dr. John Marks, former 
chairman of the British Medical Association Council, described the case as "border[ing] on 
the Frankenstein syndrome." Cited in Peter Pallot, "Doctors Divided on Late-Life Child-
This is in marked contrast to the public response which often celebrates the virility of 
"older" men who "father" children. As noted by Valpy, *op. cit.*, n.33, when the 71 year old 
former Canadian prime minister, Pierre Trudeau, was entered on the birth certificate of Sarah 
Coyne as the father, *The Globe and Mail* (Canada's "National" newspaper) published a cartoon 
showing Mr. Trudeau and another "older" man seated at separate tables in a restaurant. 
Gesturing toward Mr. Trudeau, the man says to the waiter: "I'll have whatever he's having" 
The gendered responses to the prospect of "late parenthood" also differ when the issue is 
considered from the child's point of view. One of the anxieties expressed about post-men- 
opausal mothers is that their children will be deprived of a mother into their adult years 
because they will die. We don't hear the anxiety expressed about "older" fathers, even though 
the life expectancy of women in industrialized societies is longer than that of men.
FRAGMENTING THE BODY

of our thinking tools. One of the major risks of new technologies and new social arrangements is not merely that of practical failure... but of conceptual. ...failure involving a breakdown of existing modes of categorization and evaluation that leaves us with only shards from our customary decision making implements.35

In a postmodern landscape of decentered subjects, where essentialist and naturalistic conceptions of identity are eschewed,36 why should we be agitated by the existence of new entities - frozen embryos, humans with transplanted baboon livers, cows which produce genetically engineered human milk and life-support systems which sustain brain-dead individuals?

As they open up spaces in which we may examine the gaps and limitations of old conceptual paradigms, fragmentations also create the possibility of novel material and social rearrangements. But how do we choose which reassemblies to prefer and which to reject? Should we favour the post-mortem insemination of a woman with the sperm of her dead partner - resulting in a child conceived after the death of his or her male progenitor? Do we want to encourage the breeding of pigs with genetically engineered histocompatible organs to be harvested for human transplantation if we subsequently ate them, would we engage in a new form of cannibalism? In light of the new technologies and possible social arrangements, why should we limit a child to only two legal parents one of each recognized sex?37

35 Shapiro, op. cit., n.22, at 341-342. Offering a different account of the significance of breakdown, Donna Haraway cites the following passage: "Breakdowns play a central role in human understanding. A breakdown is not a negative situation to be avoided, but a situation of non-obviousness, in which some aspect of the network of tools that we are engaged in using is brought forth to visibility... A breakdown reveals the nexus of relations necessary for us to accomplish our task... This creates a clear objective for design - to anticipate the form of breakdowns and provide a space of possibilities for action when they occur." See Haraway, op. cit., n.1, at 214.

36 I am aware of the simplified formulation of the positions I am calling postmodern. I rely, for my characterizations of postmodernism in this paper on: Janell Flax, Thinking Fragments: psychoanalysis, feminism and postmodernism in the contemporary West, Berkeley: University of California Press, 1990 and Haraway, op. cit., n.1. I am, in most respects, supportive of postmodern projects. What troubles me here is how easily certain accounts or descriptions of the new medical, reproductive and genetic technologies - arguably the epitome of rationalist thought and practice - can be represented by certain categories or instances of postmodern description and thinking.

37 I say "recognized sex" in light of the law's insistence that one be either a male or female despite the biological spectrum of "intersexuality". For an interesting discussion of the commitment of western culture - including the culture of medicine - to the notion that there are only two sexes, in the face of biologically "intersexual" persons, ie. those with some mixture of female and male characteristics, see Anne Fausto-Sterling, "How Many Sexes are There?" The New York Times, Op-Ed (Friday, March 12, 1993).
These novel arrangements invite a multiplication of meanings by fostering a multiplicity of material and social rearrangements. If we were to embrace these there would not be a question of privileging one meaning over others. But, the law is resistant to multiple meanings and will, when confronted by them, seek to coercively privilege one set of meanings over others, and will further attempt to reinforce the authoritative relationships established by precedent and practise. The law is oriented towards choosing among multiple meanings and upholding particular ones as authoritative. Given this gaze of the law, I prefer to speak in terms of the fragmentation of categories of meanings rather than their multiplication. The idea that meanings are fragmented calls attention to the authoritative ways in which these are reassembled.

At the material level, these processes of fragmentation and reassembly are the processes of instrumental rationality — the application of means to ends. Instrumental rationality is a power relationship. Technology is applied to bodies as a means of perfecting other bodies. Bodies become the raw material in the creation, reassembly and the perfection of other bodies. The process of fragmentation becomes inexorable. Each prior fragmentation reveals new gaps or "imperfections" which are then addressed through further and more profound fragmentations. The replacement of tissues and organs becomes unnecessary when human beings are bio-engineered to no longer require such transplantations. But this inexorable process does not proceed indifferently across the social landscape. In the process, some bodies are more frequently the objects and others the subjects of fragmentation and reassembly. Thus, fragmentation and reassembly are not just about blurring boundaries but exploding embodied subjects. We need to inquire about the systematic pattern which governs whose bodies become subjects and whose bodies become objects in the process of fragmentation.

In Simians, Cyborgs, and Women, Donna Haraway presents the image of the cyborg, a hybrid creature of machine and organism - a construct of fiction and social reality as the embodiment of her notion of postmodern identity and existence.38 The cyborg transgresses the defining boundaries and binaries of modernism - gender, class, race, nature/culture, self/other, agent/resource, reality/appearance, truth/fiction, mind/body. It is a creature who inhabits a world which is "about lived social and bodily realities in which people are not afraid of their own joint kinship with animals and machines, not afraid of permanently partial identities and contradictory standpoints."39 Haraway recognizes however that cyborgs are the product of the application of the instrumental rationality which she critiques. "The main trouble with cyborgs, of course, is that they are the illegitimate offspring of militarism and patriarchal capitalism . . . . But illegitimate

38 She says that: "The cyborg is a kind of disassembled and reassembled, postmodern collective and personal self." Haraway, op. cit., n.1, 163.
39 Ibid., 154.
offspring are often exceedingly unfaithful to their origins. Their fathers, after all, are inessential.”

Now I happen to live in the sole Canadian province where the legal status of illegitimacy is still recognized. To me, this status perfectly illustrates the real life material consequences of legal and social constructions. For illegitimacy is, fundamentally, a social and legal construction based on the material relations of filiation. As a legal and social construction, the child is *filius nulius*, the child of no one, but the child’s corporeal existence is directly traceable to the body of the father. Illegitimacy is a status which stigmatizes a child who bears no responsibility for the circumstances of his or her birth, and which absolves the father of any responsibility for his offspring. It is a power relationship and a fundamentally unequal one. The father may recognize his child at any time, thereby granting her or him certain rights and privileges, but the child has no access to these on her or his own. In the same way, the science created by militarism and patriarchal capitalism retains control over all the tools of instrumental rationality and may yet disclaim responsibility for its creations, fatally compromising the independent status of the cyborg whose power to control its fate is limited by the access to the tools of science.

My concern is that speculative use of the cyborg to instantiate a postmodern unbounded self may overlook its very situated creation. Those who construct the cyborg are very likely still operating within the paradigm of enlightenment rationality with their own tools, using their rules, creating novel entities. Moreover, in the context of the new reproductive and biological technologies, at least some of the new bodies which have been created are the result of fragmentation and objectification of others. Decoupling the body from the subject is an act that is politically fraught: “forgetting about the body is an old Cartesian trick, one that exacts a price from those bodies rendered invisible by the act of forgetting — those on the lower end of the social scale by whose labor the act of forgetting (or in this case, fragmenting) is made possible.”

The fragmentations occasioned by technology reveal gaps or deficiencies in the conceptual orderings which sustained old arrangements (both at the level of the individual and the social). Legal discourse is one ordering which constructs and regulates the realm of the social and defines the subjects it controls. With the proliferation of the new biological and medical technologies, legal discourse has had to contend with the exploding subject and its resulting fragments. How is the law to regard the relationship between the body and the person, and the body and its parts, in light of the instrumental uses to which bodily fragments can now be put?

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41 The province of Alberta. The *Legitimacy Act*, R.S.A. 1980, c. L-11, sets out those circumstances in which an illegitimate child can be subsequently legitimated.
II THE PROPERTIES OF SELF

There exists at the root of enlightenment philosophical discourse, and in law, a particular set of generalizable attributes of personhood. These attributes were formed around a core set of concepts which arose out of, and continue to be informed by, market place transactions. Indeed it would not be an exaggeration to say that in our society the market constructs persons. It is therefore no accident that the central myth of civil society and the modern state is founded on the quintessential market concept - contract, and that the fundamental attributes of legal and enlightenment personhood mirror those qualities which shape the contracting actor.

A basic problem with existing legal concepts is that they provide only two conceptual categories within which to examine human body fragments: either as persons or as property. As persons they would be "ends themselves" and would possess a full panoply of rights in relation to other persons and objects. As property, they are "things in themselves", objects or intangibles with persons holding collections of rights in them, including or excluding the right to alienate them. In either case the law posits a radical separation between ourselves and those things recognized as objects or persons. Both other persons and all objects recognized as property are essentially "other".

Why does legal discourse about the body so easily fall into the property paradigm? Is there no other way to legally characterize the relationship between self and body without resorting to property? What is the relationship between person and embodiment in law? We know for example that corporations are legal persons. Ironically, incorporation has its root in the latin word corpus, meaning body. But clearly, General Motors has no body, still less a numbered company whose existence resides in a post office box. We know, for example, that in Canada, women were not legal persons until 1927, yet no one can deny their physical or corporeal existence, and children are still not legal persons. Historically, the legal concept of person is intimately connected with the ownership of property and the ability to be an actor in the market place, along with the possession of requisite mental capacities, and has little to do with embodiment.

Contractual relations are agreements on the basis of free will. The capacity to contract is based on will, without reference to embodiment. Owners of property are also required to be "of sound mind". In both cases, the capacities required are mental, not physical. For example, even when John Locke discusses the origins of private property, he locates it in the "improvement" of land through the application of labour. What he means however, is the application of reason through the instrumentality of the body. Appropriation and exchange are therefore applications of abstract will, without reference to embodiment as such.

Until recently it has been assumed that the human body is not property for purposes of law. Tort law distinguished and continues to distinguish between trespass to the person (assault and battery) and trespass to property (trespass to land and trespass to
chattels). In general, two approaches have been used to determine which objects are proprietary: first, if an object shares the characteristics of property, including its standard incidents or second, if it is desirable from a policy perspective to confer on a person exclusive rights of control over the object, then in law the object may be regarded as property.

The question of whether there can be property in one’s body depends on the underlying concept of person or self. Human individuals exist only as embodied beings. What we are to make of this fact for normative conceptions of personhood, however, has been the topic of much controversy. Western philosophy has approached the relationship of person to body in two opposed fashions. One posés a dualistic relationship of mind and body or soul and body from which a dualistic notion of self and body “naturally” arises. The other rejects this approach and identifies person and body. Some, like Kant, affirm a mind/body distinction while holding to embodied notions of the person. For some, the body is insignificant or even an impediment to what is essential about personhood. For others, any conception of personhood must attend to and be informed by the fact and experience of embodiment.

For those who reject the centrality of embodiment to personhood, the body is merely a necessary condition for the pursuit of truly important possibilities in being human. Its significance is only instrumental not essential. It is the view of Englehardt, for example, that all of the body’s parts, aside from the higher parts of the brain, can be replaced. Furthermore, he argues that consciousness and not the body is the essence of personhood. For him, the body is only important in an incidental way. If mental life could exist without a body, or if the body no longer supports mental life, then the body has no significance for personhood. Englehardt does concede, however, that human beings are dependent upon our bodies in order to be functioning moral persons. However, while the person cannot exist without a body, it has no moral importance in itself.

43 Descartes, of course, is the most notorious example. See R. Descartes, Discourse on Method, pt. 4, in N. Smith trans., Descartes’ Philosophical Writings, 1952, 141. (“I knew that I was a substance whose whole essence or nature consists entirely in thinking, and which, for its existence has no need of place, and is not dependent on any material thing; so that this I, that is to say, the soul, by which I am what I am, is entirely distinct from the body, and is indeed more easy to know than the body, and would not itself cease to be all that it is, even should the body cease to exist.”)
44 See for example Leon R. Kass, Toward a More Natural Science: biology and human affairs, New York: Free Press, 1985. A number of feminist thinkers are also of this view, see infra text.
46 Englehardt, op. cit., n.2, 124.
47 Ibid., 122.
For those who refuse to separate the body from what is important to informing our concept of personhood, the fact and experience of embodiment takes on normative significance. For some, the dualism of body and mind or its analogues of rationality and consciousness is rejected on the basis of an intuitive perception that persons cannot exist without their bodies. Human dignity consists not in denying but in acknowledging and elevating the necessity of our embodiment. Furthermore, our existence as human beings is always mediated and informed by our experience as embodied selves. As Leon Kass has expressed:

The body needs to be appreciated as an organic whole; as lively and self-moving; as a person centre of awareness, ...as a vehicle of individuated self-presentation, communication and perception.48

Therefore, the question of whether there can be property in the body and consequently in body parts follows from the normative significance of the body to personhood. For those holding a mind/body and a person/body distinction, there can be property in the body. Indeed for Locke49 as for Engelhardt, the body is the quintessence of property. For Kant and for Radin50 who identify personhood with the body, there is no property in the body. Although for Radin body parts can become property once they are removed from its system, they remain inalienable - and therefore, arguably, not property according to the criterion of some.

Here again, the relationship among alienability, personhood and autonomy is important. Those who would posit the centrality of the alienability of property from a normative point of view would stress the importance of alienability to the expression of personal autonomy or liberty - the primary attribute of personhood. (If it is mine I can do with it what I want, including sell it.)

If embodiment is not an aspect of our personhood, then by necessity, it becomes the object of our consciousness. Indeed, the dominant strand of Western philosophy has shown a consistent tendency to dichotomize mind and body from its earliest days. It privileges the faculties of mind as central to personhood while providing little account of the body. For example, the Platonic tradition elevated the soul and disparaged the body, a tendency reinforced in early and medieval Christianity. Subsequent philosophical accounts were interested in the role of the mind in establishing identity, most viv-

48 Kass, op. cit., n.44, 278.
fragmenting the body

idly evident in Descartes' "cogito ergo sum". To him, and to others who followed him, the body was instrumental, rather than constitutive of identity.

This philosophical tradition informs the legal concept of the self, (and at times is in turn informed by it). Therefore, when looking at problems of self and body, the law too tends to dichotomize the "person" and the body. As Locke states it, we are first and foremost "owners" of our bodies. The body is property, it is instrumental to our purposes rather than who we are. The attributes of person which are established in law are those of the free willing abstract actor. These include familiar concepts such as "mens rea" and "the reasonable man". The principles and concepts applied in the law are rooted in a notion of a disembodied self. The only account of materiality with which the law is familiar is the materiality evident in objects. Hence, when attending to the human body the law will tend to apply to it the principles attributable to material objects - those principles which pertain to commodities and various forms of property. The body is therefore objectified. The principles for dealing with materiality are essentially economic - property, exchange, and contract. There is, therefore, little distinction between materiality and corporeality.

In practical terms, the legal treatment of the body considered its "worth" if it should be harmed, thus regarding the body's role in commodity production and exchange and, implicitly, turning the body into a commodity. I remember my fascination with the cash value of different body parts in the little brochures about school-sponsored life insurance which we used to get in class: $5,000 for an arm; $7,000 for a leg, but only $3,000 upon death.

When considering the new issues raised by the fragmentation and separation of the body generated by the new technologies, the only conceptual lens available to the law through which to view the interests involved is the conceptual lens of commodification and the concomitant categories of contract and property. A review of the scholarly legal literature on this subject will find that the vast majority of articles are concerned with issues of ownership, possessory interests, who shares in the profits, supply and demand, exchange transactions and markets. There is virtually no discussion of an alternative

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51 Locke, op. cit., n.49, ss.27. ("Every Man has a Property in his own Person").

paradigm within which to discuss these issues while at the same time pertaining directly to the question of materiality.

III. EMBODIMENTS

It is a philosophical commonplace that mind and its activities are superior to body and its experiences. From Plato’s insistence that knowledge can be achieved only when one has liberated oneself from the deceptiveness of the senses, through Descartes’s conception of the soul as pure intellect, to Kant’s critique of pure reason, this philosophical theme is a persistent and common one... The association of woman with the material, the bodily, the seductive, that which diverts the (male) mind from its highest pursuits, runs through the history of philosophy, in various guises, from Aristotle through Descartes, Rousseau, Kant, and Hegel, to Sartre and even de Beauvoir. Equally persistently, women are taken to be emotional beings (often pejoratively so), whereas it is men who are attracted to, and excel in, the life of reason. Indeed, it is from the Man of Reason, as Genevieve Lloyd shows us, that the common Western understanding of reason as an intellectual character ideal is derived. And conceptions of reason have, throughout a long history, been articulated through more or less conscious “exclusions of the feminine”. Because of their essentially emotional, and more purely physical nature, women are assumed to be best suited to take care of practical matters...53

My intellectual or theoretical perspective on the body and the issue of embodiment begins with the disembodied actor or self at the centre of Western, but in particular liberal discourse. I was a student of this tradition. From Plato, Aristotle, Machiavelli, Bacon, Descartes, Hobbes, Locke, Kant, Hegel and Rawls I learned that the defining


attribute of personhood was mind - and reason or rationality its finest characteristic. The body, when it appeared in philosophical discourse, was either an impediment or a distraction to knowing the truth and was therefore to be controlled and directed by reason (Plato), an instrumentality of the will (Locke), objectified will (Hegel) and increasingly an absence, (for Descartes, Kant and arguably for Rawls).

With the breakdown of the teleological, cosmological and political order of the ancients, self-constituting modern man was left to his own devices to design his creation and order his affairs. Finding himself in the state of "nature", characterized by Hobbes as brutish and Rousseau as blissful, man finds himself alone and autonomous. In order to preserve his autonomy and protect his property, which he acquires as a matter of natural right, he knows to contract with other equally autonomous men. In the beginning were rational man, autonomy, contract and property. The body was absent from this new account of beginning (and of course so were women). Abstracted, rational, willing, instrumental and possessive individuals defined the ontology of liberal discourse. The founding moment is contract, an exercise of will, not birth - an expression of women's embodied procreative powers. Moreover, the myth of the social contract and all it represented could only be sustained through assigning to women all that men were not. Theirs, ours, is an identity of negation. Not autonomous, nor contractors, nor property holders. Not rational, independent or public actors - subordinated.

Therefore, in some ways, I see a theory or account of embodiment as a necessary corrective to the false ontology of liberalism. In place of the abstracted, disembodied, rational, universal rights bearing, contracting, possessive individual at the centre of liberal discourse, I want to know what a social order that takes embodiment seriously would look like. If the structures and practices of liberal theory have been founded on a conception of person with an absent body, I want to know what a social theory centered around embodied persons would look like. In this regard I am sympathetic to feminist critiques of the liberal conception of the self such as those offered by Seyla Benhabib45, Catherine Keller55 or Jennifer Nedelsky56 which have inverted the liberal paradigm and inserted a concrete, connective, finite and embodied self at the center of social theory. Moreover, these authors acknowledge that it is only through relationship and interaction with others, rather than in acts of separation, that an individual attains and maintains one's identity. Thus, at the same time that these critiques disparage the isolated, disembodied self of liberalism they also implicitly, and at times explicitly, challenge the

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55 Catherine Keller, op. cit., n.8.
bundle of attributes which sustain such a separative individual. Most obviously, we can question a notion of liberty symbolized and guaranteed through property, and contract and exchange as the paradigm of interpersonal relationships.

Missing from these critiques of the liberal self, however, is a positive account of embodiment. If one of the primary attributes of connective, relational selves is that of embodiment, we need to inquire as to what characteristics and experiences of embodiment are significant and relevant. Moreover, we need to know what kind of an account of embodiment we can offer. This enterprise becomes even more complicated and more necessary once we note that it is not that the body has been absent from western philosophical and legal discourse, and most certainly is not absent from its effects. It is the body and the experience of embodiment which has been absent from the defining characteristics of personhood which is at the center of this discourse. Thus, we encounter the legal absurdity that a corporation enjoyed the legal status of person at the same time that aboriginal peoples, women and Blacks did not. Moreover, it is precisely the denigration occasioned by their very embodiment that deprived them of legal personhood and the concomitant rights protected and guaranteed by such a status.

In this regard, it has been important to critique the unencumbered or generalized self - to pierce the veil of ignorance, if you like, to determine who is hiding behind it and in whose interests the current moral principles, conceptual systems and epistemological order have been constructed. Thus, at the center of liberal, legal discourse we find not an absent body, but a particular body - one who is white, male, heterosexual, able bodied, young, adult, and it is this body which has been generalized as the normative body of liberal discourse. However, since this normative body was (and is still) "generalized" and reflexively individualistic, those whose position it represents cannot see beyond their own navels to the ways in which they have constructed other bodies by reference to their own. Furthermore, in part through the myth of individualism, sustained by the fantasy of the social contract, the disembodied, abstract, rational individual is able to deny the very existence of any conception of society with the power to construct other bodies. Because the individual - according to this account - is prior to society, society has no power to constitute or inscribe itself on embodied subjects. Thus, the absent body at the center of liberal (enlightenment) discourse serves at least two functions: it reinforces qualities of mind, primarily instrumental reason, as the quintessential attribute of personhood thereby negating the experience of embodiment at both the level of social inscription and the level of living through, with and in the body. At

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57 I certainly do not mean to suggest that the circumstances of all three groups were the same or even comparable - clearly they were and are not. Only African Americans have ever been the direct objects of property. My point is simply to problematize the legal status of "person" in relation to embodiment generally.
the same time, it shields the very particular body positioned at the center of the discourse while simultaneously constructing "other" bodies in relation to it.

In her article "Bodies and Knowledges: Feminism and the Crisis of Reason"58, Elizabeth Grosz suggests the importance and difficulty of theorizing about the body in feminist theory. This piece provides an entry point to think about embodiment and provides a perspective for my own work on the intersection of scientific and legal discourses on the body and in particular in the context of the new reproductive, medical and genetic technologies. Grosz reminds us that the body can be theorized in two ways: the first, as a surface of inscription on which "social law, morality, and values are inscribed"; and second, as the lived experience of the body - "the body's internal or psychic inscription."59 In her view, while the first analyzes a social, public body, the second "takes the body-schema or imaginary anatomy as its object(s)." As stated by Grosz:

The body can be regarded as a kind of hinge or threshold: it is placed between a psychic or lived interiority and a more sociopolitical exteriority that produces interiority through the inscription of the body's outer surface. Where psychoanalysis and phenomenology focus on the body as it is experienced and rendered meaningful, the inscriptive model is more concerned with the processes by which the body is marked, scarred, transformed, and written upon or contracted (sic) by the various regimes of institutional, discursive, and nondiscursive power as a particular kind of body.60

Grosz is striving for a construction and theory of the body which avoids biological reductionism, but which nevertheless recognizes the universal, transhistorical aspects of biological embodiment as well as "the body's capacity to be 'molded', 'constructed' or

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59 Ibid., 196.

60 Ibid., 196-7.
socially in-formed, or culturally specified."\textsuperscript{61} As she suggests, the body is "naturally social".\textsuperscript{62} Culture is constitutive of human biology, as Grosz points out, for example in the case of speech, and in turn, culture inscribes and produces biological constructs. Conceptualized in this way, the body is a hinge between the lived interiority of consciousness and the externally inscribed significations of culture.

Experience, moreover, is culturally mediated but is never independent of corporeality. Embodiment is also constitutive of experience and consciousness, as Oliver Sacks has persuasively argued and subtly described.\textsuperscript{63} Sacks shows, for example, that a tick is not simply experienced as an external, alien, physical phenomenon, but is incorporated into and constitutive of a person's consciousness and sense of self. Moreover, in \textit{A Leg to Stand On}, he describes the experience of losing touch with his own embodiment, in this case occasioned by the loss of feeling in his own leg, due to a temporary neurological impairment. In a recent story in the \textit{New York Times}, a 17 year old young woman described her feelings of loss about her leg which had been surgically amputated a year earlier:

\begin{quote}
It was after the operation and I was in the Rusk Institute where I was being fitted for a prosthesis and taught to walk, I was depressed. I missed my leg and I even missed the ulcer. It had been there so long. I missed the familiar pains and the familiar fears.\textsuperscript{64}
\end{quote}

It seems to me therefore, that lived embodied experience involves a synthesis of the significations of social inscription together with the interiority in which embodied subjectivity creates its own sphere of meaning.

In the most literal sense, bodies are socially inscribed in the flesh. Footbinding, ear and nose piercing, tattooing, circumcision, cosmetic surgery, ritual incisions are examples of marking the body's surface. But various forms of social discourse - law, medicine, biology, politics, religion, literature, popular culture, the visual and plastic arts and economics also construct bodies: delineating their functions, characteristics, shape,
limitations, duties and capabilities. Bodies are positioned and ordered in relation to others. Moreover, bodies are constituted by the other - the external gaze views the body in silhouette, compares it to the commodified glossy cardboard cutout of popular culture, advertising, and the mass media generally. Against this cardboard cutout, “assets” and “deficits” are thrown into sharp relief. When we look in the mirror, we may see ourselves through the eyes of another.

As Foucault explores in *Discipline and Punish*, the body is the setting of a “microphysics” of power. Others can scrutinize and judge my actions, constrain my body in prison, inflict upon it pain or other forms of violation. They can regularize my movements as in an army drill or extract regimented labor. This susceptibility of the body to the Other’s intentions, not just to illness or other organic forces, is a primary mechanism of dy-appearance. The prostitute, the tortured man, the assembly line worker, may each regard his or her own body as if it were a thing. Their bodies have been taken away from them through the alienating projects of the Other.65

However, at the same time that the various dominating cultural, political and social forces may alienate us from our own bodies - our bodies are ourselves. We live in our bodies and need not always live our bodies as the objects or instruments constructed by and for an ‘other’.

The dialectical significance of embodiment which Grosz outlines - as a surface of social inscription and as interiority - suggests a highly contingent meaning to embodiment. A meaning which is mediated by the interaction of socially inscribed signs and the subjective experience of embodied subjects. Our bodies are embedded within a system of social meaning which we somehow interpret in light of our experience. The signs on our bodies have different readers, including ourselves. Our embodiment is therefore always political: we juxtapose our own readings of our bodies to those of others who we meet in everyday life. We share readings and compare texts and seek to redesign the debased currency of commodified discourses of embodiment. We cannot specify the meaning of our embodiment individually, but we can participate in the creation of different interpretations. Thus, the project of a number of feminists to reclaim the body by developing “woman-centered” narratives about embodiment is so important.66 As Donna Haraway expresses:

65 Drew Leder, op. cit., n.9, 98.
66 I am thinking here of writing by Sara Ruddick, op. cit., n.3, especially pages 205-217 where she attempts to develop an image of the reclaimed body. See also the writing of Iris Marion Young, *Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory*, Bloomington, Indiana: Indiana University Press, 1990.
Feminism is, in part, a project for the reconstruction of public life and public meanings; feminism is therefore a search for new stories, and so for a language which names a new vision of possibilities and limits. That is, feminism, like science, is a myth, a contest for public knowledge.  

As we endeavour to construct new narratives of embodiment or feminist accounts of corporeality we must not delude ourselves into thinking that the stories we tell are not connected to the stories which have already been told about us. New stories about women's experiences of our embodiment, while necessary and important, will not be the result of "virgin birth" - untainted by prior male authoring or signification.  

Confronted with the "absent body" or male defined body of liberal discourse, we must now participate in developing new discourses of embodiment. This is no simple matter. It requires us at the same moment to engage with and yet break with the tradition of disembodied reason which lies at the center of Western philosophical, scientific and legal thinking. I think that it requires, at least, an account of personhood which locates consciousness and subjectivity within the body as an act of resistance to the dualism which pervades western philosophic and legal thinking and as the starting point for a re-visioning of conceptual and metaphoric constructs; and, the flourishing of multiple narratives of embodiment and stories about the body - the proliferation of counter discourses about the body to decenter those constructed by the white, heterosexual, "able bodied", male gaze, and any other essentializing or stabilizing accounts of the body.  

I want to resist the idea, dominant in some strands of current scholarship, that the body is tabula rasa, ready to be inscribed by culture. The body is not only a product of social/cultural inscription, but is also materially located in culture and practice and within various social as well as discursive locations and institutions. As I have suggested there is a recalcitrance to corporeality. Embodied persons are always situated or located somewhere. Therefore, when I speak about the need for a proliferation of counter discourses about the body to decenter any essentializing or stabilizing accounts of the body, I am nonetheless committed to the notion that these accounts come from somewhere. This point, it seems to me, is particularly important in the context of the larger theme of this paper which is, on one level, about the literal fragmenting of the body and the social reassemblies which occur as a consequence of various bodily fragmentations occasioned by the new medical and scientific technologies. These fragments are not just about the fragmenting or multiplication of meanings in a postmodern landscape, not only about destabilized subjects who offer emancipatory possibilities, but are the products of materially altering and invading the bodies of persons whose very selves are subjected to

67 Haraway, op. cit., n.1, 82.
68 For a discussion of why the body has been absent from philosophical discourse see Leder, op. cit., n.9.
outside instrumentality. The bodies I want to address are not mere texts pregnant with multiple meanings but poor black women gestating on contract. To view the body only as text, open to an endless proliferation of readings and meanings, is ultimately to erase the body. What kind of body is it that can be endlessly reconfigured or reauthored? The notion of the body as text substitutes a deconstructionist view from everywhere for the view from nowhere of enlightenment objectivity. As Susan Bordo suggests:

... the appreciation of difference requires the acknowledgment of some point beyond which the [body] cannot go. If she were able to go everywhere, there would be no difference, nothing that eludes. Denial of the unity and stability of identity is one thing. The epistemological fantasy of becoming multiplicity - the dream of limitless multiple embodiments, allowing one to dance from place to place and self to self - is another. What sort of body is it that is free to change its shape and location at will, that can become anyone and travel anywhere? If the body is a metaphor for our locatedness in space and time and thus for the finitude of human perception and knowledge, then the postmodern body is no body at all.

Finding herself at the opposite pole from disembodied male reason, Sara Ruddick searches out what is uniquely female, and attempts to draw out and celebrate her philosophic significance. Giving birth, unlike any other human activity, is one which only women can experience. As Ruddick states “birthing labor is uniquely female; only women can suffer its burdens or share in its powers. No other division — of class, race, religion, or culture — has been as ineradicable as that between the sex that can bear children and the sex that cannot.”

Yet, the pregnant body and the act of giving birth have been remarkably absent from philosophical discourse and its cultural significance has been minimized. It is men who have been depicted as creators, through the application of their will, and the employment of their bodies (and those of others) as the tools of reason and volition. Moreover, even with regard to the procreative process, it is often men who have been

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69 Susan Bordo, Unbearable Weight: Feminism Western Culture, and the Body, Berkeley: University of California Press, 1993, 229. ("The deconstructionist erasure of the body is not effected, as it is in the Cartesian version, by a trip to "nowhere," but by a resistance to the recognition that one is always somewhere, and limited.")

70 Ibid.

71 Ruddick, op. cit., n.7, 191. While I have used this quotation, I am uncomfortable doing so. On the one hand I do agree with it, on the other, I wonder whether it is precisely because I am white, North American, middle-class (now, though certainly not always, and most of my family remain "working class.") not religious, that it has some resonance for me. Some months later, I still remain troubled by the essentialism of this statement.
attributed with, or at least conferred, equal, creative powers while the gestation and birth labour of women have been minimized. In one of its most stark forms, the academic legal literature abounds with discussions of so-called "surrogacy" cases, where the male intention to parent - an act of will and the concomitant arrangement of a contract, is often credited with the creation of the child. "But for the intention to parent," so the argument goes, "the child would never have existed". The child is created by an act of will and rightly belongs to the mind from which it sprang. Moreover, as both Ruddick and Young indicate, women's activity and experiences of gestating are portrayed as essentially passive waiting in which growth takes care of itself, provided of course, that she comports with the standards set by the medical establishment. Thus, with respect to both the act and processes of procreation and birthing, the pregnant woman is deprived of any subjective experience of her own embodiment and contributions. As Iris Marion Young notes:

We refer to the woman as "expecting," as though this new life were flying in from another planet and she sat in her rocking chair by the window, occasionally moving the curtain aside to see whether the ship is coming. The image of uneventful waiting associated with pregnancy reveals clearly how much the discourse of pregnancy leaves out the subjectivity of the woman. From the point of view of others pregnancy is primarily a time of waiting and watching, when nothing happens.

Ruddick proposes that the "compulsion to control and minimize birth was expressed in the ideals of reason that dominate Western philosophy." We are, by now, familiar with the dichotomies which line up reason, culture, man, objectivity and the public in opposition to and superior to body, nature, woman, subjectivity and the private. But, "how did it happen that Western philosophers came to think that some bodies were more "bodily" than others?" Pregnancy, birth and the experiences of menstruation and nursing distinguish the female body and it is, therefore, these against which reason defines itself.


73 Iris Marion Young, "Pregnant Embodiment - Subjectivity and Alienation" in Young, op. cit., n.66, 167.

74 Ruddick, op. cit., n.7, 193.

75 Ibid., 194.
FRAGMENTING THE BODY

To an outsider’s (male) gaze, women’s pregnant and birthing bodies writhe and cry out in pain. They swell, bleed, and contract, their “otherwise concealed parts” are broken open. Lactating bodies leak and dribble, irregularly and at times, uncontrollably. The blood of menstruation which precedes pregnancy, must be contained and hidden. Unlike other bodily secretions: urine, feces, even semen, its excretions are not subject to voluntary control and are therefore subject to social regulation. Though its cycles and rhythms can be charted, to the male gaze, menstruation makes the body look “irregular”, even pathological76 and the blood flow it produces, the object of acute surveillance and agitation. Isabel Karpin discusses an Australian case in which a Family court judge was to determine whether an intellectually disabled girl should be given a hysterectomy - as her parents apparently wished - to avoid the onset of menstruation.77 In this case, as she describes it, “the female body is seen as modifiable in the face of (the individual’s) society’s inability to deal with the “grotesque” scenario of public menstruation, a threatened exteriorization of that which is normally (normatively) an interiorized regimen.” As she suggests, it seems easier to reconfigure the body of the young girl than to change the social construction of reality to accommodate the “exteriorization” of menstruation.

Ruddick proposes that the idealization of reason in Western philosophical thinking may be a response to the complexities of the pregnant and birthing body which is then generalized into a basic distrust of bodily life. “What reason needs is to be free of bodies. Second best, it needs a body suitable for its purposes. Concretely, reason’s body is a controlled instrument of reason’s purposes”.78 Thus, Locke could easily find that every man had property in his person - an instrumentality for reason’s ends. Moreover, when what reason values most is autonomy, conceptualized as separation and individuation, and abstraction or generalizability, embodiment signifies that which is concrete, material, connected and interdependent.

The inability of male reason to come to terms with embodiment stems from an uncomfortable relationship with the facts of his origins in the circumstances of birth.

For all its brute and sometimes brutal physicality, birthing is indelibly a social relation, a fact that only a radical distinction between mind and body can dis-


78 Ruddick, op. cit., n.7, 196.

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guise. . . Birth more than any other experience except perhaps sexuality, undermines the individuation of bodies. The growing fetus, increasingly visible in the woman's swelling body, an infant emerging from the vagina, a suckling infant feeding off a breast, the mother feeding with and of her body express in dramatic form a fusion of self and other.79

Birthing reveals what is so "unnatural" about the "State of Nature". The myth of the social contract, a post-oedipal myth of autogenesis and willful creation of society, works in tandem with the application of instrumental reason to "discover" and appropriate the "secrets of nature".80 If birthing can be mastered, the shame of relationality and dependence can be overcome. All is as it should be - man makes himself, reason vanquishes embodiment. Dissected, analyzed, synthesized and replicated, woman-nature becomes a passive object, a bundle of inert fragments brought to life only through the intervention of reason.

In the context of pregnancy and birthing, nothing illustrates this better than the routine administration of the epidural. From the point of view of the birthing woman:

. . . there is not just a feeling of numbness below the waist. There is, rather, the sense that one terminates at the umbilicus, that one's corporeal self has no extension below this, and that what lies below is not-self, not-flesh, not-real, not-anything. The anesthetized lower half has a bewildering nonentity, completely lacks meaning and personal reference.81

The experience of birthing is severed from the self - the integral feelings and sensations of embodiment are fragmented into non-existence. She is rendered an immobilized, inert vessel. What is "not-self", "not-flesh", the laboring woman cannot direct and integrate as herself, thus agency for the final stages of procreation is vested in the medical practitioner who is an accomplice in the myth of "delivering" the infant to her - the final act of the male act of the appropriation of procreation. Or is it?

Evelyn Fox Keller, in Secrets of Life, Secrets of Death, reminds us of a central motif which underlies much of scientific investigation and creativity, that of the desire to

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79 Ibid, 191.
80 Evelyn Fox Keller, op. cit., n.6, 39, 40, reminds us that in most cultures, "the secrets of women, like the secrets of nature, are and have traditionally been seen by men as potentially either threatening—or alluring—simply by virtue of the fact that they articulate a boundary that excludes them." Moreover, as she explains, the enlightenment project, is all about "undoing" nature's secrets. Ibid., 41.

IV. CONSTRUCTING HUMAN BODIES IN CASE LAW

I NOW TURN TO THREE FAIRLY RECENT AND WELL PUBLICIZED AMERICAN CASES IN WHICH ISSUES AROSE OCCASIONED BY THE FRAGMENTATION OF THE BODY AND THE APPLICATION OF NEW MEDICAL TECHNOLOGIES TO THE BODY TO OFFER SOME PRELIMINARY SUGGESTIONS AS TO HOW THEY CAN BE READ AS PART OF THE ENLIGHTENMENT ERASURE OF THE BODY. IT IS INTERESTING TO EXAMINE THE CASES, EACH OF WHICH HAS BEEN REFERRED TO AS A CASE OF FIRST IMPRESSION BY THE RESPECTIVE ADJUDICATORS, TO DISCOVER THE UNDERLYING CONCEPTUAL SCHEMATIC AND METAPHORS WHICH OPERATE TO ORDER THE BODILY FRAGMENTS AND SHATTERED SOCIAL ARRANGEMENTS WHICH OCCUR IN EACH

82 Keller, op. cit., n.6, 40.
83 Ibid., 41.
84 See for example the vanished, penetrated, conquered depictions of nature as woman, and the necessity to force her to reveal herself and submit to reason's (men's) power, methods and uses rendered by Francis Bacon in The New Organon (Fulton, H. Anderson, (ed.), 1960).
85 Keller, op. cit., n.6, 42.
86 Ibid., 51.
87 I take this to be the erasure of the female body since white male rational actors will still exist as mind. Moreover, one of the "promises" of the new genetics is the authoring of new bodies in accordance with "man's" desired ends ie: the selection of traits, both through somatic and germ line "therapies".
of these cases. These cases are: Moore v. Regents of the University of California, Davis v. Davis and Anna J. v. Mark C.

A. Property and the Body

In Moore, the issue was whether John Moore had a claim to a share of the profits generated by a patented cell line derived from bodily tissues and fluids taken from his body as part of his treatment for leukaemia. Mr. Moore was not told about his doctors' financial interest in exploiting his genetic material. The court of first instance struck out Mr. Moore's action on the ground that there was no basis in law for recognizing his claim. On appeal, the California Court of Appeal ruled in favour of Mr. Moore and found that there was a breach of fiduciary obligation and breach of a duty of full disclosure. In addition, a majority of the Court reasoned that people have property in their own bodies because in relation thereto they exercise the classic proprietary incident of control. As stated by Rothman, J.A.:

'Property' refers not to a particular material object but to the right and interest of domination rightfully obtained over such object, with the unrestricted right to use, enjoyment and disposition . . . . The rights of dominion over one's body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else.

In addition, a so-called policy analysis was also used by the majority of the Court to support the idea that people have property in their bodies and body parts. The majority of the Court of Appeal considered the promotion of privacy and dignity - personhood rationales - as irresistible justifications for concluding that people have property in their bodily tissues. As stated by the Court:

A patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress.

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92 Ibid., 508.
FRAGMENTING THE BODY

While the Court held that Mr. Moore had property rights in his cells, it refrained from expressing a view on whether such rights included the right of sale.93

On further appeal, the California Supreme Court rejected the property theory adopted by the Court of Appeal for three reasons. First, the Court found that the privacy and dignity interests of Mr. Moore could be upheld without resorting to the law of property. As stated by Justice Panelli:

one may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of "privacy" and "dignity" into the square hole of "property" in order to protect the patient since the fiduciary-duty and informed consent theories protect these interests directly by requiring full disclosure.94

Second, the Court suggested that the legislature is better suited than the courts to develop a proprietary regime pertaining to body parts. Third, the Court was of the opinion that the recognition of property in human tissue could become a significant impediment to medical and scientific research by restricting access to necessary raw materials.95

As expressed by Pannelli J.:

If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, companies are unlikely to invest heavily in developing, manufacturing or marketing a product when uncertainty about clear title exists.96

It was the cumulative effect of these three reasons that led the majority of the Supreme Court of California to conclude that property law is an inappropriate vehicle with which to impose liability on the various defendants. However, the Court did not reject outright the theory that people have property rights in their bodies and body parts. Future use of this characterization was expressly left open by the majority judgment. Pannelli J. stated that:

93 Ibid., 504.
95 Ibid., 161.
96 Ibid., 162-163.
while we do not purport to hold that excised cells can never be property for any purpose whatsoever. . . the novelty of Moore's claim demands express consideration of the policies to be served by extending liability.97

In the second case, Davis, a dispute arose in the context of divorce proceedings over the disposition of several frozen embryos created with the sperm and ova of Mr. and Mrs. Davis by in vitro fertilization. Mrs. Davis sought to have the embryos implanted and asserted that they were living persons and that their "custody" ought to be determined according the "best interests of the child test". Mr. Davis argued that the embryos were property with the potential of becoming human beings and sought joint control over the frozen embryos.

The trial judge expressly rejected the argument that the embryos were property and held that the embryos were human beings as of the moment of conception. Young J. accepted as scientific fact that embryos are living persons, relying on minority evidence that the cells of an in vitro embryo are differentiated from one another and that the embryo is a completely constituted person. Moreover, he rejected the argument that an in vitro embryo is not a living person because it does not have the "usual characteristic" of living persons such as a nervous system and body parts. As he stated:

upon fertilization the entire constitution of the. . .[person] is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life codes for each of these otherwise unobservable elements of the unique individual.98

Accordingly, custody or control of the embryos was decided according to family law and not property principles and the judge concluded that it was in the "manifest best interest of the children, in vitro, that they be made available for implantation to assure their opportunity for live birth."99

On appeal, the Tennessee Court of Appeal overturned the trial judgment and

97 Ibid., 160.
98 Op. cit., n.89 (Tenn. Cir.), 19. It is far from apparent why a "scientific approach" - and here a disputed one - should be the touchstone of the juridical status of an embryo. As stated by the Supreme Court of Canada in Tremblay v. Daigle: "metaphysical arguments may be relevant but they are not the primary focus. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task." Tremblay v. Daigle [1989] 2 S.C.R. 530.
99 Op cit., n.89 (Tenn. Cir.) 25.
awarded the parties "joint control of the fertilized ova . . . with equal voice over their disposition." The trial judgment was reversed because:

awarding the fertilized ova to . . . [Mrs. Davis] for implantation against . . . [Mr. Davis'] will constitutes impermissible state action in violation of . . . [Mr. Davis'] constitutionally protected right not to beget a child where no pregnancy has taken place.

In addition, the Court noted that the embryos were not entitled to the same protection as persons. Franks J. noted that even after viability, they are not given legal status equivalent to that of a person already born. While at no point does the Court expressly describe the embryos as property, the terminology of joint control and equal voice over their disposition sounds very much like the language of property.

On subsequent appeal to the Supreme Court of Tennessee, Daughtrey J. affirmed the judgment of the Court of Appeal, but with respect to the characterization of the frozen embryos found that:

we conclude that preembryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, with the scope of policy set by law. (emphasis added.)

Finally, in Johnson v. Calvert, the Court of Appeal viewed its role as determining "who are the parents of the child" born and gestated by Anna Johnson and formed in vitro from the ova of Chrispina Calvert and the sperm of Mark Calvert. In this case, Anna Johnson, an African-American woman, contracted to gestate and give birth to an embryo formed by the sperm of Mark Calvert and the ovum of Chrispina Calvert. Anna Johnson, argued that she was not paid the sum of money promised to her pursuant to the contract and, in any case, decided that she wanted to keep the child she had carried and nourished in her own body for nine months.

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101 Ibid.
B. The Use of Scientific Evidence

One of the things I have found fascinating about these cases is the construction and use of scientific evidence to support a particular legal outcome. That is, to uncover the socially and legally constructed standard or norm which masquerades behind the application of scientific evidence. In each of these three cases, and commonly in jurisprudence, scientific knowledge is regarded as an objective basis upon which to reach particular and determinative legal outcomes. However, we find the scientific explanation or understanding used in one case directly contradicted by its usage in another case. For example, when we juxtapose Johnson v. Calvert and Moore, we find a contradictory application of a standard of genetic "uniqueness". In Johnson v. Calvert the court notes "the unique genetic inheritance" which is passed on to a child and it is this connection and quality of uniqueness which is used to establish the legal parent-child relationship and to deprive this status to Anna Johnson who gestated and gave birth to the child. As the California Court of Appeal states:

The whole process of human development is "set in motion by the genes." There is not a single organic system of the human body not influenced by an individual's underlying genetic makeup . . . . Also, according to the expert testimony received at trial, it is now thought that genes influence tastes, preferences, personality styles, manners of speech and mannerisms.104

However in Moore, the California Supreme Court found that Mr. Moore's cells and genetic makeup were not unique. As the court stated:

Lymphokines, unlike a name or a face, have the same molecular structure in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.105

In Moore, the court chose to overlook the fact that it was precisely the unique properties of Moore's genetic "program" — the fact that his virus infected cells overproduced lymphokines that made his tissue so important to the research scientists and so commer-

104 Ibid., 380.
cially valuable. The court held that “by definition a gene responsible for producing a protein found in more than one individual will be the same in each”.

Again, scientific knowledge is used in a contradictory fashion with respect to the significance attributed to gestation in *Davis* compared with *Johnson v. Calvert*. In *Davis*, the Supreme Court of Tennessee acknowledges that “left undisturbed in the mother’s uterus, a viable fetus has an excellent chance of being brought to term and born live. In contrast, a preembryo in a petri dish, if later transferred, has only a 13-21 percent chance of achieving implantation. Of these pregnancies, between 56 percent and 75 percent result in live births.” (The court relied upon this evidence to refute the determination of the lower court that a preembryo was a person.) And, according to my calculations, if unimplanted, the preembryo has no chance of achieving implantation or live birth. And yet, in *Johnson v. Calvert*, the judge dismissed the contribution of gestation altogether in the determination of maternity.

One can only conclude that the use of scientific evidence is politically fraught. Far from constituting an objective basis upon which to ground legal decisions, it is used to mask whatever conclusion is preferred.

To my mind, the best illustration of this occurs in the use of a blood test to establish that Anna Johnson was not the “natural mother” of the baby. The judgment includes a verbatim copy of the Disputed Parentage Study as reported by the Director of the parentage testing laboratory. The summary of findings of the report states: “Anna L. Johnson is not the mother of Baby boy.” The report then provides the results of the human leucocyte antigen test and notes an inconsistency between the child and the woman. The report states: “Our opinion of non paternity is based on the above noted inconsistency.” Here there is an explicit acknowledgment that a paternity standard is applied to determine that Anna Johnson is not the mother of the child. The court, relying solely upon the blood test as the determination of natural motherhood, finds that the Calverts are the child’s genetic, biological and natural father and mother, and that Anna Johnson has no parental rights.

By resting its decision on genetic information gleaned from a blood test, the court applies a sex specific test which cannot be generalized to deal with maternity. This is a classic case of “manthropomorphizing”, where, even using a biological model, the importance of the contribution of pregnancy, gestation and birth have vanished with regard to the creation of a child. But, on the court’s assessment, this does not constitute gender discrimination since the same procedure is used to establish both the natural

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mother and the natural father. After all, this way no man who ever gives birth to a child could be discriminated against.

C. Creative Agency and Authorship

Beyond the apparent inconsistencies and incoherence which operate when we compare one case with another, is there a larger logic which links the rhetoric and the decisions of these cases? I think there is. In each case, what is privileged, valued and ultimately made decisive is a notion of creative agency or individual authorship. In Johnson v. Calvert, this creative agency is expressed through the genetic operation of gametes and through the operation of intentionality, an act of will. As the court stressed “the whole process of human development is "set in motion by the genes."”

It is interesting to note that the court chooses to emphasize the agency of Mark Calvert to refute any analogy of his role to that of a sperm donor. “It is a gross distortion of the facts to put Mark into the sperm donor category rather than what he functionally is - a husband who used a new medical procedure which enabled him and his wife to have a child of their own.” If Mark Calvert is making use of a “new medical procedure”, then Anna Johnson is reduced to the status of a medical device. Oddly enough, Chrispina Calvert becomes the natural mother only by default. Once Anna Johnson is excluded as the natural mother because of the blood test, “there is no reason not to uphold the trial court’s determination that Chrispina is the natural mother. She is the only other candidate!” Moreover, the decision of the California Supreme Court to uphold the decision to deny Anna Johnson’s parental rights on the basis of the surrogacy contract demonstrates another triumph of creative agency. But for the intentions of the Calverts, the child would not have existed. This child is created by an act of will and rightly belongs to the mind from which it sprang. The embodied, procreative agency of Anna Johnson is of no effect.

In the Davis case, the court sees itself as resolving questions of genetic parenthood and concludes:

...that an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood. The technological fact that someone unknown to these parties could gestate these preembryos does not alter the fact that these parties, the gamete providers, would become parents in that event, at least in the genetic sense. The profound impact this would

111 Ibid., 380.
112 Ibid., 378.
113 Ibid., 376.
have on them supports their right to sole decisional authority as to whether the process of attempting to gestate these preembryos should continue.\textsuperscript{114}

In conclusion, the court held that "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question."\textsuperscript{115}

Genetics confers specific rights irrespective of any social relation or intention to form a social relationship with offspring. In effect, what the court argues with respect to the right not to procreate is the right to prohibit "unauthorized reproduction" much along the lines conferred by copyright. In other words, like any other creative author, the court grants Junior Davis the right to prohibit the unauthorized circulation of copies of his genetic material.

Finally in Moore, the court finds that only the intervention of the scientists to transform Moore's diseased tissue into a commercially valuable substance merits a property right in the form of a patent. "[T]he subject matter of the Regent's patent - the patented cell line and the products derived from it - cannot be Moore's property. This is because the patented cell-line is factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms. Human cell-lines are patentable because "[l]ongterm adaptation and growth of human tissues and cells in culture is difficult - often considered an art . . .," and the probability of success is low. It is this inventive effort that patent law rewards, not the discovery of naturally occurring raw materials."\textsuperscript{116} As Jamie Boyle states: "There is something wonderful in the way that Mr. Moore becomes a "naturally occurring raw material" whose "unoriginal" genetic material is rendered unique and valuable by the "inventive effort," "ingenuity," and "artistry," of his doctors."\textsuperscript{117} Moore, like Anna Johnson, is an instrument of someone else's creative agency. His tissue was the object of appropriation by the scientists of the University of California. The Mo cell-line was named after him but it's "their baby." Moore is gendered female. Moore goes to court, and makes a liberal feminist argument, "my body, my property", but the argument fails. The court confirms the property rights of the scientists in the products of the application of their abstract, disembodied rationality. In trying to fill the gaps created by the fragmentation of the body, the courts reflexively fall back on a Cartesian mind/body distinction where will and rationality and individual creativity are privileged over the body (materiality) viewed as mere instrumentality.

\textsuperscript{114} Op. cit., n.89 (Sup. Ct. Tenn.), 602.
\textsuperscript{115} Ibid., 604.
\textsuperscript{117} James Boyle, "A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading" 80 Calif. L.Rev. 1413, 1518.
V. RESISTING CONCLUSIONS

The less we talk about embodiment, the more powerful the discourse of the absent body becomes. We need to confront the reality that scientific and technological discourse will always privilege mind and will over the body because, at a minimum, this validates the contributions of the scientists and capital, and as we have also seen, the courts will enthusiastically endorse this reading. Therefore, I don’t think we can overcome the mind/body dichotomy and resist becoming the objects of instrumental reason unless we articulate new discourses of embodiment. I think there has been some resistance to theorizing about embodiment, and especially about the material body, for fear of falling into essentialist constructions. The alternative is to be reduced to the status of a medical device, a raw material or bits of data on a diskette.

Instead of only “gaps and inconsistencies”, the fragmentation of the body by technology reveals a gaping hole - constructed, rather than overlooked - by the consistent application of instrumental reason and the simultaneous denial of significance to embodiment. Viewed from nowhere, body fragments do not readily stand out from a myriad other “objects” visible to the “mind’s eye”. They are indistinguishable from the countless molecules suspended in the Brownian motion of commodity exchange and available for instrumental purposes to anyone willing to pay the price.

Fortunately, there is a developing body of discourse about embodiment. The very recalcitrance of our corporeality continuously challenges the mind/body dichotomy and builds a resistance to the privileged status of the mind and will. So far, at least, the conservative and retrospective outlook of the law has responded to the destabilization of categories and meanings attendant on the fragmentation of the body by retrenching to the very familiar duality of privileging mind over body. The law has done so, in part, in order to reiterate the “objective” “view from nowhere” by focusing on the generic qualities of mind. But bodies are different. Each person will take a stance in her own body in order to articulate a view from somewhere. Since bodies are objects of social inscription they will be subjected to different readings from different sub-cultures challenging the mainstream. The very existence of different readings of the body undermines the authority of the dominant discourses of science and law by challenging their universality. It is important not to substitute the view from “everywhere” of postmodernism for the view from “nowhere” of enlightenment legal discourse. The potential seen in destabilizing older categories and creating new spaces for meaning can only be realized by emphasizing the view from somewhere. To account for embodiment means to simultaneously account for difference. When the law is finally able to account for difference it may be ready to “incorporate” embodiment into its discourse.
Privatization, Law, and the Challenge to Feminism

Edited by
Brenda Cossman and Judy Fudge
© University of Toronto Press Incorporated 2002
Toronto Buffalo London
Printed in Canada

ISBN 0-8020-3699-6 (cloth)
ISBN 0-8020-8509-1 (paper)

Printed on acid-free paper

National Library of Canada Cataloguing in Publication

Main entry under title:

Privatization, law, and the challenge to feminism / edited by Brenda Cossman and Judy Fudge.

Includes bibliographical references.

1. Women – Government policy – Canada.  2. Women – Legal status, laws, etc. – Canada.  3. Sex discrimination against women – Canada.
I. Cossman, Brenda II. Fudge, Judy

HD4005.P75 2002  305.42'0971   C2002-901164-7

This book has been published with the help of a grant from the Humanities and Social Sciences Federation of Canada, using funds provided by the Social Sciences and Humanities Research Council of Canada.

University of Toronto Press acknowledges the financial assistance to its publishing program of the Canada Council for the Arts and the Ontario Arts Council.

University of Toronto Press acknowledges the financial support for its publishing activities of the Government of Canada through the Book Publishing Industry Development Program.
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Public Bodies, Private Parts: Genetics in a Post-Keynesian Era

ROXANNE MYKITIUK

Genetics is a branch of biology that deals with the heredity and variation of organisms and understands such variation to be located in one’s genes. It is aligned with the realm of the natural, the empirically verifiable, and the material essence of the individual organism. It is ahistorical and apolitical. Privatization, as understood in this project, refers to the process of state restructuring attendant on the economic and political forces set off by globalization, and stands on the opposite side of the nature/culture divide. Privatization is a politically inspired project, the creation of human design. However, there is a significant affinity between the new genetics and the recent projects of privatization and neoliberalism.

I use the phrase ‘new Genetics’ to refer both to a world-view that shapes understandings of human characteristics and approaches to health and disease and to the various technologies that now influence clinical and policy decisions related to reproductive and other health services. The new genetics is both a ‘way of thinking’ about human characteristics, health, disease, and normalcy, and a ‘way of doing’ – a technology employed to produce genetically based goods and services characterized primarily by the knowledge or information they reveal. Moreover, given their intimate link to understandings of heredity and relatedness, genes are inextricably linked with biological reproduction and the process of procreation.

The privatization project is largely political and economic, entailing a shift in state form from Keynesianism to neo-liberalism (Cohen 1997; P. Evans 1997; Leonard 1997) as well as a shift in governing practices (Brodie 1997; Rose 1996b). Its economic momentum is rooted in the beliefs that the Canadian state must reduce the fiscal burden of social welfare
programs that have become too costly and that the state is an inefficient provider of services for its citizens. Services characterized as social or public goods and previously provided by the welfare state have thus been eliminated, scaled back, or transferred to the private realm. As Brodie suggests, in this process 'the very distinction between the public and the private is eroded. Public goods are privatized while the public sphere embraces as its governing logic market practices and rationales' (Brodie 1997, 239). At a discursive level, privatization is also about privacy, individual choice, and self-reliance. One of its core ideas is that the preferred mode of social arrangement is one that allows individuals to control their lives as they see fit without interference from others or from government. It is a view that distrusts collective solutions with respect either to economic arrangements or normative social relations. Within neo-liberalism the best form of regulation is self-governing; the governance of individual subjects promotes processes of self-regulation and provides the circumstances under which people may effectively govern themselves (Petersen 1999; Rose 1996b).

Genetic discourse and its associated medical practices and technologies have come to dominate health and medicine at a time when state support for health care and social services is decreasing and the privatization of health services is increasing (Gilmour this volume). This chapter explores the role played by the geneticization of health and medicine in the ongoing process of the dismantling and restructuring of the welfare state in Canada, together with the associated privatization of values and institutions in the age of globalization. It examines the recent Canadian Biotechnology Strategy, the federal government’s proposed changes to health protection, and the lack of state regulation of the social and health effects of the new reproductive and genetic technologies. It shows how the changing discourse of health is integral to the state project of privatization and neo-liberalism: discursive shifts in the meaning of health are used to legitimate the interests of privatization in both the spheres of production and social reproduction. Using genetics as a focal point also demonstrates the range and shifting forms of governance deployed in order to carry out the privatization project. Law and state policy remain dominant forms of regulation in accordance with the aims of privatization. However, less direct and accountable forms of governance, such as professional regulation and self-governance, are also used, suggesting that the forces of privatization are not confined to state institutions but are more diffuse and pervasive.

This chapter is divided into four sections. Part I sets out the theoretical framework for my analysis of the new genetics in the context of privatization.
tion. In Part II, I examine changes in conceptions of health as the Keynesian welfare state gives way to neo-liberalism, demonstrating that health and health care are increasingly constituted as commodities with a corresponding decline in the notion of health as a social good. A new discourse of health has emerged where responsibility for the social risk of disease is transferred from the public state to the private individual and the management of this risk is viewed as a marker of individual responsibility. In the third part I examine three recent policy initiatives of the Canadian government: the Canadian Biotechnology Strategy, health protection, and new reproductive and genetic technologies. I suggest that the new genetics, as one form of knowledge in the information and knowledge-based economy, constitutes an integral part of the capital accumulation strategies of the state. Moreover, in the Canadian state’s response to regulating the new genetics we see a shift in paradigms of legal regulation, from one in which the state assumes the role of protector of the public and social interest to forms of private ordering, including international trade and intellectual property law. In the final section of the chapter, the focus moves to procreation as a central aspect of the process of social reproduction. Here, the individualist discourse of neoliberalism can be contrasted with the eugenic discourses of the mid-twentieth century. By allocating the risk of disease on the basis of genetic predisposition, the new genetic discourses discipline the body through the process of biological reproduction, with women acting as the principal gatekeepers of social cost. Thus, genetic discourse informs and constructs a new gendered subject/citizen of the post-Keynesian order.

I. Social Reproduction and Biological Reproduction

Configurations of the relationship among the state, the market, and the family are historically specific and associated with particular technologies of production. The demise of the Keynesian welfare state was occasioned by a prolonged economic crisis and the collapse of public finances; both crisis and collapse are generally attributed to the rise of ‘globalization,’ the integration of production processes by transnational corporations that has effectively destroyed the national market as an economic space, and with it, the power of the nation state to manage the national economy. The advance of globalization has shifted responsibilities previously consigned to the state and the market to the family, as well as restructuring state institutions to favour the market and private investment. Thus, globalization and privatization in the neo-liberal era have been contingent on new and different industrial structures and
technological processes: investment in high technology has been promoted in order to offset job losses in old industrial sectors. And in recent years the most prominent areas of high technology have been information technology and biotechnology. Not only are these technologies transforming the class structure of industrial societies, they are transforming the meaning of property through developments to intellectual property rights that grant new forms of ownership over biological entities and processes. By changing the relationships involved in biological reproduction, the very meanings and definitions of family and kinship relations are being contested.

Overlooked by the state in its single-minded quest for global competitiveness in the sphere of production is the fact that genetic technologies are as much or more about reproduction as about production. Biological reproduction has often been regarded as an immutable fact of nature (Franklin 1995, 333), albeit controllable through technological developments including abortion and contraception. Feminists have hesitated to address the subject, in part because biological explanations were used to subordinate women’s roles and to legitimate the gendered division of labour. They are understandably reluctant to essentialize women by focusing on the reproductive role of motherhood. Feminist political economy has instead followed the insights of Engels to illustrate the hidden and undervalued contributions of women’s role in social reproduction within capitalist modes of production. Social reproduction, or the creation of human life, as defined by Ursel, involves three processes: procreation, socialization and daily maintenance and care giving (Ursel 1992, 5).

By emphasizing women’s roles in social reproduction, as opposed to strictly biological reproduction (or procreation), feminists have called attention to the social implications of gender and of unpaid female labour. Nevertheless, gender roles have been closely tied to cultural understanding and definitions of roles in biological reproduction. Therefore, any redefinition of biological reproduction through the introduction and utilization of new genetic and reproductive technologies is bound to have an impact on cultural understandings of reproduction and consequently on gender.

The role of biological technologies may be seen as both symptomatic and as an important constitutive factor in the transformation of the state in the post-Keynesian era (Loeppky 1999). Examination of the legal issues that surround the introduction of the new genetic and reproductive technologies provides access to the forces driving contemporary social and economic changes as well as ‘fleshing out’ the shape of the
new social relations emerging in their wake. Gender not only affects the ways in which these new technologies are being applied and adopted, it is also reshaped as a result of the biological entities created and the legal definitions that accompany them. In sum, it is literally correct to speak of the new post-Keynesian state as being inscribed on our bodies. Perhaps never before have the 'body politic' and the biological body been so dramatically reshaped by the same social forces.

The new biological and reproductive technologies have promoted the commodification of reproductive arrangements via surrogacy contracts and the sale of gametes, ova, and sperm. It is not far-fetched to say that the introduction of these new technologies is driven by commercial interest and the redefinition of childbearing as a consumer good (Basen 1994). Thus, reproduction becomes 'a site for capital investment and profit through the proliferation of commodified reproductive services and goods' (Singer 1993, 87). In this context, biological reproduction is being removed from the private realm, and human reproduction is becoming increasingly public. The emergence of reproduction as a public process is at the same time shaping and being shaped by novel forms of property arrangements, 'privatizing' to the market various elements and functions of human biological reproduction. I have looked at the role of law in the fragmentation of reproductive and biological processes elsewhere (Mykitiuk 1994); here, I examine the political and economic forces that play a significant role in the reconstitution of legal norms. Whereas the new reproductive technologies disassemble and reassemble the procreative processes in ways that facilitate the commodification of the reproductive process, the new genetic technologies, by linking specific reproductive outcomes to specific genetic traits that can now be revealed though genetic tests, make possible the appropriation of traits. What was formerly opaque and immune to human intervention can now be revealed and manipulated so that an element of choice can – at a price – be introduced with respect not only to bearing offspring but to which kinds of offspring to bear.

II. The Discourse of Health in an Era of Privatization

Discourses on health are never just about health. Specific discourses emerge at particular historical moments and gain acceptance primarily because they are more or less congruent with the prevailing economic, political, and social order (Robertson 2000). Moreover, discourses about health function as repositories of ideas and beliefs – they are pro-
foundly normative and not merely descriptive of the current state of scientific fact.

Canada's universal health insurance program developed under the Keynesian welfare state regime during the post–Second World War era. The introduction of National Health Grants in the 1940s, the Hospital Insurance Schemes in the 1950s, and Medicaid in the 1960s all contributed to the construction of health and health care as a basic social good, to be distributed equally on the basis of need without regard to ability to pay. Under the welfare state, state planning and state funding meant that medical services were accessible and less expensive than if they had been privately organized. Private actors, however, were not denied the opportunity to profit through the health sector.

The decline of the welfare state and the rise of privatization and neoliberal ideology have redefined health and called into question the provision of health care as a right of citizenship. In the post–welfare state era, health is increasingly conceptualized as an individual responsibility and health care as a commodity. This transformation in the nature of health and health care is produced via a shift in the concept of health embedded and implicit in the new genetics and a shift in public policy with respect to the meaning of health and the location of responsibility for the provision of health-related goods and services in the restructured state.

A. The Changing Concept of Health

The anthropologist Margaret Lock reminds us that the idea of health is not self-evident; its meaning has changed over time and social, cultural, and political factors are inevitably implicated in how it is conceptualized (Lock 1998, 48). According to the dominant concept in North America, health is an individual biological state or condition characterized primarily by the absence of disease (Lock 1998, 48). Illness, for its part, is equated with a recognizable pathology that can be detected, measured, and managed through the application of various technologies to individual bodies. As a consequence, a biomedical concept of health emerges in which responsibility and agency for health is located with individuals, who are made responsible for safeguarding, monitoring, and regulating their own physical conditions.

Identifying health with factors that lie within individual bodies obscures the fact of external determinants of health. Physical, social, and economic factors – the presence of environmental and workplace
toxins, income and social status, levels of education, and social support networks – have been proven to affect individual and population health status. However, these social determinants are increasingly viewed as less significant than genes and detectable changes in the material body as indicators of health.

The privileging of a biomedical concept of health carries with it certain political implications (Lippman 1998, 69). It empowers specific people and institutions with the ability to define health and manage health care and simultaneously excludes others. Concomitant with government cutbacks in health care funding has been the promotion of ‘healthism,’ which emphasizes individual health practices and consists primarily of exhorting individuals to change their behaviour and manage their own health. Initially, this change was touted as a shift towards ‘health promotion’ and ‘disease prevention.’ An emphasis on individual responsibility for health, corresponding as it does with a reduction of state expenditures on health care and other social policies, protects those institutions that – 'perversely – threaten individual health through discrimination, exploitation, pollution and iatrogenesis' (adventitious physician-induced illness) (Lippman 1998, 72). ‘Victim’ or patient treatment, in this instance, takes precedence over workplace or institutional ‘treatment’ or cleanup (Lippman 1998, 72). ‘Healthism’ bears a certain affinity to other state policies characterized by a decrease in government spending for social welfare and a rise in strategies that lead to increased profits for the biomedical and pharmaceutical industries (Lock 1998, 49).

The rhetoric of ‘individual empowerment’ found in the area of health and health care over the past two decades encompasses stronger protection of informed consent and a social rejection of health care paternalism at one end of the spectrum, while at the other end lies an explosion of popular interest in healthy lifestyle choices, diet, exercise, and alternative therapies. Behind the rhetoric of individual empowerment, however, lurks the shadow of individualized responsibility for health and an unwillingness to acknowledge the social causes of illness.

Individual empowerment is manifested, in part, through the ability to make personal choices concerning health and well-being. When individuals, rather than health professionals, shoulder the responsibilities for personal health maintenance and the prevention of illness, the principle of informed consent has been invoked to allow patients to accept, decline, or withdraw from particular treatment or preventative options. Choice, with respect to the provision of health, has been fashioned as an integral aspect of women’s individual autonomy. Championed by femi-
nists, choice provides a means to escape the paternalism that has characterized women’s health care provision under medical models of care and encompasses the notion that every individual has the right to determine what is done to his or her body.

Choice, however, as part of an emergent discourse of health within the neo-liberal political regime, has been effectively appropriated by politicians and industry in order to accomplish the goals of privatization. ‘Choice’ is utilized as representative of the array of options available to the individual through the procurement of biomedical goods and services (Lippman 2000, 1). Lippman insists that ‘this market-driven approach to health care co-opts and manipulates concepts of choice to rationalize industry-driven health care’ (Lippman 2000, 1). In the neo-liberal era, government agendas are focused on budget reduction and the development of profitable global industry. Industry is encouraged to develop, market, and sell new pharmaceuticals, health-related technologies, and services which are then presented as additional health care ‘choices’ available to the individual. Constructing choice in this manner leads to an obvious shift in the balance of relations among the state, the individual, and the market – one in which health care choices are increasingly relegated to, and regulated by, the market – encouraging the individual or patient to take on the role of consumer. Under neo-liberalism, autonomy, understood as greater patient choice, is perceived to encompass the right of access to health-related goods and services. The existence of a wide array of preventative and treatment options feeds into this perception as those options become desired, whether provided by the state or through the market (Caulfield & Feasby 1998, 984). Choice, constructed in this manner, coupled with notions of individual responsibility for health, serves to privatize need and to reframe it as want.

While the commercialization and further privatization of health care presents favourable financial incentives for private sector industry, it also presents particular risks for women. Women’s demands for heightened choice have been translated into one of the most profitable areas of private sector health-related expansion. As women are the predominant managers of health within the domestic sphere, they are primarily responsible for the access to and use of health-related goods and services, and are therefore increasingly targeted as consumers. Commercially influenced notions of autonomy, individual responsibility for health, and the extent to which choice is created and constrained by the state will result in further inequalities for women. The market approach
'reinforces libertarian self-reliance without promoting true self-determination and choice' (Lippman 2000, 2). It is thus essential that we be scrupulous about the way in which 'choice' is deployed within the context of health, as it is not necessarily consistent with the type of choice advocated by feminists. As Sherwin cautions, 'it is a mistake ... to believe that expressions of choice always represent expressions of autonomy' (Sherwin 1998b, 6).

B. Shifting Priorities in Public Policy

The Lalone Report of 1974 drew attention for the first time to the role of social determinants of health (Lalonde 1974). In 1981, the World Health Organization (WHO) incorporated these notions into its position that 'health related issues should not fall primarily into the medical domain; that limited resources for health care should be better distributed, and that the individual is not necessarily the unit around which the concept of health should be organized' (Lock 1998, 49). Although these principles were adopted by the Canadian government in 1986, in the Ottawa Charter on Health Promotion, increasingly they are not being used to direct governmental activities with respect to health in Canada (Lippman 1998, 75). In the same year, under the Progressive Conservative government, the Epp report identified the following as major challenges to health policy: a reduction of inequalities in health and health care; an increase in the prevention effort; and the enhancement of people's capacity to cope with chronic conditions, disabilities, and mental health problems (Epp 1986). This recognition of non-medical determinants of health went far in acknowledging that Canadian health policy had in the past emphasized the role of medical, curative, and acute-care hospital-based approaches to health at the expense of non-medical, preventative, and community-based approaches. Widely hailed as progressive and forward looking both nationally and internationally, the Epp report reflected a shift away from a narrow focus on medicine towards a broader focus on health. This shift was indicated by the reference in the 1984 Canada Health Act to 'health practitioners,’ opening the door to billing under medicare by health professionals other than medical doctors. One side effect of the focus on non-medical determinants of health, however, was an increased emphasis on the responsibility of the individual to look after his or her health.

When health policy shifted its focus away from medicine, it turned towards an emphasis on self-care and lifestyle as primary determinants
of health. The Epp report, for example, identified three mechanisms as intrinsic to health promotion: self-care, which 'refers to the decisions taken and practices adopted by an individual specifically for the preservation of his or her health'; mutual aid, which refers to the support of people working together to deal with health issues; and healthy environments (Epp 1986, 401). While the creation of healthy environments was recognized as the most complex and difficult of the three mechanisms, it received very little attention in the report. Factors within the individual's sphere of control were emphasized at the expense of environmental factors requiring societal or state intervention. In short, a process which began as a renewed examination of the societal determinants of health was subtly transformed into one that pinpointed individual responsibility for health.

As health promotion policy began to encourage people to lead healthy lives though exercise, nutrition, and the avoidance of risky habits, those who persisted in following perceived 'unhealthy' lifestyles became the focus of social disapproval (Lippman 1998, 72). For example, arising from the Epp report, the government created initiatives to 'encourage moderation in drinking, promote breast feeding, discourage smoking, and to assist voluntary groups committed to undertaking health promotion activities' (Townson 1999, 2). Under such policies, moral choice is eventually substituted for societal and environmental factors and systemic explanations for unhealthy practices are lost. Not only are socio-economic influences on a person's habits downplayed, but the relationship between poverty and ill health is also obscured. Health status becomes associated with personal preference. Moreover, as Pat Armstrong points out, an emphasis on the role of non-medical determinants of health is held out as a rationale for cutting hospital funding at the same time that the funding of social determinants of health, such as housing, are cut (Armstrong & Armstrong 1996, 66; Townson 1999, 40-3). Policy that once focused on 'population health,' an approach that addresses the entire range of factors that determine health now focuses on 'health promotion,' a process for enabling people to take control over, and improve their health (Townson 1999, 5).

From this perspective, if we want to improve public health by taking action against those social determinants that have a negative impact on health, we instruct individuals how to live so as to maximize their health outcome. If individuals refuse to act on that instruction, their bad health becomes their fault. One of the ideological effects of health promotion has thus been to persuade the citizen that he or she has a
responsibility to minimize behaviour that might have a negative impact on his or her health and increase the cost to the public purse. Once people believe that they are personally responsible for their health status they are less likely to identify poverty as a primary determinant of ill health, even though statistics support that link (Lock 1998, 56; Townsend 1999, 55–63, 98–9).

As publicly funded health care was reduced and the range and scale of services provided by the state cut back, there was a move to make conditions of access to services more rigorous, to promote private health insurance and the provision of private medical services. At the same time, new regimes and routines of the body came into play, founded on the assumption that subjects of risk would opt to participate in a self-imposed program of health and fitness. Voluntary participation in risk management has since become an essential precondition of responsible selfhood (Petersen 1999, 123).

Since the 1980s, government policy has increasingly come to regard health as a commodity. While health had been commodified, to some extent, under the post-war health care system through the adoption of such measures as fee for service arrangements, we are now witnessing the expansion of the market within the state rather than alongside it; health is actually becoming explicitly regulated as a commodity. The commodification of health used to be implicit: health was regulated as a commodity through the effects of capitalism on state administration. Contemporary health policy at both the federal and provincial levels, however, is characterized by explicit adherence to market mechanisms as the means by which government policy ought to be achieved. As Pat Armstrong argues, Canadians now live under a regime that has collapsed the distinct governmental functions of accumulation and legitimation into each other so that accumulation has become the sole legitimate goal of government (Armstrong & Armstrong 1996).

In the health sector, privatization is effected through such measures as the adoption of private sector techniques, the transfer of responsibility for payment from the collective to individuals, the shift to for-profit provision, and the move to transfer care from public facilities to the private household (Armstrong et al. 1997; Gilmour this volume). These moves are justified by the government as means to save the social safety net. Left critiques of the health care system have been appropriated by the government in the task of persuading the people that the public good is being served by the privatization agenda (Armstrong et al. 1997).

While the cultural construction of health as a public good is still very
much with us, the socio-economic conditions that gave rise to that construction are changing. The notion of ‘public good’ is being redefined as market mechanisms are promoted as the appropriate means to achieve that good. Determinants of health, such as secure employment and secure income, are increasingly being used as an argument for cost reduction (Armstrong & Armstrong 1996, 17). Various government reports that outline the determinants of health explicitly call for cost reductions in health care (ibid.). Yet health care costs are no greater now than they were forty years ago (Armstrong 1997, 10). Federal spending on health care has actually decreased over the last twenty years (Armstrong 1997). The decline in economic growth, however, has meant that a greater portion of the gross domestic product is taken up with health care costs. In spite of the priority placed upon cost reduction by the state, ‘cut-backs are bound to increase inequality in access and thus contribute to reducing the possibilities for health’ (Armstrong & Armstrong 1996, 17).

C. Individualizing Health Risks and the Impact of Genetic Technologies

The fairly recent proliferation of human genetic research and medicine, sustained in large part by the publicly and privately financed International Human Genome Project, is consistent with, and indeed further entrenches, a concept of health that is located in individual bodies and that encourages individual responsibility for health and health improvement. Lippman has coined the term ‘geneticization’ to capture the growing tendency to distinguish people on the basis of genetics and to define most disorders, behaviours, and variations as wholly or in part, genetic in origin (Lippman 1998, 68–70). Geneticization is both an emerging ideology and a set of practices, and it has enormous potential to divert attention from structural changes necessary to improve health by reinforcing individual responsibility for the maintenance, and indeed the improvement, of health (Lippman 1998, 68). It is likely to present a formidable challenge to maintaining health issues as collective and political rather than individual and medical (Lippman 1998, 69). At the same time, the development of the new genetics is tightly linked to financial markets and the interests of private biotechnology companies, and it becomes part of a structural change in which health care is increasingly regulated as a business.

Currently, genetic medicine is carried out primarily through genetic testing and screening involving prenatal, neonatal, and presymptomatic testing. Genetic testing is used to identify genetic susceptibility to a dis-
ease – it is a predictive model and in many cases one method of identifying increased risk to a particular condition. In certain cases, such as some breast cancers, this susceptibility indicates a higher risk of developing the disease. In others, it indicates a certainty that the disease will develop; however, genetic testing cannot predict the severity of the manifestation of disease, nor in the case of diseases of late onset, such as Huntingtons, when the disease will manifest itself (Lippman 1998, 69). At present, there is no way of ‘fixing’ or treating most genetic mutations.

The alleged predictive ability of genetic testing is problematic because it takes for granted that awareness of personal risk status is important to the individual, and that that awareness will encourage behavioural changes to prevent the future development of the predicted condition. Framing genetic testing as educating individuals about their health risks – when cost containment is a primary criterion for governments in considering health policies and practices – is especially problematic. Individuals with a genetic susceptibility to a disease have their physiology opened up to professional observation and are possibly subjected to medical intervention prior to the actual onset of ill health. They may be subject to increased regulation on the basis of this difference and their increased dependence on the public purse. Not only does geneticization turn some healthy individuals into patients, it creates the possibility that they will become bad patients if they do not follow advice about managing their health and taking ‘genetic responsibility’ (Lippman 1998, 72).

Genetic technologies constitute a significant departure from conventional medical technologies in that they do not, for the most part, treat an existing condition or diagnose a disease in progress. As such, they challenge an already burdened health care system and symbolize the pressures which new technology places on the universal and comprehensive aspects of the publicly funded system. The advent of genetic technologies, whether we like it or not, is changing our definition of health and disease. Increasing awareness of the fiscal pressures on the public health care system makes those who have experienced delays and cutbacks in receiving health services become more conscious and possibly more critical of those who can be perceived to be abusing the health care system (Lippman 1998, 72). In this context it is important to question the results of individualizing health care risks through the application of genetic testing. Might this information be used to ration publicly funded health care and contain costs? (Clarke 1990). Alternately, in a climate where individuals are asked to assume more individual responsibility, will genetic testing be viewed as an aspect of preventive health care?
Under the former welfare state regime, the cost of providing health care to individuals in need was largely borne by society. However, when the individual is required to ‘manage’ and ‘minimize’ risks to health on an increasingly personal basis, the social nature of both costs and risk disintegrate. Because genetic risk is located in individual bodies, it deflects attention from the social risks and determinants of health, apportioning responsibility for that risk, and its associated costs, with the individual. Since women’s bodies are the predominant site of prenatal genetic testing and screening, the process of biological production will likely render women the principal gatekeepers of ‘social’ cost.

The commercial providers of private genetic tests will naturally exaggerate the risks of genetic factors in order to expand their market (Harper 1995; Kirk 1997). These claims are likely to reshape the public’s conception of what is necessary as part of health care and they will expand the share of health care dollars spent privately. Without a concerted policy decision, we may quickly face a bifurcated health care system. Moreover, once genetic information becomes more widely available, would it not be reasonable to expect that public policy decisions concerning health care will be made on the basis of known genetic risk factors? In other words, we may as a matter of public policy refuse to routinely fund genetic tests. However, we cannot pretend that genetic information does not exist, as the very availability of such information has profound policy consequences.

As patients are exhorted to take greater responsibility for their own health, they are demanding more information on which to base their decisions. In a publicly funded health care system, they will insist that the government fund the tests on which to base these decisions.” Ironically, the more responsibility is placed on individuals to look after their own health status, the more politicized the question of the provision of health care services becomes, and the less deferential individuals will be towards health providers and government officials. Whether genetic technologies are utilized in our publicly funded health care system or not, they are likely to become an example of the ‘creeping privatization’ of our health care system.

III. The Political Economy of New Technology

A. Biotechnology and Genetics in the ‘Knowledge-Based Economy’

One key response to globalization in advanced economies has been to promote investment in high technology in order to offset job losses in
old industrial sectors. The development of a Canadian biotechnology is a key component of a strategy aimed at reaping the benefits of a ‘knowledge-based economy.’ The Organization for Economic Cooperation and Development (OECD) defines knowledge in the knowledge-based economy as ‘the acquisition of intellectual property through learning or research’ (OECD 1989). The appropriation of research as intellectual property is integral to the knowledge-based economy in general and to an industrial strategy focused on biotechnology in particular.

Knowledge-based capital accumulation, defined broadly, entails not only research and development but also design, advertising, marketing, and management (Marshall 1999, 117). A prime example is the pharmaceutical industry, in which the costs of the applied knowledge and information required for maximum productivity greatly outweigh the manufacturing costs of pharmaceutical goods. This industry is currently transforming its chemical base into a biotechnology-driven foundation. Technology, in this sense, acts as an ‘engine of transition,’ facilitating the transformation of the capitalist state (Marshall 1999, 116).

Biotechnology – ‘the application of scientific, and engineering principles to the processing of materials by biological agents to provide goods and services’ (OECD 1989) – advances the notion of an information age to new levels. The information captured and developed in the context of biotechnology is the genetic information contained within all living things. Given the ability of this information to provide insight into the complex workings of living organisms, biotechnology has widespread and potentially revolutionary importance with respect to the creation of new processes, systems of knowledge, and products in the medical, scientific, and industrial sectors. Biotechnology therefore, not only promises revolutionary implications in the context of science and medicine, it will enable Canada to achieve competitiveness in the globalized, international economy.

The growth of biotechnology within the high technology sector has involved the creation of new forms of intellectual property and new forms of ownership in biological entities and processes. This has been justified as allowing those who have invested in research, development, and creation to recoup their investment. Efforts to promote investment in biotechnology have been stimulated by the emergence of the health sector as a source of corporate profit making. Given that the health sector is a potential source of private profit and at the same time forms a major part of the state budget, biotechnology occupies a critical position in the transformation of the role of the state. Even in Canada, where health care is still regarded as a public good, patients are increas-
ingly encouraged to view themselves as consumers and health is increasingly seen as a commodity in the marketplace.

Analysis of Canadian government policies with respect to biotechnology, health, and new reproductive and genetic technologies demonstrates that efforts to promote biotechnology as a sector of production underemphasize its potential and actual impacts on social (including biological) reproduction. State promotion of the productive aspect of new genetic technology has taken precedence over the regulation of such impact.

Government policies on biotechnology have undergone a dramatic shift and pharmaceuticals, in particular, have received specific government attention in Canada. An alteration of the objectives behind patent protection can be detected, from providing pharmaceutical drugs to Canadians on an accessible, affordable basis, to encouraging technical innovation, competition, and the growth of domestic industry.

Early patent protection in Canada was extended only to the process by which a product was made, not to the chemical product itself. High drug prices, a result of the nature of Canadian patent law, were perceived by a series of federal commissions from the late 1950s to the mid-1960s to inhibit competition (Marshall 1999, 125). Rather than choosing to implement policies such as limiting selling costs, prices, or profits, the Canadian government decided to alter the conditions of competition at the manufacturers' level. Thus, increased competition was promoted 'by easing the conditions under which new competitors entered the market for finished pharmaceutical products' (Marshall 1999, 126). Canada's policies took the form of compulsory licensing of imported prescription drugs. Proprietary drug companies voiced strong opposition, on the grounds that such licensing affected their ability to recoup investments and that drug companies would be reluctant to invest in research, development, and manufacturing in Canada (Marshall 1999, 127). These companies are predominantly foreign-owned and mostly American (Marshall 1999, 129). The effects of compulsory licensing were controversial: while Canadian companies documented large savings on pharmaceutical costs, foreign investment in Canada remained low. By the late 1970s and early 1980s, low levels of investment in biotechnology in Canada led to the incorporation of research and development as the primary objectives relative to the pharmaceutical sector. Growth was to be stimulated by changes to intellectual property incentives.

Policy choices at the nation-state level, however, are effectively restricted by international trade agreements. As will be demonstrated in
the following analysis, the policies adopted by the Canadian state respecting biotechnology and the NRGTs have imposed and ensured neo-liberal reform. Fractions of capital, such as the pharmaceutical and biotechnology industries, have aligned themselves so as to enable reorganization of the state’s infrastructure to accommodate the changing international economic regime (Marshall 1999, 146, n. 57). In so doing, they have also maintained their policy dominance. Within government, decision-making centres have been placed within ‘opaque’ sites (Marshall 1999, 146). In other words, ‘internationalization changed the nature of nation-states policies and functions, by intensifying the pressure to remove key regulatory functions from popular scrutiny’ (Marshall 1999, 146, n. 57).

The Canadian government codified its intentions to become an international biotechnological player with the passage of Bill C-91, the Patent Act Amendment Act 1992. The bill was intended to bring Canadian patent law into line with international standards. Formerly, Canadian law only permitted the issuing of patents on unicellular biological materials (Marshall 1999, 133), whereas the United States granted patents on plants and animals – higher life forms. In addition, the bill eliminated outright compulsory licensing and extended patent protection to twenty years (ibid.). Butressed by the presence and acceptance of a public discourse of globalization, the political environment surrounding the legislation was accepting. As a means to increase the private appropriation of intellectual property resulting from research and development, such reform was intended to be ‘the key to the creation of a competitive and dynamic regime of private accumulation’ (ibid., 135). Within an ‘innovative’ economy, intellectual property rights are essential to the maintenance of the commodity status of knowledge as well as the provision of a continued incentive for private capital investment (ibid., 142).

B. The Canadian Biotechnology Strategy

The Canadian Biotechnology Strategy (CBS), created in 1998, is the most recent version of the twenty-year-old federal policy concerning biotechnology (Canada 1998e, 1-5; National Biotechnology Advisory Committee 1998, 12). The main purpose of the CBS is to define the role of the federal government in managing the biotechnology industry and the development and use of biotechnology in Canada. Building on recent developments in molecular genetics and the international human genome project, the CBS is intended to facilitate new industry regarded
as having national and global significance (Canada 1998c, 8). The strategy seeks to situate Canada as a world leader in biotechnology by harnessing molecular genetics, other biological technologies, and social technologies such as intellectual property protection to attain market advantage. The process of renewing Canada's national biotechnology strategy is being carried out by the Biotechnology Ministerial Coordinating Committee (BMCC), under the leadership of Industry Canada, in collaboration with seven federal departments (Health, Agriculture, Natural Resources, Environment, Fisheries and Oceans, Foreign Affairs, and International Trade and Human Resources Development).

Biotechnology is defined as 'an umbrella term that covers a broad spectrum of scientific tools. Biotechnology uses living organisms, or parts of living organisms, to make new products or provide new methods of production' (Canada 1998c, 1). This broad description covers all organisms and their parts and products, whether developed traditionally or through the newer molecular techniques such as genetic engineering (Canada 1998c, 1). Specifically, the biotechnology strategy focuses upon the development of new innovations and products in sectors as diverse as agriculture, health care, aquaculture, forestry, mining, energy, and environmental services (Canada 1998e, 4). Public opinion as to the desirability of biotechnological goods varies in relation to different processes, uses, and countries. For example, there has been widespread public scepticism of the merits of agricultural technology, in particular, in relation to genetically modified foods and the alteration of seed crops that would require farmers to purchase seeds on a yearly basis (Aberge 1999). This led to mandatory labelling in many jurisdictions. At the same time, there is public acceptance and excitement in Canada about the potential health benefits of genetics for human beings including, for example, the development of processes that allow better tracking of pathogens through rapid tracking and detection of DNA sequences (Canadian Biotechnology Strategy Task Force 1998b, 3; Johnston 2000).

Aside from stressing its economic benefits, the government is promoting biotechnology to a sceptical public by emphasizing the anticipated health benefits (Canada 1998a, 1). The policy literature emphasizes that 90 per cent of the current uses of biotechnology worldwide are related to human health, and it is projected that health will continue to be an important part of the biotechnology strategy and framework (Canadian Biotechnology Strategy Task Force 1998b, 1). Thus, the CBS is promoted as a strategy that will help to develop the tools to improve the health and well-being of Canadians through 'improved disease surveil-
lance, diagnosis, treatment and prevention' (Canadian Biotechnology Strategy Task Force 1998b, 3).

The CBS mandates the creation of an expert, arm's-length committee to advise the BMCC on biotechnology issues, raise public awareness, and engage Canadians in discussions regarding biotechnology (Canada 1998e, 7). The Canadian Biotechnology Advisory Committee (CBAC) is to advise the government, independently and impartially, on crucial policy issues associated with the ethical, social, regulatory, economic, scientific, environmental, and health aspects of biotechnology (Canada 1998e, 8, emphasis added). The addition of the CBAC to the strategy was effected in order to ensure increased public participation. The CBAC is presently composed of senior executives from the industry and finance communities, representatives from consumer interest groups, and academics. Within its first workplan, CBAC has made public its intention to undertake five special projects: the regulation of genetically modified foods; the protection and exploitation of biotechnological intellectual property (including the patenting of higher life forms); the incorporation of social and ethical concerns into biotechnology; the use of novel genetically based interventions; and genetic privacy (Canadian Biotechnology Advisory Committee, 2000c). Each project will be evaluated using the following thematic structure: stewardship, including the social, ethical, legal environmental, and regulatory dimensions; economic and social development, focusing on scientific development and its application to health, the environment, and the economy; and citizen engagement, where discussions of the public policy implications of the development and application of biotechnological innovations will focus on the concerns of both present and future generations (Workplan for Biotechnology Review, 2000).

Statements made during the first CBAC meeting, which identify the moral and ethical issues associated with biotechnology as ones to be 'managed' by the committee, raise doubt as to whether the CBAC investigations will effectively address public concerns (Canadian Biotechnology Advisory Committee 2000b). Further, in determining 'areas of interest' within the membership of the CBAC, it was stated that one of the main objectives of the committee ought to be the 'building [of] public acceptance of biotechnology where the balance between benefits and harms is positive' (Canadian Biotechnology Advisory Committee 2000a). A closer examination of the CBAC's membership reveals not only that parties close to industry are well represented but communications experts are also prominent, suggesting that the committee's role is
to ‘spin’ or finesse issues of public interest rather than to incorporate the concerns of society as a whole (http://cbac.gc.ca).

The CBS is a prime example of the form of privatization in which, the state actively intervenes to facilitate market rationality, which, in the context of biotechnology, includes the licensing of new forms of appropriation. It is significant that the strategy is being coordinated by Industry Canada rather than Health Canada. Inherent in this shift is the relativization of the role of Health Canada, including the Health Protection Branch, within the interministerial structure of an initiative whose explicit purpose is industrial promotion. As a result, the CBS has been couched within an economic paradigm (Sherwin 1998a, 1). In the CBS workplan, health protection is but one aim; others include economic expansion, promotion of development, modernization of intellectual property laws, facilitation of commercialization of new technologies, creation of international leadership and stewardship, and the management of data and sectoral action plans. ‘Responsible leadership’ within the vision statement is coupled with ‘market access,’ providing a clear indication of actual priorities.

Clearly, although its role is shifting with globalization, the Canadian government has responsibilities in both the economic and health spheres. Where it was once more confined to the promotion and protection of health, as intended within the CBS, the role of the government has shifted so that its primary function is now the development of the tools necessary to improve the health and well-being of Canadians. The CBS is an industrial strategy aimed at capitalizing genetic knowledge. It is about wealth: new commodities, new markets, and the social forms that can maintain these forms of accumulation, including law. Two examples, as proposed by the National Biotechnology Advisory Committee (NBAC), illustrate the potential role of law within this shift. First, the NBAC recommends the strengthening of Canadian intellectual property protections to bring them into conformity with global standards (i.e., those of the World Trade Organization), in order to promote regulatory efficiency, expanded international cooperation and increased international market access (National Biotechnology Advisory Committee 1998, 46–8). Biotechnology patent issues include, among others, whether and to what extent patent claims covering plants, animals, and human body parts should be allowed, what exemptions and safeguards are needed to protect the public interest, and whether or not ethical and moral aspects should be considered in granting patents (Canada 1998e, 6). Second, the NBAC recommends that the commercialization
of biotechnology be facilitated through increased access to experienced management and scientific personnel (National Biotechnology Advisory Committee 1998, 14). This would necessitate an easing of immigration legislation in order to grant timely recruitment of such individuals, harmonization of salary and income tax rates with those of Canada’s major trading partners, and improved access to capital and the flow of funds through alterations to corporate tax provisions (National Biotechnology Advisory Committee 1998, 14–16).

The relationship between the health and economic areas of governance and the development of biotechnology policy in Canada has arguably been skewed in favour of economic prosperity, as it is assumed that prosperity alone will have positive impacts upon health. It is by no means obvious that development and sale of profitable biotechnology is a particularly effective way to promote the health of Canadians (Sherwin 1998a, 2). Economic development contributes to health only when its benefits are widely distributed throughout the community (Sherwin 1998a, 2). Health needs in relation to social determinants such as gender, class, region, race, language, and ethnicity are minimized within the CBS. There is presently nothing in the biotechnology strategy to suggest that its economic benefits will be extended to those citizens whose health is most threatened by economic insecurity. Rather, it promises to make a contribution through the development of new products that will foster the overall health of citizens – for example, vaccines, pharmaceuticals, and nutraceuticals (Sherwin 1998a, 2). Some of these developments may indeed foster the overall health of citizens if the products in question are made available to them. Others, however, may detract from health. Prudent financial planning requires that government policy consider carefully its use of limited health care dollars and be wary of the development of technologies that will generate individual demand without making a positive contribution to the overall health of the population (Sherwin 1998a, 4). Moreover, the adoption of the goals of both promotion and protection by the government brings the role of consumer choice into question. The dilemma is articulated as follows: 'It is fairly clear why industry would be guided by consumer choice – after all, manufacturers have reason to produce all and only products that can be effectively marketed. But it is essential that government agencies responsible for the health of Canadians not make the mistake of believing themselves bound by the notion that consumer choice is an adequate criterion for determining product development and availability because it is not the only relevant ethical value' (Sherwin 1998a, 3,
emphasis added). The CBS will not be an effective strategy for meeting the challenge of globalization unless the government can ensure that there is indeed something to sell. This necessarily entails the creation of increased opportunities for the commodification of health products and their sale on national and international markets. While the benefits of health and health care are touted as a public good, what we are actually seeing is a further extension of privatization. One suggestion made in a CBS policy document on research and development, a suggestion that is particularly alarming for those of us in the academic community, is that universities change promotion and tenure standards to promote patenting as a substitute for publication (Canada 1998d, 3–4). There is no greater indication of the shift in government priorities than movement away from the public dissemination of knowledge towards its private appropriation for commercial purposes.

Despite the federal policy mandate that identifies the need for gender-specific analysis of Canadian policy developments, the dimensions of gender as they relate to health and molecular biotechnology are presently unexamined within the CBS (Status of Women Canada 1998). Framed in gender-neutral language, the CBS is silent regarding the gender contours and the potential effects genetic biotechnologies may have on women. Ultimately, whether issues of gender and health are integrated into the CBS in an effective manner will be a telling example of the ability (and desire) of commercially based strategies to incorporate ‘social’ and ethical concerns. This type of analysis will be important in demonstrating how policies such as the CBS act as containers of genetic knowledge, shaping and limiting their gendered effects.

C. The Health Protection Branch of Health Canada

Nowhere has the shift in governmental roles from social protection to industrial promotion been so apparent as in the recently proposed transformations of the Health Protection Branch (HPB), which is responsible for regulating the approval and safety of aspects of the new health-related technologies (Health Canada 1998d). Arguing in part that the new reproductive, and especially the new genetic, technologies do not correspond physically or conceptually to the medical devices and pharmaceuticals traditionally licensed and regulated by the HPB, Health Canada has stated that its regulatory and legislative framework is inadequate and launched a so-called transitions program (Caulfield & Feasby 1998, 377; Health Canada 1998c).
This process, articulated by Health Canada as a 'modernizing of the health protection system' and framed as a transition rather than a 'cut-back' or 'downsizing' (Health Canada 1998b, 3) corresponds to the restructuring of the Canadian state in a climate of privatization. Not surprisingly, the transitions program includes strategies to externalize the costs of regulation by enhancing cost-recovery and the development of stronger relations with industry (Health Canada 1998a). The effort to externalize the costs of regulation corresponds with an increase in extragovernmental research and scientific activity. In this transition not only would outdated methods and ideals become 'modern,' but the protection of health would increasingly be carried out by actors other than the Canadian government. Citing the inadequate number of government laboratory and testing systems, Health Canada has signalled its intention to embrace the increasing capacity of non-governmental organizations, universities, and industry to 'strengthen the science that underlies decision making' and carry out health protection work (Health Canada 1998b, 3, 8–9). This is an example of active state restructuring in the context of the promotion of health.

One of the central safeguards proposed under the Health Protection Branch Transition Program is legislation which would, in principle, prohibit manufacturers from placing dangerous products on the market (Health Canada 1998c, 35). This 'umbrella' health protection legislation would replace four existing statutes: the Food and Drugs Act, the Hazardous Products Act, the Radiation Emitting Devices Act, and the Quarantine Act. Such prohibitions are expected to force manufacturers to be more explicitly responsible for ensuring product safety via the imposition upon them of enhanced and more rigorous liability. Currently, it is the government that is primarily accountable to the public for safety and the protection of the health of the public. Under the proposed legislation, primary responsibility for ensuring product safety prior to public exposure would lie with industry and Health Canada's interventions would be activated after a danger has been detected by market use. One readily apparent disadvantage would be the potential for dangerous goods to enter the market before government intervention, in the form of punishment, occurs. Incidences in which women have suffered serious harm from the introduction of unsafe drugs and devices such as DES (diethylstilboestrol), Thalidomide, breast implants, and the Dalkon Shield illustrate the disasters that can occur as a result of releasing unsafe drugs and medical devices onto the market (Working Group on Women and Health Protection 1999). Moreover, the HPB
is presently considering allowing private individuals to bring enforcement actions, such as injunctions, against companies (Health Canada 1998c, 33). This raises questions as to whether the HPB is, in fact, envisioning the replacement of federal enforcement with civil enforcement by private parties (MacIntosh 1999, 23). 7

Health Canada acknowledges that its regulatory system is shifting away from a model where assessments of risk are made in-house towards what it calls a 'networked' model, which includes universities and industry (Health Canada 1998b, 5, 8). The new model is defended as being more consistent with access to the best scientific knowledge and expertise. But look, for example, at the restructuring of funding proposed by the transition in the Therapeutic Products Directorate, which is responsible for licensing new drugs and medical devices and for banning or restricting drugs and devices that prove to be unsafe. Its costs were previously covered by general tax revenues, in a manner similar to other public agencies. This division now relies on industry user fees to cover approximately 70 percent of its operating costs (Simand 1998, 3). Therefore, industry must pay to have its product reviewed for potential market approval regardless of whether the submission is approved or rejected. A proposal to formalize this practice by integrating it into legislation would place industry, not the public, in the position of being Health Canada's client for the purposes of product review (MacIntosh 1999, 13).

Yet another illustration of the shifting role of the state can be found in one of the primary objectives of the transition process – the promotion of 'efficiency.' The goal of efficiency highlights the distinction between privatization as simple deregulation and privatization as regulation in the service of private industry. This goal, under a health protection system characterized by increasing levels of industry involvement, will likely be manifested through the championing of shorter time frames for regulatory approvals. 9 More rapid introduction of new pharmaceuticals is obviously in the interests of industry but glosses over the potential trade-offs between accelerated introduction of new products and the assessment of possible risks. In the long term, the HPB has agreed in principle to implement a suggestion of the pharmaceutical industry which would tie the amount of fees collected each year to the 'performance targets' of the branch (Working Group on Women and Health, 1998: 2). If this type of proposal were to be implemented, the potential for even greater conflicts of interest would arise. The increased potential for collection of industry fees could negatively influ-
ence the quality of HPB reviews of applications for the marketing of goods or services.

There is little evidence that Health Canada or the federal government seeks to abandon its mandate to protect health, or that it is blind to the ethical concerns which have been raised. Rather, the renewal of the mandate for health protection occurs in a context where the role and meaning of the state is shifting, and where the autonomy of the Canadian state has been reduced by international trade agreements and the demands of multinational corporations. For example, the transition strategy addresses the extent to which Canada’s drug regulations should be harmonized with those in Europe, the United States, and other industrialized countries (Health Canada 1998c, 22). Concerns have been raised that harmonization will be used as a cost-cutting tool of deregulation, which will encourage Health Canada to adopt the weakest of the member states’ regulations (Working Group on Women and Health 1998, 5). The lack of representation of women’s groups at industry-led international fora on this issue illustrates the potential for economic concerns to take precedence over the gender, ethical, and health implications of change (ibid.). The implementation of the privatization agenda is not bringing about the deregulation of health; rather, the manner in which health is being regulated is changing. Health is increasingly being regulated as a commodity rather than a public good, health care as a business rather than a public service. The federal government is positioning itself to manage the risk inherent in unsafe pharmaceuticals and medical devices and to mediate between the interests of industry and the citizen public. Where formerly it characterized social reproduction as a central issue, the state now balances this concern with the requirements of production, and often privileges production in the process.

D. Efforts to Regulate New Reproductive and Genetic Technologies

One of the functions of the Keynesian welfare state in mediating the tension between production and social reproduction has been to monitor and regulate technologies of production in the interests of the social good. The profit of innovation was balanced by the potential social harms of innovation. In the current context of globalized capital and state restructuring, the capacity, or indeed priority, of the state to regulate in relation to the social good is called into question. While the federal government has signalled its intention to regulate reproductive and
genetic technologies, the slow pace at which this has been effected – in contrast with the speed at which policies related to the Canadian Biotechnology Strategy and the Health Protection Branch transition have been implemented – suggest a shift in state priorities from social democratic concerns to technocratic management and economic development and efficiency.

There has been a significant demand in Canada for federal legislation pertaining to the regulation of reproductive and genetic technologies, on the basis that the use of these technologies will have important ethical, social, and health impacts for citizens. Canadian legislation would exist within the greater international regulatory framework, including that imposed by international trade agreements. The North American Free Trade Agreement (NAFTA), for example, contains provisions that can be used to limit the capacity of a member state to regulate commercial activity within its territory with respect to new reproductive and genetic technologies (NRGTs). Yet the potential for national regulation is not entirely precluded. In response to growing public concerns about developments in reproductive and genetic technologies, the Government of Canada appointed the Royal Commission on New Reproductive Technologies (RCNRT) in October 1989. In November 1993, the commission made public 293 recommendations, concluding that 'decisive, timely, and comprehensive national action is required with respect to the regulation of new reproductive technologies' (Royal Commission on New Reproductive Technologies 1993, 107).

In particular, the commission called for legislation to set clear boundaries around acceptable and non-acceptable uses of NRGTs and to regulate and monitor the use of practices and developments in this field. The commission stated that the federal government should use its power under the Criminal Code to prohibit practices that 'because of their unsafe or unethical character [are] considered unacceptable under any circumstances' (Royal Commission on New Reproductive Technologies 1993, 108). In addition, the commission recommended the establishment of a National Regulatory Commission charged with setting and enforcing standards for those practices deemed acceptable. The major functions of the proposed National Commission were to be 'licensing and monitoring; guideline and standard setting; information collection, evaluation, and dissemination; records storage; consultation, coordination, and intergovernmental cooperation; and monitoring of future technologies and practices' (Royal Commission on New Reproductive Technologies 1993, 115–16).
In July 1995, the then federal Minister of Health, Diane Marleau, called for an interim moratorium on specific applications of NRGTs and announced the appointment of an advisory committee to monitor compliance with the moratorium (Health Canada 1996). In June 1996, the federal government introduced Bill C-47, An Act Respecting Human Reproductive Technologies and Commercial Transactions Relating to Human Reproduction (the Human Reproductive and Genetic Technologies Act), providing for criminal sanctions for the most serious practices, including those named in the moratorium. The bill would prohibit 'practices that commercialize reproduction or are inconsistent with the principles of human dignity, including the buying and selling of eggs and sperm, sex selection for non-medical reasons, and commercial surrogacy.'

Bill C-47, if enacted, would have prohibited specific genetic manipulation, the payment of surrogate mothers, the purchase and sale of reproductive materials, and the use of ovum without consent. The offering, or giving of, consideration for any of the illegal procedures was also prohibited (ss. 4(2) and (3)). This prohibition was extended to preclude the offering or giving of consideration to a woman to act as a surrogate mother, or to any person acting as an intermediary in obtaining such services (s. 5). In acknowledgment of the health and ethical dangers inherent in the commercialization of human reproduction, the selling, purchasing, bartering, or exchanging of gametes, embryos, and foetuses were included within the prohibitions of the bill (s. 6(1)).

The prohibitions contained within Bill C-47 were intended to signal state recognition of health and safety, the dignity of all persons (particularly women and children), and the inherent potential of reproductive materials as human life. Attached to the prohibitions were to be punishments ranging from serious fines to imprisonment for a term not exceeding ten years (ss. 8 to 11).

At the same time as the introduction of Bill C-47, the federal government published a White Paper entitled New Reproductive Technologies: Setting Boundaries, Enhancing Health, in which it promised to establish a regulatory body and framework for acceptable practices. The White Paper identified several guiding ethical principles for a policy framework: balancing individual and collective interests; equality; protecting the vulnerable; appropriate use of medical treatment; non-commercialization of reproduction and reproductive materials; and accountability (Canada 1996, 15–17). A two-step enactment process was proposed for legislation that would eventually combine prohibitions (under Bill C-47)
and regulatory controls to provide for 'a comprehensive management regime for NRGTs' (Canada 1996, 27). Any such regime would promote a multidisciplinary approach and would be established under an agency removed from central government (Canada 1996, 27). The proposed regime would centre on the issuance of licences for various NRGTs and related practices and the establishment of appropriate standards by a range of enforcement mechanisms, as well as the creation of information registries and health surveillance procedures. Under the various pressures of an upcoming federal election, however, this regime failed to materialize. Bill C-47 died on the order paper when the June 1997 federal election was called.

In December 1999, the minister of health again expressed a commitment to pursuing a legislative approach to the regulation of NRGTs, which 'could provide the statutory basis for regulation of human reproductive and genetic technologies through the enforcement of prohibitions (where technologies are unacceptable) and the regulation of other technologies through the development of standards, licensing, information registries, health surveillance, and enforcement and compliance' (Health Canada 1999, 5). Health Canada, in citing the values of dignity, equality, health and safety, and the 'best interests of children born of reproductive technology,' situates the proposed legislation within the broad context of 'sexual and reproductive health.'

The portion of the new proposal pertaining to prohibited procedures clarifies the provisions of Bill C-47 in attempting to prevent commercialization and the exploitation of vulnerable persons (predominantly children). Advertisement for any of the proscribed procedures is to become a prohibited activity and qualifications have been added to the restrictions against use of reproductive materials in the creation of an embryo, foetus, or person to further condemn the use of 'anyone under eighteen years of age' (Health Canada 1999, 11).

The regulatory procedures for the management of new reproductive and genetic technologies would apply to all activities involving the manipulation of human sperm, eggs, and embryos. Thus, there has been a shift in emphasis from reproductive technologies to one concerned also with genetic technologies. Health Canada foresees the creation of a national multifaceted regulatory body, which would take on administrative, developmental, and policing responsibilities. The body would develop national standards for the use of human reproductive materials in medical research and practice; create and circulate requirements for counseling and informed choice; review relevant developments and research in
the approval process for new medical and research practices; develop and maintain data registries; and monitor new national and international research developments. It would also create and submit recommendations to the minister of health regarding the development of regulations. With respect to monitoring and enforcement, the body would license individuals or facilities offering or providing for the collection, processing, distribution, and use of human reproductive materials and inspect practices, procedures, and treatments (Health Canada 1999, 12–15). The proposed regulatory framework represents an attempt to govern the uses of NRGT in a timely, systematic, and accountable fashion.

Since the RCNRT reported in response to public concern about the social, ethical, and health consequences of new reproductive and genetic technologies, virtually no new legislation has been passed. Regulation of the social and medical impacts of the technologies has principally been left to standard setting by ‘private’ professional bodies such as the Canadian College of Medical Geneticists and the Canadian Society of Obstetricians and Gynaecologists and is overseen by the advisory committee monitoring the voluntary moratorium. The effect of government inactivity in this area has thus been to cede regulatory authority to private or quasi-private actors – professional associations or the market. While it might be reasonable to defer to professional regulation in relation to some of the medical implications of reproductive or genetic technologies, professional medical bodies are not best placed to monitor, regulate, and enforce the innumerable social and ethical consequences. Moreover, deferring regulatory authority to a quasi-private body reduces, even eliminates, mechanisms of public accountability. The absence of legislation prohibiting or regulating practices involving reproductive and genetic technologies signals a preference for market norms and mechanisms as means of governing in this area.

Considering the range of federal government initiatives that relate to biotechnology and the new genetics, the phenomenon we are witnessing is not ‘deregulation’ in the service of the market, but rather a different kind of state regulation and a shift in the legal paradigm of regulation. Instead of deregulating, the state regulates with a view to promoting investment and capital accumulation in biotechnology, making possible the greater appropriation of intellectual property and its capitalization. At the same time, however, the Canadian Biotechnology Strategy and the restructuring of the Health Protection Branch illustrate not merely the promotion of the biotechnology industry but a redefinition of the public interest such that it becomes aligned with or
subsumed by private corporate interests. The economy is no longer managed by the state for social purposes; rather, the social interest is redefined and governed in the service of economic interests.

Within this new regulatory framework, the state sees itself as promoting the interests of private actors as the potential benefactors of the public through their production of health commodities, whereas in the welfare state era the state sought to protect, or at least to balance, public and private interests. Changes such as those to the Health Protection Branch are justified on the basis that they provide rapid access to new therapies, rather than as an outright regulatory bias in favour of the owners of capital. While demonstrably furthering the rights of property and capital owners, the discourse of choice and freedom of access mollifies a public which might otherwise be concerned about the erosion of citizenship rights. In moving from defining and representing the public interest to promoting product liability and intellectual property, the state is also shifting the arena of adjudication into the area of private, commercial law and away from public and constitutional law.

Changes to the nature of state regulation and adjudication are accompanied by a transformation of the governing normative ideals. Equality and social justice concerns have given way to competitive fairness, protection of proprietary interests, and the creation of conditions for wealth accumulation (Fudge and Cossman this volume). In the absence of a legislative template articulating the public interest concerns in genetic technology, when courts are brought in to adjudicate disputes involving NRGTs they will interpret problems and render decisions based on analogy to a familiar context or category, in which the discourses of individual choice and liberty prevail. This entails not only a different set of concerns, expertise, and evidentiary rules, but also a shift into a socio-legal arena with its own gendered hierarchy. The shift from a paradigm of the state as the guardian of public interest to the state as guardian of private ordering may involve a movement toward the recognition of the interests of organized parties (such as multinational corporations or professional bodies), where women are notably absent, disempowered, or otherwise lack authoritative representation.

IV. Genetic Technologies and the Production of the Neo-Liberal Subject

The qualities and characteristics of the citizen are historically contingent; that is, citizens are shaped by and contribute to contemporary ide-
ology and practices. Whereas under the Keynesian welfare state, the citizen was the beneficiary of social rights and civil protections and risk was, to a large degree, socialized, the neo-liberal citizen is self-reliant and individually responsible for the risks to his or her well-being; he or she also has reduced expectations about the state’s provision of social welfare. Neo-liberal practices and the accompanying strategies of privatization operate not only to justify the decrease in government activity in economic terms, they signify as well an ideological commitment to recognizing and rewarding individual choice and personal decision making. Neo-liberal governance operates at arm’s length from its subjects (Rose 1996b). Integral to the neo-liberal project is the notion that the best forms of governance create the conditions that facilitate autonomous self-regulation; the individual is rendered an active entrepreneur of his or her self (Petersen 1999, 33). Thus, a range of strategies for the regulation of the conduct of individuals are employed by a variety of agencies, including organizations, professional bodies, families, and individuals themselves, which enhance the distance between the apparatus of rule and individual regulation (Rose 1996b). The new genetic technologies are one means through which the neo-liberal citizen is governed and materially produced.

The shift to a neo-liberal discourse of risk and choice is predicated on a distinct politics of knowledge. Individual risk and choice occur within the context of the provision of ‘information’ by experts. However, the provision of this information is itself contingent on the production and sanctioning of new forms of knowledge, including knowledge about health. The knowledge economy at the macro-level is dependent on a knowledge economy at the micro-level, where individuals consume genetic information to ensure against risks. While federal and provincial governments may not directly regulate the use of this information in the health care system, the state actively encourages its production within the biotechnological sector and medical research. By encouraging the production of such knowledge, the state implicitly certifies the expertise of the providers of genetic information and indirectly legitimizes the risk categories they create.

In the absence of legislation, at present prenatal diagnosis, a form of genetic testing, is primarily regulated by the disciplines of medicine and ethics. Lack of explicit guidelines turns the practice of prenatal diagnosis into an individual matter between patient and physician, facilitating its emergence as a site of self-surveillance. '[N]eo-liberal notions of individual autonomy, the free market and limited government are related,
in a mutually producing and sustaining way, to the imperatives of “self-care” – in the form of self-surveillance and self-regulation – which themselves are a consequence of the phenomenological experience of being “at risk” (Robertson 2000, 7–8). Prenatal diagnosis becomes the means through which individuals are able to literally construct the post-Keynesian citizen, through the exercise of choice. Within neo-liberal rationalities of privatization, health and health risks are individualized and depoliticized. Embodying risk represents the embodiment of a neo-liberal rationality. By selecting the qualities of an embryo, or choosing to abort those with undesirable characteristics, risk is translated into ‘desirability’ – which in the neo-liberal context centres on the ability to be an autonomous, competitive, self-reliant individual.

Many fear that the new genetics will usher in a new wave of eugenics. It is important, however, to distinguish the social context and social implications of the kinds of eugenic practices fostered by the new genetics in a climate of neo-liberalism from the eugenics movements of the early twentieth century. Analysis of the new genetic practices embedded in neo-liberalism reveals the material links between the discursive practice of neo-liberalism and the reorganization of social reproduction attendant on the new genetics. What this entails is a technological splicing of biological reproductive processes with the political requirements of neo-liberal governance. In effect, the new genetics disciplines biology in order to create the neo-liberal subject.

A. The New Genetics: Are They Eugenic?

It is better for the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes ... Three generations of imbeciles are enough.

Buck v. Bell (1927)

Eugenic philosophy has historically been translated into legal imperatives which not only permitted but mandated the sexual sterilization, institutionalization, and segregation of a designate population: the prostitute, the mentally ill, the poor, the criminally deviant, and the ‘non-white’ (Law Reform Commission of Canada 1979; Press & Browner 1995, 307). Efforts were also made to encourage the reproduction of those who did not fall within these social categories. Negative eugenic
practices were largely rationalized on the basis of decreasing the ‘costs to society’ attendant upon the existence of such individuals. Thus, the old eugenics situated society as the subject of state directives regarding interference with reproduction and was constructed around an ideology of ‘social protection and improvement’ (Caulfield & Robertson 1996, 72). While the means to achieve desired eugenic goals still involves the manipulation of the reproductive capacities of the body, the site of the struggle for social protection and improvement has shifted. In part as a result of feminist struggles, it is no longer acceptable for the state to directly discipline reproductive capacity. Due largely to the existence of genetic technologies, such as prenatal testing, the individual has become the ‘gatekeeper’ of healthy offspring and is increasingly imparted the ability to ‘manage’ these issues (Roy, Williams, & Dickens 1994, 187). To identify differences between current practice and the eugenic policies of the early twentieth century, we must carefully examine the context and rhetoric surrounding the new genetics. The twentieth century was haunted by the racist approach to eugenics that culminated in the Nazi-directed genocide of the Holocaust. Thus, the mere mention of genetics tends to raise alarms about its possible consequences for social policy (Caulfield & Robertson 1996, 72). The promoters of new genetic technologies are well aware of the shadow that hangs over any discussion of eugenics and therefore carefully craft their message in terms of ‘choice.’

As eugenic arguments are founded on the premise that negative traits are inherited, reproduction is perceived to be the means for controlling the propagation of undesirable traits. What counts as a negative trait, however, and the techniques for controlling reproduction have changed over time. Previous eugenic policies assumed, wrongly, that behavioural attributes such as criminality, laziness, and homosexuality were genetically transmitted to future generations. Despite the lack of scientific grounding, these assumptions were generally accepted and reinforced notions of normalcy.

In Canada, the eugenic movement dates to the early part of the twentieth century and culminated in the introduction of the Sexual Sterilization Act in Alberta, passed in 1928 and revised in 1937 and 1942. During the forty-four years in which the Alberta act was in effect, the Eugenics Board, as it was widely referred to, authorized 4,725 sterilizations, of which 2,822 were actually carried out (Caulfield & Robertson 1996, 61). Those who were sterilized were disproportionately female and people who were unemployed, of minority ethnic backgrounds – particularly
eastern and southern Europeans and Asians — and from lower socio-economic classes; many of them were children (Caulfield & Robertson 1996, 61). Newspaper accounts of the legislative debates about the Sexual Sterilization Act make its eugenic objectives very clear.12 This Act, together with restrictions affecting procreation within marriage statutes,13 demonstrates that the state, in adopting policies of negative eugenics, had assumed the role of deciding whether or not particular individuals had the right to reproduce.

Early eugenics programs, which sought to purge the social body of unwanted or undesirable characteristics, designated categories of people unfit to reproduce and subjected them to involuntary sterilization. The goal is evident in the language of the Alberta statute, which stated that a patient about to be discharged from a mental hospital ‘might safely be discharged if the danger of procreation with its attendant risk of multiplication of the evil by transmission of the disability to progeny were eliminated.’14 Among the characteristics that many eugenicians regarded as almost exclusively hereditary were mental retardation, mental illness, pauperism, criminality, prostitution, and sexual perversion (Caulfield & Robertson 1996, 65). While some of the attraction of eugenic practices was the reduction of the financial burden on the state arising from families with ‘defective offspring,’ the primary motivation was the prevention of social delinquency and crime attributed to inherited conditions (ibid.). The absence of scientific grounding and the increasing opprobrium of eugenics in light of human rights concerns led to the repeal of the Act in 1972.

The new genetics, by contrast, is individual rather than state-centred, and purports to be about both individual ‘choice’ and individual ‘health.’ Its language is that of the informed consumer rather than a state-directed ideology of social protection and social improvement. Negative eugenic policies are extremely unlikely in most, if not all democratic societies. Indeed, since the adoption of the Canadian Charter of Rights and Freedoms in 1982, the Supreme Court of Canada has moved to effectively outlaw the forms of state action upon which the old eugenics depended (Re Eve, 1986). Moreover, some of the individuals wrongfully sterilized under this regime have been able to claim retroactive compensation.15 The advocates of the new genetics do not make explicitly eugenic claims and scrupulously avoid the slightest suggestion of state coercion. Ironically, however, the same individualistic calculus used to outlaw past eugenic practices is presently employed to promote the new genetic practices.
In the context of reproduction, the new genetics is promoted as offering prospective parents information upon which to make choices. The primary rationales for contemporary use of prenatal genetic testing or screening is to provide pregnant women with information they can use to make decisions about whether to terminate an affected pregnancy; to take measures while the foetus is in utero to reduce the 'negative' effects on a future child, where these are available; or to prepare for the birth of a disabled child or one with a genetic disease. Where former eugenic practices involved coercive activities designed and implemented by the state to 'improve the quality' of future generations for the benefit of society, current programs of prenatal diagnosis operate at the level of the individual pregnancy, and compliance is voluntary.

Browner and Press argue that the success of contemporary prenatal diagnosis programs rests upon the willingness of individual women to take personal responsibility for deciding whether to bear a disabled child (Press & Browner 1995, 308). But why do so many women accept this responsibility? As a society we already accept quantitative mastery over procreation, and find it acceptable to control the number of children we have through the use of contraception (Testart 1995, 305). In a culture of increased commodification, the issue of qualitative mastery arises. Prenatal diagnosis is promoted as a service or technology that can be used to reassure a pregnant woman that her foetus is healthy. The technology is offered in a cultural and social context which mandates that pregnant women (in judicial intervention cases, through the coercive power of the state, but also in the media and pop culture), abstain from all behaviours that might pose risks to the developing foetus. 'Women view pregnancy as supremely risky because society imposes nearly total responsibility on them as prospective mothers for assuring a favourable birth' (Press & Browner 1995, 309). In order to reduce this risk, pregnant women are often willing to defer to medical or scientific knowledge as insurance of the health of their foetus (Oakley 1981). Moreover, once a test exists, whether a woman uses it is not a neutral act – refusal implies her reluctance to do everything in her power to assure the health and well-being of the developing foetus (Beck-Gernsheim 1991, 47; Press & Browner 1995; 1997; Sandelowski & Carson Jones 1996). There is societal and cultural approbation for giving a child a head start and all the opportunities one can. In this way, the use of genetic technologies becomes, along with reading to him or her, extracurricular activities, sound education, and proper nourishment, another form of doing what is best for a child.

The success of contemporary prenatal diagnosis programs also rests
upon society’s endorsement of abortion as a legitimate course of action in the event of a ‘defective’ pregnancy.\textsuperscript{16} Often using a cost/benefit analysis, it is argued that it is less costly for a woman to abort her disabled fetus than for the public to provide a lifetime of social services, or increasingly in the context of privatization, for individual families to incur the financial responsibility of caring for a disabled child, as this function is shifted from the state to the family. The risk of bearing an unhealthy child results in more than the dependency of the offspring; it often implicates the parent, usually the mother, in caring for the child. This has a profound bearing not only on the economic status of the family, but on the social and political status of the caregiver in a society in which participation in the labour force is the mark of full citizenship.

The growth of genetic testing and the prevalence of its marketing suggests that we are witnessing a shifting rationality regarding child-bearing, one that may have an explicitly eugenic slant to it. Genetic testing and counselling practices ‘reinforce the message that not only do individuals have a right to “healthy” genes, they also have a right to information that will assist them to minimize their own contribution to disease and disability’ (Petersen 1998, 64). In addition, the new reproductive and genetic technologies provide increased opportunities not only for selective abortion of ‘undesirable foetuses’ (a form of negative eugenics) but also for the choice of gametes with specific traits or characteristics and the preferential treatment of pre-embryos with such characteristics for implantation and gestation (a form of positive eugenics). A new eugenics – one which, unlike older versions, is acceptable to our developed and democratic sensibilities – is emerging. It consists in the selection of the genome, not its manipulation, through embryo selection and prenatal diagnosis (Testart 1995).

The deployment of new genetic technologies in the context of reproduction is an important site where the construction and rearticulation of the neo-liberal citizen takes place. The new ‘eugenic’ practices leave pregnant women, and their health care providers personally responsible for deciding what kind of life is worth living; in an era of increasing cutbacks in the provision of health care and social services, they also force women (and the family) to assume the costs of care if the choice is made to proceed with a ‘risky’ pregnancy. This is a form of privatization. In contrast to the old eugenics, the state is only indirectly implicated in the creation of the conditions where private actors – professionals, industry – enable individuals to make personal choices and exercise their autonomy in the procreative context. Under neo-liberal governance, while experts act as advisers and define norms, individuals are called upon to
take an active role in decision making, and to exercise their right to know, so that they can make informed and responsible decisions about their health and that of their progeny (Petersen 1999). Information pertaining to the health of the foetus obtained through the employment of genetic technologies is the basis upon which procreative and 'eugenic' choices are made. Risk, characterized as the possibility of genetically inherited disease or traits, becomes a crucial factor in the decision-making process arising from genetic testing.

In the age of neo-liberalism, risk management becomes an everyday practice of the self (O'Malley in Petersen 1999, 123). In order to be independent and to avoid becoming a burden upon others, the individual takes rational steps to avoid and insure against risk. A new prudentialism also arises in which insurance against eventualities such as ill health, unemployment, and old age become a private choice rather than a communal responsibility (O'Malley in Petersen 1999, 123). Rose suggests that 'social insurance as a principle of social solidarity, gives way to a kind of privatization of risk management' (Rose 1996b, 58). As the state disengages from providing or monitoring insurance schemes, the individual is left to make his or her own choices (Harris 1999, 45). Thus, the impetus behind selecting the qualities or traits of offspring, deciding which foetuses to terminate and which to carry to term, or controlling the quality of one's progeny through the use of genetic and reproductive technologies must be set in the context of a neo-liberal ideology and political order in which risk consciousness and freedom of choice prevail.

The discursive and material effects of the new genetics in the context of privatization have restrictive implications for women, for people with disabilities, for historically disenfranchised groups, and for our understanding of social good. The routine availability of genetic testing fosters an ideology according to which the birth of individuals with certain diseases and traits should be avoided. In addition, it leads to more restrictive notions of normalcy and humanity. The individualist rationale also constitutes an effort to deny that there are social consequences pursuant to the adoption of the new genetic technologies. This effort is situated within the general context of privatization and the drive to make social policy conform to the needs of the market. By highlighting individual well-being and choice, promoters of the new genetic technologies seek to entice the individual as consumer to purchase their products. The new forms of appropriation and private property these new technologies require are 'sold' as a way to promote the public good. Social responsibility is privatized, as the onus for the consequences of choices is placed squarely on the shoulders of the individuals making the deci-
sions, rather than on the state. The state merely regulates the availability of the technologies and licenses the forms of private appropriation required to make investing in them viable.

Active citizenship is a key mechanism by which individuals engage in risk management and regulate themselves through exercising their freedom of choice (Petersen 1999). Implicitly, and in some cases explicitly, genetic testing is looked upon as a form of responsible behaviour. King predicts that 'we are going to be told that if we know that certain genes cause disease and we can test for them, then we are being irresponsible leaving things to chance; and we are being irresponsible and cruel if we even consider bringing a disabled child into the world' (D. King 1995, 25–6). Within the political rationality of neo-liberalism, in order to act responsibly individuals are expected to govern themselves through processes of endless self-examination, self-care, and self-improvement (Petersen 1999). The consumer who chooses to know and behave prudently where genetic health risk is concerned is therefore the self-reliant citizen who actively works to avoid becoming a burden on society and to maximize her or his productive potential. The genetically responsible health care consumer is the ideal new citizen of the post-Keynesian state. The choice to become informed about genetic risk also provides an individual with the knowledge upon which to make decisions about reproductive choices. In the neo-liberal context these choices are shaped by the desire to produce offspring who conform with neo-liberal rationality. Genetic technology becomes a quintessential tool of neo-liberal governance, one which simultaneously enables and disciplines, through the categories of risk and choice, permitting the state to govern from a distance. As eloquently stated by King: 'One way or the other, we are all going to be dragged into the regime of gene management, that will, in essence, be eugenic. It will all be in the name of individual health rather than for the overall fitness of the population, and the managers will be you and me and our doctors, not the state. Genetic change will be managed by the invisible hand of individual choice, but the overall result will be the same, a co-ordinated attempt to “improve” the genes of the next generation on the way' (D. King 1995, 25–6).

B. Disciplining Women's Bodies

The effects of the new genetics are predominantly borne by women, in part because of the historically gendered nature of procreation. The ideology of geneticization purports to be gender neutral: the health benefits produced by genetic technology and practice are considered to be
good for all human beings. However, men and women are situated differently in relation to the production and reproduction of these health effects. Unlike the eugenic practices of the early twentieth century, which were enacted upon the bodies of both men and women, current genetic interventions in the reproductive context occur predominantly upon and within the bodies of women.

The concept of choice and the process of decision making are problematic for women as pregnancy and motherhood are increasingly subject to control through the category of risk (Weir 1996). 'The growing availability of supposedly risk free genetic testing technology' (testing techniques that do not create a physical risk for the foetus or the pregnant woman), 'combined with the imperatives of responsible healthy citizenship, compromise the exercise of free choice in relation to genetic testing' (Petersen 1999, 126). Choosing not to know about genetic risk becomes less of an option.

Women are the gatekeepers of genetic risk and social cost in two overlapping and complementary senses. First, as the gender disproportionately burdened with the costs and responsibilities of social reproduction, women are the primary 'managers' of the risks of dependency (Mahowald 1996; Stacey 1996). Second, women, as the gestational sex, carry the foetus whose 'risks' to the family and society are rendered transparent through the use of genetic technologies. In this sense, women literally embody genetic risk. Genetic knowledge and 'genetic responsibility' transform the subjectivity of child-bearing women, and to the extent that child rearing and child bearing construct women as a gender, all women are affected by the reconstruction of subjective embodiment surrounding the issues of genetic risk.

Self-surveillance has particular effects on women. Women's bodies have become the predominant site of testing and screening (especially in the prenatal context); therefore they become the dominant agents through which this kind of governance is achieved. Subjective feelings of well-being are juxtaposed against 'objective knowledge' provided by genetic technologies. Through these acts of surveillance the body is continually produced as a potential source of danger to the subject (Kavanagh & Broom 1998). The purported 'choice' associated with genetic knowledge and genetic testing presupposes a profound alienation from personal embodied experience and places a particular burden on women as the site of 'responsible citizenship.' In particular, prenatal diagnosis involves a calculated alienation of the woman from the foetus and from her own body.

Both forms of alienation are a result of the way in which genetic technologies have been developed and subsumed within the neo-liberal
imperative. Genetic counselling is based upon a model of rational decision making which assumes that, when properly advised about the risk of genetic disease, individuals will weigh up all available information and arrive at the most appropriate decision (Petersen 1998, 65). However, this model fails to acknowledge that genetic information is complex and difficult to interpret and that, ‘except for a few diagnostic tests, most fall into a gray area where the results can be more confusing than helpful’ (Feldman in Petersen 1998, 65). Decisions, including those about whether to terminate a pregnancy, are often made on the basis of partial information, without knowing whether or how seriously a condition will manifest itself. This decision-making model also overlooks the fact that many other factors may influence an individual’s behaviour when she is confronted with the choice of whether or not to reproduce. Further, women’s choices are limited by available treatment options: no effective therapies exist for many genetic disorders for which they or their foetus have been screened or tested. Often, the only reproductive option for women is to choose whether or not to abort. Reproductive choice, in a context where the social safety net has been dismantled and self-reliance and autonomy are the hallmarks of citizenship, is not a choice at all.

Conclusion

This chapter has addressed the gendered impact of the relationship between privatization and the new genetics. The Canadian state has played a central role in promoting the production and dissemination of genetic knowledge; by failing to regulate the use of genetic technologies in the context of procreation, it has also facilitated the emergence of the new active citizen responsible for her own risks. Law operates on a number of different levels and in a variety of ways in this process. Most visibly, at the instrumental level, new forms of property and opportunities for accumulation are legally constituted through supra-national agreements and state law. However, state restructuring and supra-national agreements have also weakened the role of law as an instrument of a democratically organized society acting through the state to impart norms of social justice and substantive equality. This diminishes the potential for women’s collective action and their ability to shape and limit the gendered effects of NRGTs. At the same time, the normative role of law, by underscoring and sanctioning the discourse of individual autonomy and choice, supports and guides the acceptance of the normative categories which the marketing of NRGTs requires. Moreover, law’s emphasis on
individual autonomy and informed choice, which are central elements of neo-liberal discourse, help to legitimate a professional-client model for the regulation of genetic testing in the context of procreation. Explicitly and implicitly, law has sanctioned the contribution of genetic technologies to the gendered and unequal burden of social reproduction. Although women now have more information on which to base reproductive choices, they are disproportionately burdened if the 'wrong' choices are made.

The discourse of genetic risk and the practices of genetic testing have created an environment in which women increasingly understand themselves, and their pregnancies, in terms of embodied risks. Internalization of genetic risks has forced women, individually, to incur the responsibility for social reproduction. Resistance to this political imperative could be effected by recognition and re-emphasis of the fact that human beings and 'normalcy' involve tremendous variation. The construction of disability and disease as costs to the individual (and greater society) relies upon a purposeful obstruction of the social determinants of health. Insisting upon a recognition of the relationship between genetic expression and social, political, and physical environments will lead to an equal recognition that individual health and the health of future generations cannot be ensured solely through reliance upon genetic information. Contrary to the tenets of neo-liberalism, interdependence and dependence are facts of life. Even if procreation is controlled in the effort to pre-empt future dependency, people will continue to display 'difference,' and dependence: no amount of individualization of responsibility will eradicate the social facts of life attendant upon social risks. Genetic knowledge may help us to recognize that each individual is different, and infinitely varied and allow us to begin to embrace those differences. When facing reproductive decisions we can use genetic technologies to highlight genetic variation and diversity rather than genetic risk.

Individual prudence and knowledge comes with great social risk and potentially great social cost. While genetic knowledge may inform individual choices concerning procreation, it renders more obscure or opaque the shape of future society, including the very individualistic values of metaphysical life and personhood on which the ideology of genetic choice is founded. The dilemma we face is that the current ideological climate diminishes the effectiveness of the regulatory tools we require to order and to better control the consequences of our own productive and reproductive activities.
Notes

This chapter was written in partial fulfilment of the requirements of the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. I would like to thank Judy Fudge, Brenda Cosman, Lisa Philpps, Jeremy Paltiel, and Isabel Karpin for being generous readers and collaborators. Wendy Sutton, Cailin Morrison, and Ruth Fletcher provided wonderful research assistance. I am extremely indebted to Kerry Taylor for her diligent assistance in completing the chapter.

1 Victor McKusick, whose catalogue of human genetic conditions is a classic in the field, defines 'genetics' in the following way: '[T]he science of biological variation; human genetics: the science of biological variation in humans; medical genetics: the science of biological variation as it relates to health and disease; and clinical genetics: the part of medical genetics concerned with health and disease in individuals and their families or the science and practice (art) of diagnosis, prevention, and management of genetic disorders' (McKusick 1993).

2 See e.g. Abraham 1999 for a discussion of the case of Fiona Webster. Webster was successful in her appeal to the Health Services Appeal and Review Board of Ontario of a decision of the Ontario Health Insurance Plan (OHIP) that denied coverage of the fee for private BRCA 1 and 2 testing through Myriad Genetics. Webster argued that given her high-risk status for breast cancer, OHIP should cover the cost of having the test done privately as she would otherwise have had to wait approximately a year for the testing to be done in a local laboratory.

3 In the context of patents and intellectual property rights regimes, the Canadian state, by entering into both NAFTA and the GATT agreement (the Uruguay Round), has ensured the entrenchment of intellectual property rights (Marshall 1999, 139). The protectionist provisions for intellectual property rights grant a monopoly for a period of twenty years to those corporations holding patents on inventions. The entrenchment of intellectual property rights has ensured that future democratically elected governments will be restrained from implementing policies favourable to generic pharmaceutical companies (Marshall 1999, 159–40). This is accomplished through the threat of trade sanctions: future Canadian governments cannot reinstate compulsory licensing without violating trade obligations under the threat of reprisal (Marshall 1999, 137).

4 Internationally, these fears have been voiced through a growing movement in the European Union and are the subject of the 1998 EU Council Regula-
1139/98, which requires that products containing modified corn and soybeans carry information on the food label or ingredient list stating that the product contains genetically modified materials (International Trade Reporter 1999). Similarly, in 1999, Australia and New Zealand proposed legislative measures regarding labelling requirements for genetically modified foods (ibid.).

5 In 1995, the Government of Canada adopted a policy requiring the application of gender-based analysis in the policy development and analysis process. All federal departments and agencies are now required to analyse their policies and legislation to take into account their differing impacts on women and men (Status of Women Canada 1998).

6 Currently, for example, under s. 31(b) of the Food and Drugs Act. R.S.C. 1985, c. F-27, the maximum fine that can be imposed on a drug manufacturer is a mere $5,000.

7 A number of public interest groups have expressed concern that new health protection legislation may do away with accountability under the Criminal Code. They argue that any new health protection legislation should maintain its status as criminal legislation. The scope of the federal criminal law power in relation to health was addressed in RJR-MacDonald Inc. v. Canada (A.G.) [1995] 3 S.C.R. 199, a case involving the constitutionality of the federal Tobacco Products Control Act.

8 In February 2000, the Science Advisory Board submitted a report to the minister of health criticizing the approval process for its lack of transparency, timeliness, efficiency, and effectiveness (Science Advisory Board 2000). Later that month, in memoranda obtained by the CBC under the Freedom of Information Act, reference was made to the introduction of a Health Canada policy for the fast-tracking of drug approvals (Canadian Broadcasting Corporation 2000).

9 According to Shared Responsibilities, a Health Canada discussion paper, health protection legislation must ‘meet Canada’s international obligations including free trade agreements’ (Health Canada 1998c, 22).

10 NAFTA does allow a state to exclude from patentability diagnostic, therapeutic, and surgical methods for the treatment of human beings, as this was a provision within the Canadian Patent Act at the time the agreement came into effect (Cameron 1996, 121). In addition, the Canadian government placed a reservation in Annex II to NAFTA with respect to social services. This reservation is directed at excluding existing and future measures of Canadian governments related to certain public and social services from coverage by important clauses of NAFTA (Cameron 1996, 122). While there is some ambiguity about the precise definition of ‘social service’ under the
agreement, the provision of such services in Canada may occur pursuant to it. Also, the Canadian government retained the right to impose standards to be met by the producers of goods and services entering the Canadian market (Cameron 1996, 121). Standards-related measures apply the notion of ‘safety’ – the protection of human, animal, or plant life or health, the environment, or consumers and sustainable development – as legitimate objectives (Cameron 1996, 121). For example, a fertility drug deemed unsafe could be excluded from the Canadian market on this basis (ibid.).

At the time some women who held themselves out to be ‘feminists’ or ‘progressives’ did support eugenic initiatives. Legendary suffragettes and feminists Nellie McLung and Emily Murphy promoted sterilization, as, in the words of Murphy, ‘the sterilization of the unfit was needed to produce “human thoroughbreds”’ (Western Report 1995, 1).

12 See, for example, Edmonton Journal 1928a; Edmonton Journal 1928b; Medicine Hat News 1928.

13 In Alberta, the Solemnization of Marriage Act, R.S.A. 1925, c. 39, s. 29 prohibited the issuing of a marriage licence where one party was, ‘an idiot, insane or mentally incompetent.’ A similar prohibition was enacted in British Columbia.

14 R.S.A. 1942, c. 194, s. 5

15 See, Muir v. Alberta (1996), 132 D.L.R. (4th) 695 (Alta. Q.B.), in which damages of approximately $750,000 were awarded to a woman who was wrongfully sterilized under the Alberta Sexual Sterilization Act in 1959.

16 The practice of rejecting ‘defective’ babies has a long history. Even in many jurisdictions where abortion is subject to criminal sanctions, a woman may have access to an abortion when there is a substantial risk that if the child were born, he or she would suffer from such physical or mental abnormalities as to be seriously handicapped. See (Clayton 1993) for a discussion of legislative examples in the United States. Abortion laws, as well as prenatal diagnosis and other foetal screening programs, have been defended against eugenic claims on the ground that they reflect compassion for the child who would be born and its potential pain and suffering. Others, however, assert that such laws, programs and techniques really relate to the welfare of the parents, or to the public purse.
References

Books, Articles, and Theses

References


- 1997. 'From “Mothers of the Nation” to Migrant Workers.' In Abigail Bakan and Daiva Stasiulis, eds., Not One of the Family: Foreign Domestic Workers in Canada. Toronto: University of Toronto Press, 53–79.


References


– 1997b. ‘Foreign Domestic Worker Policy in Canada and the Social Boundaries
References 425

of Modern Citizenship.' In Abigail Bakan and Daiva Stasiulis, eds., Not One of the Family. Toronto: University of Toronto Press, 29.


Bala, Nicholas. 1994. ‘What’s Wrong with YOA bashing? What’s Wrong with the YOA? Recognizing the Limits of the Law.’ Canadian Journal of Criminology 36, 247–70.

426 References


Basham, Partick. 1999. ‘Equity or Social Engineering?’ Montreal Gazette, 26 October, B3.


- 2000b. 'In Fact.' *Benefits Canada*, 15 February.


References


Borsellino, M. 1994. ‘OHIP Cuts Eight Unnecessary Services.’ Medical Post, 8 March, 44.


References 429


430 References


References 431


References

References


References

- 2000c. 'Ontario Set to Appeal Court Ruling Barring Province from Denying Welfare to Common Law Moms.' Canadian Press, 29 June
- 1999a. 'Provinces Tiring of Deadbeat Sponsors.' Canadian Press Newswire, 4 October.
Caputo, T., R. Weiler, and K. Kelly. 1994a. Phase II of the Runaways and Street
References 435

Youth Project: The Ottawa Case Study. Ottawa: Ministry of Supply and Services Canada.


References


2000c. 'Landing Fee Eliminated for Refugees.' News Release, 28 February.


1998b. 'Pilot Project to Help Canadian Employers Attract Highly Skilled Temporary Workers.' News Release, 30 September.


Clarke, A. 1990. ‘Genetics, Ethics and Audit.’ Lancet 336, 120.


References


Corrado, Raymond, and Alan Markwar. 1994. ‘The Need to Reform the YOA in Response to Violent Young Offenders: Confusion, Reality or Myth?’ Canadian Journal of Criminology 36, 343–78.


Coyne, Andrew, and David Frum. 1995. 'How Far Do We Take Gay Rights?' Saturday Night, 66–75.


Curran, Peggy. 2000. 'Ottawa Set to Kick Out Pregnant Caregiver.' Montreal Gazette, 28 August.


References 439
References


References 441


Duffy, Andrew. 1999. ‘Canada Attracts 24% Fewer Skilled Immigrants Than Expected.’ *Ottawa Citizen,* 15 July.


Egelton, Rick, and Wojciech Szadurski. 1999. ‘Trends in Canada–U.S. Migra-
442 References

References 443


Evans, R., M. Barer, S. Lewis, M. Rachlis, and G. Stoddart. 2000. Private Highway,
References

*One Way Street: The DeKlein and Fail of Canadian Medicare*? Vancouver: UBC Centre for Health Services and Policy Research.


Fergusson, Robb. 1999. ' Equity Ignores the Oldest Law Right Here.' *Calgary Sun,* 28 October, A15.


Findlay, Sue. 1987. 'Facing the State: The Politics of the Women’s Movement Rec-


References


References 447


References


Gee, Marcus. 2000. 'Health Care is No. 1 Concern.' Globe and Mail, 7 February, A5.


- 1998a. 'Where Have All the Smart Men Gone.' Globe and Mail, 28 December, A18.


- 1998c. 'Equity Doesn't Compute.' Globe and Mail, 17 October.
References 449

- 1998e. 'St. Michael’s Won’t Budge on Birth Control.' *Globe and Mail*, 11 April, A5.

Godfrey, Tom. 2000a. 'Foreign Peelers Crucial, Say Clubs.' *Toronto Sun*, 10 May, 7.
- 2000b. 'Strippers Get the Boot.' *Toronto Sun*, 17 March.
- 2000c. 'Canada Tries to Break the Habit – Foreign Strippers are Posing as Nuns, Officials Say.' *Toronto Sun*, 9 May, 5.


References


References


Harvey, Robin. 1999. 'Program to Stop Runaways Chopped: Children’s Aid Blames Provincial Changes in Welfare Funding.' Toronto Star, 8 April.


- 1997b. ‘Direction to Wellesley Central Hospital.’ July.
References


- 1993b. ‘Rethinking Anti-Feminism in the 1930s: Gender Crisis or Workplace Justice?’ Gender and Society 5(1), 4.


- 1999d. Standing Committee on Finance. For the Benefit of the Children: Improving Tax Fairness (Nineteenth Report of the Standing Committee on Finance, Sub-Committee
References 453

on Tax Equity for Canadian Families with Dependent Children). Ottawa: Queen’s Printer.
- 1984. Special Committee on Sexual Offences against Children and Youth (Badgley Committee). Report of the Special Committee on Sexual Offences Against Children and Youth. Ottawa: Minister of Supply and Services Canada.


References


Kay, Fiona, and Joan Brockman. 2000. 'Barriers to Gender Equality in the Canadian Legal Establishment.' Feminist Legal Studies 8, 169–98.
References

Kingsford Smith, Dimity. 1999. 'Contrasts with Canada: Women and Retirement Income in Australia.' Notes for Paper Delivered at the Women and Retirement Income Continuing Legal Education Seminar, University of Sydney, Faculty of Law, Australia, March 29. Copy on file with the author.
Klein, Ralph. 1999. 'Why I Want to Privatize Surgical Services.' Time, 6 December, 52.
References 457


Leblanc, Daniel. 1999a. 'Civil Servants to Get $3.6 Billion.' Globe and Mail, 20 October.

- 1999d. 'Bell to Appeal Pay-equity Ruling to Supreme Court.' Globe and Mail, 16 January, A2.
- 1998a. 'Many Feel Pay-equity Award too High: Poll.' Globe and Mail, 5 December, A16.
References

- 1998e. 'Chrétien Regrets Promise to Observe Pay Equity Ruling.' Globe and Mail, 27 August, A21.


Lemelin, Maurice. 1978. The Public Service Alliance of Canada: A Look at a Union in the Public Sector. Los Angeles: Institute of Industrial Relations, University of California.


References 459


Little, Bruce. 2000a. 'Canada Leads the Way in G7 Deficit Battle.' Globe and Mail, 29 February.

– 2000b. 'A Trillion-dollar Economy.' Globe and Mail, 1 June.


References

Loney, Martin. 1999. 'Equity Ruling Shows Courts in Grip of Radical Feminism.' Financial Post (National Post), 20 October, C7.
References 461


Macleans Magazine. 1996. 'Cutting Back.' 1 July.


MacNaughton, John A. 1999. 'The CPP Investment Board: Remarks by John MacNaughton.' October/November, online: Canada Pension Plan Investment Board Homepage http://www.cppib.ca/media/101999_SP.htm (21 August 2000).


- 2000b. 'Alberta Defies Court on Prostitution: Will Continue to Enforce Dis-
References

puter Law as It Appeals, Says Young Sex Workers Need Protection.' Globe and Mail, 1 August, A2.

Mahowald, Mary E. 1996. 'Genetic Technologies and Their Implications for Women.' University of Chicago Roundtable 3(2), 489–63.


Martin, Dianne L., and Janet Mosher. 1995. 'Unkept Promises: Experiences of Immigrant Women with the Neo-criminalization of Wife Assault.' Canadian Journal of Women and Law 8, 3–44.
References 463


May, Kathyn. 1999a. 'Pay-equity Talks Shrouded in Secrecy.' Ottawa Citizen, 26 October, A3.


– 1998. 'Pay Equity: Chrétien Promised to Pay.' Ottawa Citizen, 6 August, A1, A2.


464 References


McIroy, Anne. 2000a. ‘Provinces Given $2.5 Billion Infusion.’ Globe and Mail, 29 February, F3.

– 2000b. ‘Children’s Agenda Gets Kick-start.’ National Post, 8 June.


Milne, Celia. 2000a. 'The Balance between Church and Hospital.' Medical Post, 5 December, 38–9.

– 2000b. 'The Salvation Army’s Fall from Grace.' Medical Post, 5 December, 38.


Morton, Millie. 1999. 'The Legal Position of Migrant Workers in Canada.' Speaking About Rights 14, 10.


466 References


Mossman, Mary Jane, and Morag MacLean. 1997. 'Family Law and Social Assistance Programs: Rethinking Equality.' In Patricia Evans and Gerda Wekerle, eds., Women and the Canadian Welfare State. Toronto: University of Toronto Press.


Nettleton, Sarah. 1997. ‘Governing the Risk Self: How to Become Healthy,
References


References

OMA/MOHLT. 2000. Ontario Medical Association/Ministry of Health and Long Term Care Agreement (on file with the author.)
– 1996. ‘Future Directions in Social Services.’
References


– 2000b. ‘Canada’s Bare Essential.’ Globe and Mail, 19 February.


References

References


Public Service Alliance of Canada. 1997. Presentation to National Joint Committee, Valleyfield, Quebec, September.
References

- Rachlis, M. 1995. 'Defining Basic Services and De-Insuring the Rest: The Wrong Diagnosis and the Wrong Prescription.' Canadian Medical Association Journal 152(9), 1401-5.


References 475

Richmond, Ted. 1996. 'Effects of Cutbacks on Immigrant Service Agencies.' Toronto: Joint Centre of Excellence for Research on Immigration and Settlement.


Roberts, Dorothy E. 1996. 'Biology, Justice, and Women's Fate.' *University of Chicago Roundtable* 3(2), 465–71.


Ross, Ellen, and Rayna Rapp. 1997. 'Sex and Society: A Research Note from
References

References 477


References


1997c. Standing Committee on Social Affairs, Science and Technology. 28 January, 18:45.

1996. Standing Committee on Social Affairs, Science and Technology. 10 December, 16:30.


1999c. 'How All the Right Words Lured Girl into Street Life: Toronto Man Jailed on Charges of Prostitution.' *Toronto Star*, 9 March, B1.

Sherwin, Susan. 1998a. 'Biotechnology and Health: The Place of Ethics in a National Strategy.' Unpublished MS.

1998b. 'Response from the Maritime Centre of Excellence for Women's Health (MCEWH) to Health Protection Branch Discussion Papers.' Unpublished MS.
References


University of Toronto Faculty of Law Review 116–35.


Simmons, Alan. 1999. 'Economic Integration and Designer Immigrants: Canadian Policy in the 1990s.' In Free Markets, Open Societies, Closed Borders? Miami: North-South Center Press, 53–69.


480 References


Special Joint Committee on Custody and Access. 1999. For the Sake of the Children. Ottawa: Queen’s Printer.


References 481


482 References


Table féministe de concertation provinciale de l'Ontario. No Date. 'Submission to the Health Services Restructuring Commission.' Ottawa: Carleton.

References 483

Tam, Pauline. 1999 ‘Doors Open for Skilled Migrants.’ Ottawa Citizen. 8 September.
Thompson, Allan. 1999a. ‘Head Tax on Refugees a Headache.’ Toronto Star, 17 May.
484 References


References


References


References 487


Wyson, P. 1999. 'Non-profit Centres Delivered Better Dialysis.' Medical Post, 21 December, cover, 49.


References


Legislation

Canada Health Act, R.S.C. 1985, c. C-6
Canada Pension Plan Investment Board Act, S.C. 1997, c. 40, as am.
Citizenship Act, R.S.C. 1985, c. C-27
Civil Service Act, R.S.C. 1906, c. 17.
Civil Service Amendment Act, S.C. 1908, c. 15.
Divorce Act, R.S.C. 1985 c. 3.
Employment Equity Act, R.S.C. 1985, c. 23 (2nd Supp.).
Family Benefits Act, O. Reg. 409/95.
Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education
Food and Drugs Act, R.S.C. 1985, c. F-27.
General Welfare Assistance Act, R.S.O. 1990, c. G.6, repealed by S.O. 1997,
   c. 25.
Hospital Insurance and Diagnostic Services Act, S.C. 1957, c. 28.
Immigration Act, R.S. 1952, c. 93.
Immigration Act, R.S. 1976, c. 52.
Immigration Regulations, SOR/78-172.
Income War Tax Act, S.C. 1917, c. 28.
Juvenile Delinquents Act, 1929, S.C. 1929, c. 46.
Medical Care Act, S.C. 1966, c. 64.
Ministry of Health and Long Term Care Statutes Law Amendment Act, S.O.
   1999, c. 10.
Ontario Disability Support Program Act, S.O. 1997 c. 25, s. 2 (Schedule B).
Ontario Income Tax Act, R.S.O. 1990, c. 1.2, as am.
Protecting Children from Sexual Exploitation Act, S.O.
References

Sexual Sterilization Act, S.A. 1928, c. 37, as am. S.A. 1937, c. 47, and S.A. 1942, c.194
Social Assistance Reform Act, S.O. 1997, c. 25.

Intergovernmental Agreements


Cases


Canada (Minister of Finance) v. Finlay, [1986] 2 S.C.R. 607.

References

Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour) [2000], 51 O.R. (3d) 417 (C.A.)
Collett v. Ontario (A.G.) [1995], 81 O.A.C. 85 (Div. Ct.).
Finlay v. Canada (Minister of Finance), [1993] 1 S.C.R. 1080.
Jabs Construction Limited v. The Queen, 99 D.T.C. 729 (T.C.C.)
492 References

M. v. H., [1999] 2 S.C.R. 3,
Ottawa Carleton Dialysis Services v. Ontario (Minister of Health), [1996] O.J. 2721 (Div. Ct.).
Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission) (1997), 36 O.R. (3d) 41 (Div. Ct.).
R. v. Mark Richard Morgan, 5 February 1986 (Ont. Dist. Ct.).
References 493

Re Dele Ilis (1998), 21 O.S.C.B. 305
Re Doctors Hospital and Minister of Health et al. (1976), 12 O.R. (2d) 164.
Re Koonar and Minister of Health (1982), 133 D.L.R. (3d) 596 (Ont. Div. Ct.).
Re Mersch (1998), 21 O.S.C.B. 3805
Re Metropolitan General Hospital and Minister of Health (1979), 25 O.R. (2d) 699 (H.C.).
Re Multi-Malls and Minister of Transportation & Communications (1977), 14 O.R. (2d) 49 (C.A.).
Toronto Birth Centre Inc. v. Minister of Health (1996), 92 O.A.C. 74 (Div. Ct.).
BEYOND CONCEPTION: LEGAL DETERMINATIONS OF FILIATION IN THE CONTEXT OF ASSISTED REPRODUCTIVE TECHNOLOGIES

BY ROXANNE MYKITIUK

This article argues that legal determinations of filiation are normative ideological constructions about how societal relations between parents and children should be ordered. They are based upon particular understandings of the relationship between biological and social facts and, as this article demonstrates, operate to create an asymmetrical relationship between the categories between paternity and maternity. I suggest that fairly recent developments in reproductive and genetic filiation have been made and offer the potential for an expanded understanding of relatedness or kinship which does not take the two-parent—one of each sex—model of the family as its normative form. While the examples I draw on arise in the context of reproductive technologies, I suggest that the analysis has broader implications for the recognition of broader family forms and relationship.

Cet article avance que la caractérisation juridique de la filiation est une création idéologique normative qui dicte la façon dont les relations sociales entre parents et enfants doivent s'agencer. Cette caractérisation repose sur une compréhension particulière de la relation entre des faits biologiques et sociaux et cet article démontre que ces filiations créent une relation asymétrique entre les catégories de la paternité et de la maternité. L'auteure suggère que des développements récents en filiations génétiques et reproductives offrent le potentiel d'élargir le concept des liens de parenté et de consanguinité qui n'adhèrent pas au modèle familial biparental (dont un parent de chaque sexe) comme étant la forme normative. Malgré que les exemples utilisés par l'auteure se situent dans le cadre des technologies reproductives, elle suggère que l'analyse a des conséquences appréciables pour la reconnaissance des types et relations familiales plus libérales.

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Disputes about filiation\(^1\) have not figured prominently in modern family law. Changes over the past fifteen years, however, have compelled both courts and legislators to discard their previous assumptions that parental status is easily ascertained or that the rare disputes over parental status disqualify filiation as a key concern. New medical and scientific technologies have fragmented biological processes and have eroded the familiar social arrangements that rely on this biological order. Assisted reproductive technologies (ARTs) make possible the separation of the genetic, gestational, and rearing aspects of motherhood, and the genetic and rearing aspects of fatherhood, while DNA technology allows biological paternity to be established with almost complete certainty. In the midst of these technological changes, courts are called upon to resolve competing claims of maternity and paternity arising from their use.

ARTs hold out a promise of alternative family forms. They invite a reconception of filiation by opening a view on the relationship of law to the social and biological construction of parenthood and, more significantly, the asymmetric, gendered relationships between paternity and maternity in family law. While ARTs offer the possibility of alternative family forms, some are disturbed by the ruptures in social relations that have been precipitated by ARTs. For those who wish to challenge the conventional heterosexual procreative family, these ruptures and fragmentations should be embraced\(^2\) as they forcefully reveal the gaps and deficiencies of existing

\(^1\)Filiation was traditionally defined as the relationship of a son to his father and omitted the relationship of father and daughter. I extend the use of this term to include the legal determination of any parent-child relationship

\(^2\)For a more extensive discussion of this point, see R. Mykitiuk, “Fragmenting the Body” (1994) 2 Austl. Feminist L.J. 63.
III. THEORETICAL UNDERPINNINGS

A. Kinship As Social Construct

In making determinations of filiation, law is influenced by two distinct, yet interrelated, forms of knowledge. The first is the system of kinship relations through which the social recognition of relatedness between and among persons is articulated. The second, legal ideology, draws upon normative constructions of family that govern the relationship between parents and children. When making legal determinations of filiation, law uses both bodies of knowledge to render pragmatic determinations of who is a parent, who is a child, and who is a parent of a particular child. Privileged legal relationships are granted to those who are

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assumed to share an intimate biological relationship with a child based on the understanding of the role biology plays in the creation of parenthood; this role, of course, differs for men and women. Kinship, then, can be seen to organize both natural or blood relations and more positive law or legal relations.

As modern anthropology has recognized, kinship is the “social construction of natural facts.” Cultural ideas about procreation provide the starting point for thinking about relatedness and the way in which the Euro-American institutionalized system of kinship privileges both biology and marriage when ordering and sanctioning relationships. Beliefs about procreation are themselves foundational to a range of cultural definitions concerning parenthood and kinship, gender and sexual difference, inheritance and descent. This particular cultural understanding articulates relations of kin through procreation either by *consanguinity* (shared bodily substance) or *affinity* (marriage). According to this system, because procreation creates offspring *from the body,* this necessitates the inclusion of social relations of intercourse and the biological relations occurring throughout conception. When procreation is accorded prime significance in this way, the circumstances of birth are believed to confer an identity upon a child as a result of a “fact of life.” By presuming that biological ties and the “facts of life” exist, we have created a strong rationale for foundational arguments which favour the “naturalness” of family and kinship relations. What has been construed within our understanding of kinship as “natural,” then, is a normatively essentialist position having direct bearing upon the way we understand gender and sexuality within the reproductive context. “Natural” procreation, in this sense, occurs only between two heterosexual individuals, without the assistance of technology.

Kinship is everywhere a part of the social and cultural management of reproduction and is intimately interlinked with “gender” as the survival of any given society relies upon successful reproduction. Because gender

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not only encompasses biological categories of male and female, but also the
“ways in which these understandings are interwoven with other dimensions
describing social and cultural life,” a primary concern becomes how kinship affects
the sexual and reproductive roles of women and men and, in turn, gender.\(^9\)

Since kinship is also a fundamental source of social identity within
a culture, it is central both to understanding expressions of morality
embedded within social and legal ideas about relationships and perceiving
how morality assists in solidifying certain notions as “truths.” As a result,
laws, norms and cultural ideologies use morality as one tool to define
where, when, and in what context reproduction and the resultant
relationships are sanctioned. When intercourse results in reproduction, and
the allocation of children becomes a societal objective, many more norms,
values and laws come into play. The various articulations of “marriage,”
“divorce,” and “legitimacy” can illustrate how different human groups
handle reproduction.\(^10\) Lastly, those practices understood to be either
unnatural or illegal are conceptualized as immoral within kinship’s mode
of governance.

B. The Legal Ideology of the Family

Highlighting the complex socially constructed nature of kinship, and
the way understandings of it are incorporated into and built upon within
law is pivotal to challenging determinations of filiation. Because one means
of establishing relatedness has its origins in biology and the natural facts of
life, kin relations have come to be seen as the natural processes in which
people become connected to one another through the transmission of
bodily materials. Conflating notions of biology, or relations of blood, with
that of “nature,” results in a powerful foundational statement about how
reproduction occurs. Relationships derived from “blood ties” become a
means of establishing connections and disconnections between persons.\(^11\)

The relationship between the ideology of the family and the social
construction of kinship is dynamic with each discourse feeding off of one
another. It would be imprudent to grapple with issues of filiation within

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\(^10\) Ibid.
\(^11\) S. Franklin & M. Strathern, “Kinship and the New Genetic Technologies: An Assessment of
Existing Anthropological Research” in Ethical Social and Legal Aspects of Human Genome Analysis:
A Report Compiled for the Commission of European Communities Medical Research Division (DG-XII)
Human Genome Analysis Programme (January 1993) at para. 2.3.4.
family law without engaging both discourses. Likewise, failing to recognize distinctions between the two would disable any attempt to understand how law's treatment of paternity and maternity has been created.\textsuperscript{12} The legal discourse which privileges certain “familial” relationships over others is constructed by its reliance on socially constructed understandings of kinship and pervasive ideologies of the family.

The social recognition of parenthood by law is understood to follow the biological fact of procreation.\textsuperscript{13} Once relations of kin are translated by law into obligations, family formations take on additional social and cultural signification. The legal ideology of family, which privileges relations between adults and children based upon a married heterosexual and procreative union, severely restricts who may be recognized as a legal parent.\textsuperscript{14} The law recognizes that blood can create legal ties, however, as a result of the operation of social convention and morality, not all blood relationships are given legal recognition. Law does not always mirror nature and often it is more representative of the societal values (i.e., social and cultural imperatives) it is employed to protect.\textsuperscript{15} In utilizing kinship ideals to structure legal determinations, law acts as an informal kinship system.\textsuperscript{16} By conflating the relationship between natural and social facts and construing them together as “natural,” law reiterates and embeds these social constructions within the way we order our relations. In this respect, the family does not always reflect blood relationships, but can take on “a classificatory role that is profoundly social.”\textsuperscript{17}

Despite dramatic changes in the past twenty-five years in the ways people “choose to live and define themselves as family, and the possibility

\begin{footnotes}
\item[13] Technologies of Procreation, supra note 6 at 22.
\item[16] Franklin & Strathern, supra note 11 at para. 2.5.1.
\item[17] Rouland, supra note 15 at 6.
\end{footnotes}
of disjoining genetic and social family ties,” only recently have these new relationships gained legal recognition and protection. Recognition of more diverse forms of family relationships and arrangements occurred first with respect to non-marital heterosexual cohabitation and more recently in the case of same-sex unions. The focus of these legal challenges has been the legal interpretation of “spouse” so that the normative family has been decentred primarily in the context of determinations of spouse and the recognition of the relationship between the adult parties to a relationship. This article challenges the filiative aspect of the normative legal construction of the family: that is, that every child has two—and only two—parents of opposite sexes to whom the child is biologically related. This norm is, as Harvison Young suggests, exclusive because for the most part, the legal parental relationship is all or nothing and there is neither room made for the recognition of quasi-parental or limited parental relationships, nor questioning of the primary assumption that a child usually does not have more than two parents. Legal norms have shifted to respond to changing social relations regarding the parent-child relationship and the existence of the legal recognition of adoption, in loco parentis status, and of parents of intention attest to this. These accommodations, however, do not disrupt the normative ideal of the family to the extent required by the consequences of ARTs.

In light of the development and use of ARTs, “facts of nature” are even more readily subject to dispute. ARTs clinically require the separation of intercourse from procreation, and reproductive activity from heterosexual activity. Consequently, it is now increasingly possible to see how the “naturalness” of heterosexuality, marriage and the nuclear family is socially constructed and perpetuated. Presently, not all biological relationships are activated as social ones. Paradoxically, there are also many instances where law does not recognize that persons are related to one another through ties of substance and physical bonding even where such

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18 M.L. Shanley, “Lesbian Families: Dilemmas in Grounding Legal Recognition of Parenthood” in J.E. Hanigsberg & S. Ruddick, eds., Mother Troubles: Rethinking Contemporary Maternal Dilemmas (Boston: Beacon, 1999) 178 at 178. As Shanley and others argue, family arrangements do not often conform to the normative ideal but involve a multiplicity of family forms and functions—a premise which obviously underpins this paper.


ties are not instigated through procreation. Legal determinations of parenthood in the context of ARTs are not simply

... discarding the old ideas about kinship but, on the contrary, are making every effort to preserve the cultural notions of "real" biological parenthood. Toward this end, they are reinterpreting NRTs and their tricky implications so as to reconcile them with these core cultural notions of biological parenthood and the resulting family ideal.

The discrepancy between the recognition of social and biological relations within law is, in part, a result of the way that maternity has been constructed as both biological and unitary. For example, until recently fatherhood was not the subject of biological scrutiny. The law created a series of rules and presumptions attributing fatherhood on the basis of a host of social factors and relationships. Legal determinations of maternity, on the other hand, were historically unnecessary, it being assumed that the act of giving birth necessarily resulted in motherhood. Since maternity has traditionally been constructed purely as a biological "observation" and since a child's relation to its mother was historically determined by the act of birth, maternity was generally established on the basis of consanguinity. This natural "fact" led to the theoretical and practical association of women with the body within patriarchal systems of binary categorization. In law, then, this gendering of reproduction has been translated into an asymmetry between the social recognition of parenthood in the case of fatherhood and the purely biological basis for the recognition of motherhood.

ARTs present the possibility of not only a legal mother and a biological mother, but of the potential division between gestational and biological (conception) motherhood thereby creating a third relationship which was previously not possible. What was once considered natural and evident has been thrown into disarray by reproductive technology with the result that, in theory, motherhood is now as divisible a concept as fatherhood has historically been.

As a result of the relationships arising out of the use of ARTs, the potential for restructuring our ideas of kinship and family, both in the courts and in our minds, is easier to articulate. This technology, "makes


\footnote{Stone, supra note 9 at 273.}

\footnote{For a detailed discussion of surrogacy in the context of kinship see H. Ragone, Surrogate Motherhood: Conception in the Heart (Boulder, Colo.: Westview Press, 1994).}
visible the way two perspectives—biological and social—are connected to each other in relations of kinship. The point becomes doubly evident when new procedures introduce new procreative actors.\textsuperscript{24} Law is caught up in determinations based on biology and “natural fact.” In terms of maternity, it remains difficult to make legal arguments that challenge the unitary nature of maternity, or favour the recognition of the social mother(s). Arguments in favour of the recognition of social relationships in the context of motherhood have not been successful because they do not fall within the unquestioned rubric of kin relations, nor do they satisfy the category of “mother” within the normative legal construct of the heterosexual, married, procreative couple.\textsuperscript{25}

\section*{III. FILIATION: HISTORICAL APPROACHES TO PATERNITY, LEGITIMACY, AND MATERNITY}

The belief that biological relatedness is the essence of the parent-child relationship provides the justification for legal understandings of filiation. However, the role biology plays in the creation of parental status differs for men and women. As groundwork for the analysis of the potential of ARTs to challenge legal constructions of the parent-child relationship, the legal categories of paternity and maternity will be examined in order to illustrate the role played by biology within each, and to articulate how the categories have developed in an asymmetrical manner when viewed from the perspective of gender.

\subsection*{A. Paternity: Pater est quem nuptia demonstrant}

The legal category of paternity provides the quintessential illustration of the relationship between natural facts, social construction, and legal ideology. The uncertainty of biological paternity combined with the social, moral, and legal approbation of the traditional family (two persons of the opposite sex reproducing), have created numerous means of establishing legal paternity, as well as a variety of legal tests to determine whether a man is the father of a child.

Prior to developments in genetic testing, the exact biological relationship between a father and his child was impossible to verify and

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{24}] Technologies of Procreation, supra note 6 at 14.
\item[\textsuperscript{25}] D. Farquhar, The Other Machine: Discourse and Reproductive Technologies (New York: Routledge, 1996) at 35ff.
\end{enumerate}
\end{footnotesize}
legal presumptions of paternity historically “reflect[ed] a need to compensate for the lack of certainty in the biological reality of paternity.”

At common law, the legal connection with the child’s mother rather than any direct biological connection with a child established paternity. According to the still-existent maxim *pater est quem nuptia demonstrant* (or, by marriage the father is demonstrated), if a woman was married at the time she gave birth, her husband was presumed to be the father of the child. No proof was necessary to establish the paternal relationship between a married man and a child born within that union. Precisely because the biological facts of paternity were unknowable, the legal presumption was based on a *social determination* about a man’s relationship with the mother of a child thereby sanctioning the courts to assume a set of biological facts.

The common law presumption did not operate in cases where evidence confirmed that the mother’s husband could not have been the biological progenitor of his wife’s child. A man presumed to be the father of a child could bring an action to disavow paternity for a child who was not his genetic offspring. Historically, the evidence required to rebut the presumption was proof of no intercourse beyond a reasonable doubt.

Regardless of how difficult this possibility of disavowing paternity was in fact, its import lies in the overt primacy of the biological tie for determinations of paternity. Although the presumption could be disavowed by the husband of the child’s mother, it could not be rebutted by any other man, even if he could prove he was the biological progenitor. Thus the biological anchoring of legal paternity was more elusive and illusory—legal truths were not always consistent with biological facts.

The historical presumption of paternity within a marital relation was very difficult to overturn because of the vested interest society had in “ensuring that a child was born into a family and would have the benefit of

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30 However, in several cases in the United States, the marital presumption was discarded when a dark-skinned child was born to a white woman married to a white man. See D.E. Roberts, “The Genetic Tie” (1995) 62 U. Chi. L. Rev. 209 at 259ff.
a legal mother and a legal father." Paternity by presumption—aptly referred to as “the legal fiction of biological fatherhood in marriage” preserves normative claims about the nature of marriage and family by codifying notions of the “naturalness” of sexual relations those between husband and wife. Legal truths were not always consistent with biological facts such that:

... what purports to be an inference about biological fact may actually grow out of a normative aspiration and may readily be transformed into a prescriptive command about marriage and family, often without acknowledgment that such a transformation has taken place. The important issue becomes not who is, but who should be having sex with the mother: her husband. Thus, the social construct, in fact normative and mutable, draws substantial but disguised legitimacy from the representation that it simply expresses "givens" of nature.

In both the context of paternity and maternity, the “idea of ‘nature’ has ‘come to mean biology’; therefore, the idea of relatedness has, to a large extent, been ‘biologized.’” However, in order to construe the existence of the paternal biological tie, law has had to examine and attend to the social relationships among men, women, and children.

Examining the category of “the bastard,” we can see how the law sought to uphold the norms of society against the facts of biology. The legal construct of illegitimacy illustrates the tenuousness of the biogenetic tie in determinations of paternity and the fact that paternity has always rested upon a selective construction of biological facts. While the legal status of illegitimacy has been eliminated in every Canadian province but Alberta, the concept remains important for an understanding of the social construction of paternity.

Historically, the law distinguished between legitimate, and illegitimate children as an illegitimate child was one who was “not only begotten, but born out of matrimony.” In other words, the bastard was a child resulting from unsanctioned sexual acts and was determined to be filius nullius, or the child of no one. Biologically, the notion that a child is

31 Mykitiuk & Sloss, supra note 27 at 362.
34 “Paternity Testing,” supra note 26 at 20.
35 Blackstone, supra note 28 at 454.
the child of no one and has no kin relations is an obvious absurdity. Within law, however, the illegitimate child literally had no legal relations and the rights held by illegitimate children at common law were very few. The biological links connecting a man to a child were all but irrelevant at common law unless they were accompanied by the legal relationship of marriage between that man and the child’s mother.\(^{36}\) Because they did not belong to a lineage, they could not be affixed with a legal surname, although one could be attained by reputation or as a nickname.\(^{37}\) An illegitimate person could not establish future biological lineage and, as a result of being “kin to nobody,” had “no ancestors from whom any inheritable blood could be derived.”\(^{38}\) Furthermore, illegitimate children were not eligible to inherit from their parents.

Whether a child was granted legitimate or illegitimate status had a direct bearing upon the rights and obligations attributed to a parent. The objectives of the rules of marriage were to “ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong.”\(^{39}\) Therefore at common law, the father of legitimate children had duties to maintain, protect and educate their children.\(^{40}\) The duty of maintenance, however, was understood to arise as a result of natural law, and was a direct result of the natural process of reproduction. At common law the biological progenitor of illegitimate children—even if only putative—had a duty of maintenance, notwithstanding the fact that he was not the child’s legal father. This historical obligation has influenced the current legal conception of paternity, and, more importantly, has become one of the accepted indicia of paternity.

The common law presumption of paternity and the construct of illegitimacy illustrate that paternity is social. Every aspect of the category of illegitimacy speaks of the primacy of legally sanctioned social norms over the alleged facts of biology and birth. Historically, law erased the body from paternity. Biology was presumed from the social relationship. However now, largely as a result of advances in DNA testing, the biological father asserts itself. When the paternal body is produced, we should examine the

\(^{36}\) For a discussion of the status of illegitimacy in relation to maternity see below.

\(^{37}\) Teichman, \textit{supra} note 29 at 36; and Blackstone, \textit{supra} note 28 at 459.

\(^{38}\) Blackstone, \textit{supra} note 28 at 459.

\(^{39}\) \textit{Ibid.} at 455.

\(^{40}\) \textit{Ibid.} at 446.
sites very closely. For the first time in the history of human reproduction, it is now possible to locate and “prove” biological fatherhood: that is, to situate with certainty the biological father within his body.  

Recent advances in genetic testing have offered fathers a double element of choice. A man who is not married to the mother of his child can choose to recognize that child as his own, while married men can choose to deny paternity on the basis of genetic evidence. As a result, the concept of legal paternity has become complex—it does not remain constant as the context in which it is rendered varies.

An analysis of the statutory provisions that determine the circumstances in which a man will be found a legal father, and of common law decisions in which legal paternity has been ascribed, demonstrates the complexity of the paternal relationship and of legal determinations of that status. Under Canadian provincial legislation there are several circumstances that result in a man being presumed to be the father of a child. These include: if the man was married to the mother of the child at the time of the birth of the child; if the man was married to the mother of the child and the marriage was terminated within 300 days of the birth; if the man married the mother of the child after the birth and acknowledged that he was the father of the child; if the man was cohabiting with the mother in a relationship of some permanence at the time of the birth of the child, or the child was born within 300 days after the person and the other ceased to cohabit; if the man has acknowledged paternity of the child and is so registered under the Vital Statistics Act or similar legislation; and finally, if the man has been found by a court of competent jurisdiction in Canada to be the father of the child. In most jurisdictions, any interested person may seek a judicial declaration of paternity. A man presumed to be the father of a child may bring an action to disavow paternity. Where the matter goes before the court, the birth registration (which may simply

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42 The presumption of paternity is difficult to overturn. The onus rests on the man contesting paternity to provide proof that he is, or is not, the father of the child. Biological evidence obtained through a blood test or genetic fingerprinting is usually the most compelling form of proof but the court does not always order blood tests. See T. Caulfield, “Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing” (2000) 46 Queen’s L.J. 67.

43 For details of particular provincial schemes, see Sloss & Mykitiuk, supra note 27 at 352 and n. 56.

44 Ibid. at 352 and n. 59.
reflect a presumption of paternity) may be used, in most jurisdictions, as *prima facie* proof of the facts recorded in it.45

Situations now arise where it is in the state’s interest to emphasize biological relatedness such as with the enforcement of maintenance obligations.46 In particular, determinations of paternity are highly contingent upon the social welfare policies of the state. As the importance of marriage has declined, the state has taken an interest in the economic well-being of children and sought to enforce paternal obligations of financial support, regardless of whether a marriage ever existed.47 To achieve this objective biological evidence is invoked in order to establish legal paternity.

There have also been recent cases which appear to explicitly state that the biological father is not the legal father of a child. Within adoption legislation, consent to adoption is not required by the biological father of a child in cases where he factually has neither a relationship with the child, nor the mother of the child.48 There have also been recent cases which appear to de-emphasize the paramountcy of biology over social connectedness.49 In these contexts, the courts construe “parenthood” as an issue of relationship, nurturance, shared experience, interdependency, and responsibility rather than merely biology.

Another instance of the legal recognition of non-biological ties is the doctrine of *in loco parentis* which has been developed in order to recognize those who voluntarily provide support or assume custodial duties for a child or children who are not legally his or hers.50 While the person

45 Ibid. at 352 and n. 63.
46 Paternity Testing, supra note 26 at 20.
47 The increasing emphasis on this in Canada, the United States and the United Kingdom, masks a concern with the burdening of the public purse in the guise of concern with the welfare of children. For an analysis of this trend in the United States, see J.L. Dolgin, “Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family” (2000) 32 Conn. L. Rev. 523.
48 See e.g. the consent provisions and the meaning of the term “parent” in Ontario's Child and Family Services Act, R.S.O. 1990, c. C.11, s. 137(1) [hereinafter CFSA]. For a detailed analysis of consent provisions within adoption statutes, see Mykitiuk & Sloss, supra note 27 at 356-57. See also S.(C.E.) v. Children’s Aid Society of Metropolitan Toronto (1988), 64 O.R. (2d) 311 (Div. Cl.) [hereinafter S.(C.E.)].
50 Mykitiuk & Sloss, supra note 28 at 395. The Divorce Act, R.S.C. 1985 (2nd Supp.) c. 3, s. 2(2)(b) refers to this type of parental status as one who “stands in the place of a parent.”
standing *in loco parentis* is not accorded full parental rights and responsibilities, he or she is legally recognized on the basis of the relationship that has developed between her or him and the child. Predominantly, this issue has received judicial consideration in the context of the relationships between men and children upon the re-combination of families. This is largely due to the high incidences of custody remaining with the mother of a child or children upon divorce, the increasing existence of single mothers, and the prevailing political and economic conditions in which law acts as an arm of the state, and looks for private sources of support. The bases for this type of relationship were articulated in the 1999 Supreme Court of Canada case *Chartier v. Chartier*. Financial support, emotional support, and the child’s relationship with his or her absent biological parent are taken into consideration. The Court also examined the extent of the child’s participation in the family unit, the level of interaction between the parent and child in terms of discipline and child responsibility to that parent, and the extent to which the child is represented by the adult “to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child.”

Notwithstanding examples of the legal means through which a man may become a father, these results cannot be categorized as indicating a particular judicial “trend” regarding determinations of paternity. Rather, the courts use the legal standard or indicia of paternity necessary in the circumstances of the case to reify the construction of family that law has traditionally favoured. In cases where a nuclear family appears to exist, law is willing to allow a man to be a father strictly on the basis of a social relationship. In cases where paternity is contested by two (or more) men, the law now often relies upon strict biological determinations in order to maintain the appearance of only one legal father. In circumstances where a child’s biological father is known but neither supports nor cares for the child, law is willing to recognize the limited social contribution of another man or men. Within family law decisions regarding the father/child relationship, the courts are and always have been willing to bestow paternal status upon men on the basis of either biological or social relationships. As a result, more and differently situated men are legally recognized as fathers, 

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51 [1999] 1 S.C.R. 242 [hereinafter *Chartier*]. Although the principle use of the doctrine of *in loco parentis* is meant for determinations of support obligations, the Court in *Chartier* discussed some of the relevant factors to be taken into account when assessing a parent-child relationship.

52 *Ibid.* at 261. Similar factors are considered in the context of “settled intention.” Although the financial aspects of a settled intention parent-child relationship are key considerations, courts also often consider the social, emotional, and psychological factors in the relationship.
or as having a significant relationship with a child deserving of legal recognition.

B. **Maternity: Mater est quam gestation demonstrat**

Until recently, courts have rarely been burdened with disputes about maternity. Women have been placed in a passive position in relation to their parental status resulting from the presumed biological inevitability of their reproductive role. Biology, including both genetics and the processes of gestation and birth, was historically paramount and decisive in the maternal context. This is reflected in the maxim *mater est quam gestation demonstrat* (or “by gestation the mother is demonstrated”). The notion that gestation is demonstrative of maternity has historically been applied, without qualification, to all births. Because birth can be witnessed, the biological and social/legal aspects of maternity have been construed as inextricably linked.

In order to articulate the constitutive elements of the legal construction of maternity, the relationship between maternity and paternity within a patriarchal society must be addressed. Maternity, as a legal category, has been articulated in the contexts of heterosexual monogamous marriage, and the system of patrilineal descent. Maternity in a patriarchal society is what mothers and babies signify to men. “Patriarchal kinship is the core of what is meant by patriarchy; the idea that paternity is the central social relationship,” In our society, the ideology of patriarchy provides us with an understanding not only of the relations between women and men, but also of the relations between women and their children. Mothers arise out of the act of male impregnation and, although they play a biological role, it is seen as secondary to the male contribution. In a patriarchal system, when people talk about blood ties, they are referring to a genetic tie or a connection by “seed.” This particular form of male domination does not attribute value to the maternal tie; rather, it focuses strictly on genetic linkages.

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55 Ibid, at 29.

56 Ibid. at 29-37.
Until women attained legal personalities, the definition of maternity was relevant to the legal status of a child only to the extent that law examined the relationship between the mother and father of a child. This situation of legal insignificance resulted in a jurisprudential void concerning the articulation of the ways in which a woman may legally become a mother. The mater est presumption rendered determinations of parental status problematic only in terms of a child’s relation to her or his father, a status which depended on whether the relationship between parent and child came into being within the confines of legal marriage. Thus, at common law and before modification by statute, a child born to a single woman was filius nullius, the child of no one: “... a bastard’s mother, being a woman, was in fact that very no-one. In law, lineage, and in matters having to do with property, a woman, until modern times, was a kind of nullity.”\(^57\)

The mother of an illegitimate child had a customary, if not legal, obligation to care for the child until which time she placed the child with an authority or the child was removed from her custody.\(^58\)

If a woman was married at the time she gave birth, her husband was presumed to be the father of the child. This presumption is based on the assumption that a woman’s husband was the only person who would have access to her reproductive capacities.

As a result, biological or genetic ties between parents and children have been accorded great legal significance. Since the relationship of caring and nurturing is not privileged within patriarchal conceptions of reproduction, legal maternity has been strictly in opposition and subordinate to paternity on the bases of both women’s biological contribution and their role as the gestators of the male seed. Further, because of the primacy accorded to the male biological contribution, legal maternity has taken on a secondary role, an essential component of which is the social relationship of caring for children.

Adoption provides a good example of one circumstance in which a child’s legal mother is not the biological mother. However, the operation of normative standards about heterosexual, monogamous marriage have resulted in the virtual elimination of the contribution of the biological birth mother in order to maintain the construct of the fertile nuclear family.\(^59\)

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\(^{57}\) Teichman, supra note 29 at 83.

\(^{58}\) Ibid. at 41.

\(^{59}\) According to Druclla Cornell, “[i]t is only in the context of a system of duties that remain bound up with women’s legal identity in the heterosexual family that we can even begin to understand the unequal treatment of birth mothers and adopted children.” See D. Cornell, “Reimagining
the appearance of a nuclear family with biological children to exist, the actual biological parents of the child must be removed from the life of the child. To accomplish this, statutory provisions contain standard adoption procedures in which the adoptive parents are substituted for the biological parent(s). All of the rights and responsibilities of the biological parent(s) are removed, and correspondingly attributed to the adoptive parents. This approach to adoption operates essentially as one of assimilation rather than one of acknowledged variation.

Before a child can be adopted, his or her legal parents or guardians must give legal consent. The notion that every parent must consent operates within statute to automatically include the child’s mother, but only to include the child’s father depending on the factual nature of his relationship with the mother. The requirement that a birth mother relinquish all rights and status as mother upon adoption is an illustration of the way in which the law perpetuates the woman/mother/motherhood construct as an indivisible category and role. In the context of adoption, legal determinations of the inability to act in accordance with societal definitions of motherhood have resulted in the denial and reassignment of legal maternal status. In addition, the types of behaviour acceptable for mothers have been at issue in many legal disputes both in adoption cases, and in other areas.

Adoption and Family Law” in Hanigsberg & Ruddick, eds., supra note 18, 208 at 211.

60 Step-parent adoptions are an exception, as the biological connection to one of the child’s parents remains intact.

61 Shultz, supra note 33 at 320. As Shultz notes: “…intention, rather than biology, is the basis for giving up or adopting a child, but an imagery of biology locked into conventional family forms has shaped the transaction. Neither the surrendering biological parents nor adoptive legal parents have had more than one choice about how to structure their relationship to each other or to the child.” Ibid.

62 S. Fodden, Family Law (Toronto: Irwin Law, 1999) at 97. For example, see the consent provisions and the term “parent” in CFSA, supra note 53.

63 Cornell, supra note 59. See E.N. Glenn, “Social Constructions of Mothering: A Thematic Overview” in E.N. Glenn, G. Chang & L. Forcey, eds., Mothering: Ideology, Experience and Agency (New York: Routledge, 1994) 1 at 13. According to Glenn, the conflation of woman with mother appears an undifferentiated and unchanging monolith. This exists in sharp contrast to the historical specificity, and variance of roles and contexts, in which men are linked to parenthood. The conflation of “woman” and “mother” reflects a fusion of actor and activity and has historically been one in which only women, or birth-mothers, are recognized as nurturers and caregivers. Further, Slaughter illustrates how language is pivotal to this discussion. “Mother” is a term that refers to two functions: childbearing and childrearing. Since women are usually both the primary childrearers and childbearers, the two functions are usually collapsed under this term. However, there is nothing in nature that requires women to “mother,” nor that which prevents men from doing so too. See M.M. Slaughter, “The Legal Construction of Mother” in M.A. Fineman & I. Karpin, eds., Mothers in Law: Feminist
The issue of step-parent adoption in the context of lesbian partnerships is another example of a situation in which the traditional legal construction of maternity has been expanded. In step-parent adoptions, same-sex partners may now adopt the “natural” child of their partner. Thus, two women may have a legal parental relationship with the same child. While in fact, a child may now have two legal parents of the same sex, the effect of a step-parent adoption continues to be the legal erasure of the third parent. The result is the continued legal insistence upon the two-parent family.

The common law understanding of maternity is supplemented by two types of legislative provisions. The first is found within vital statistics legislation, which commonly define “birth as the complete expulsion or extraction of the fetus (or product of conception) from its ‘mother.’” Second, each province has provisions that allow “any interested party” to seek a declaration that a person is or is not the mother of a child. The provisions are seen as a potential avenue for challenging the assumption that the woman who gives birth to a child is the child’s legal mother. In addition, women may apply for limited determinations of parental “rights”
or have obligations imposed upon them by gender neutral statutes pertaining to the responsibilities accorded to “parents.”

C. Gender Neutrality, Asymmetry, and Legal Discourses of Filiation

The tendency now in modern family legislation is to refer to “parents” rather than to mothers or fathers, maternity or paternity. One might think such language is a positive reform. However, gender neutrality treats parents as fungible and risks marginalizing the gendered aspects of legal norms that continue to influence legal reasoning. Within the context of filiation, the gender neutral language of parent must confront the fact that biology is itself asymmetrical with respect to the contributions of males and females to reproduction. But instead of acknowledging this difference in ideology, legal categories of filiation reflect differences of power between men and women, an asymmetry the legal categories of filiation transmit to the present despite reform to the statutory language and practice of family and marriage law.

The traditional uncertainty surrounding paternity and the presumptive knowledge about the “natural” mother underpin legal filiation. Historically, since paternity had to be constructed on a social relationship, fathers represented culture while mothers were equated with nature through the perceived biological certainty of maternity. Women are still accorded legal maternal status only if they are able to fulfil both the biological requirement and the normative behavioral requirements established within law. Law’s absolute alignment of maternity with “nature” has rendered the construct both unitary and indivisible. Moreover, the ability to choose to “recognize” offspring reflects asymmetrical power, as choice is available only to men. While a man has the power to actively recognize his offspring, a woman has no choice in the matter and is passively assigned the status of motherhood through the “facts” of birth.67

While the concept of maternity fuses genetic, gestational, and caregiving roles in a unitary construction of “natural” motherhood, the failure to care for a child “denaturalizes” a woman and renders her “unfit” as a mother. Whereas paternity is a construction allowing fatherhood to be established in a variety of ways—including choice—maternity is a unitary construction where women can be deprived of the status if both the biological and social roles are not fulfilled. This naturalization of maternity

67 Reproducing, supra note 4.
by law has precluded legal thinking about the distribution of maternity in a manner similar to determinations of paternity.⁶⁸

**IV. Filiation Revisited**

ARTs have rendered obsolete the biological order constructing the categories of filiation. “Nature” or biology cannot be held to be determinative when it is deliberately manipulated, however, traditional ideological constructions of maternity and paternity continue to inform legal principles binding adults to children. The concept of biology, which once provided a solid platform for determinations of parental status, has been shaken by advances in ARTs. Paternity is now determined, depending on the context of the parental claim, either on the basis of biological or social relatedness. With respect to maternity, the courts continued reliance on notions of biological imperatives has led to unpredictable legal decision making. Nor have provincial legislatures developed responses to issues, such as surrogacy, that challenge a simple biological ideal of maternity.⁶⁹

ARTs challenge the existing limited legal convention of maternity. They also challenge deeply held social norms:

> It is precisely the shifting realignment of maternity as closer to paternity that social conservatives all fear. When antiquated “natural” unified maternity confronts technology, the full range of maternal social relations can be reappropriated, rejected, or appreciated as the diverse historical and social phenomena they are.⁷⁰

Maternity is now visibly divided into genetic/chromosomal, uterine/gestational, and social/legal aspects.⁷¹ ARTs make it possible to separate the genetic, gestational, and rearing aspects of motherhood (and

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⁶⁸ By using the term “similar” here, I do not mean to suggest that I favour a similarly situated conception of formal equality. Quite the contrary. As one insightful external reviewer of this article noted, I want to argue that formal equality will get us nowhere because biology never has been and never will be the exclusively relevant factor in determinations of filiation. First, because biology has always had a significant ideological component in legal discourse and second, because formal equality assumes human relations can be reduced to a simplistic male/female dyadic equation. What ARTs do is to clarify that the male/female dyad no longer has a purchase as a “biological truth” about procreation and expose what has always been its ideological content. Thus, substantive equality in determinations of filiation will require an analysis more reflective of complex social and material relations and of the asymmetrical and diverse connections of multiple persons to a particular child.

⁶⁹ Art. 541 of the Quebec Civil Code renders surrogacy contracts void.

⁷⁰ Farquhar, supra note 25 at 35.

⁷¹ The process of ovum enucleation through which the nucleus of an ovum is replaced with the nucleus of another, expands the number of women who may be biologically related to a child.
the genetic and rearing aspects of fatherhood), resulting in a child with three women and two men with potential claims to the legal status of parent. A woman can either provide the genetic material (i.e., a gamete or ova) or carry the child or both. Furthermore, while it is true that the social and biological aspects of maternity are split in some circumstances (like gamete donations to a woman who intends to carry and raise the resulting child), it is also sometimes the case that the social and biological categories are blurred. This is especially true in the circumstances surrounding surrogacy arrangements. A woman who commissions a surrogate may have no genetic or bodily connection to the child produced, but views herself, in part, as responsible for initiating the child’s existence.\footnote{72} Breaking down maternity into three categories also highlights the conflation of the activities of mothering and the status of being a mother. In the case of social and/or legal mothering, it can be argued that both men and women can nurture and rear infants so that, technically, either a man or woman could be this type of “mother” to a child.

Conversely, it is now possible to impart biological certainty into determinations of paternity,\footnote{73} an area once fraught with uncertainty for men. Genetic and reproductive technology has enabled scientific verification of paternity at the very moment it forces us to reconsider maternity. The separation of the genetic and rearing aspects of fatherhood is, perhaps, less unique within law in so far as legal rules and presumptions have, for a long time, ascribed paternity to men in relation to children to whom they are not genetically connected. In recent paternity cases involving custody and support, biological relations have been granted priority.\footnote{74} However, a line of jurisprudence also exists in which the courts have not privileged biology over the best interests of a child.\footnote{75}
The advent of ARTs places the asymmetry of filiation law in sharp relief. Maternity is now indeterminate, while paternity appears certain. More than one woman can now be biologically or “naturally” related to a child and other women may provide a caregiving role. DNA testing can now provide absolute certainty of the identity of the genetic father. But the new indeterminacy of maternity comes about only in the unprecedented circumstances of having to select one mother among contributors to the heretofore fused indicia of maternity, while the certainty of DNA testing has not eroded the social underpinnings of paternal status. In the cases discussed below, courts have resisted defining paternity purely on a genetic basis. In contrast, since the social relationships between women and children were never accorded legal significance in the absence of biological ties, legal claims to maternity on the basis of social ties are still silenced. Norms have not developed to address the fragmentation of the female biological contribution among several women. Conditioned by the fused status of maternity, the legal process seeks to elevate a single claimant to the status of mother. The result is the restriction of the legal category of maternity to its historical content, and the virtual erasure of the claims to maternity of differently situated women within the assisted reproductive process. Evidence offered by nature is always selectively deployed in order to fulfill ideological ends.

A. The Paternity Cases

The cases of Low v. Low76 and Zegota v. Zegota-Rzegocinski77 involve men whose wives were impregnated through anonymous donor insemination with their consent and who later sought declarations of paternity under the Ontario Children’s Law Reform Act (CLRA).78 Low is the first case in Canada in which a declaration of paternity was sought in these circumstances. After consenting to artificial insemination with donor sperm and participating enthusiastically throughout his wife’s pregnancy, Mr. Low was certified as the child’s father under the Vital Statistics Act.79 Upon the breakdown of their marriage only days after the child was born, the Lows sought a divorce. While they lived separately and apart since the birth of

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77 [1995] O.J. No. 204, online: QL (OJ) [hereinafter Zegota].
the child, Mr. Low periodically visited the child, visits facilitated by several orders granting access. At the time Mr. Low brought an application for a declaration of paternity under the CLRA, he also sought an order for custody or, in the alternative, access pursuant to the Divorce Act. Despite the fact that Mrs. Low had agreed that Mr. Low stood “in the place of a parent” under the Divorce Act, she argued that an order for custody or access ought be denied. The trial court held that granting liberal access rights to Mr. Low was in the best interest of the child.

Mrs. Low also contested the declaration of paternity. She argued that artificial insemination with donor sperm rebuts the presumption of paternity under the CLRA as Mr. Low is not the child’s biological father. To support her claim, Mrs. Low relied on the language of section 1(1), which specifies that all persons are the children of their “natural parents,” and section 8(1)(3), which extends the presumption of paternity to “a person who marries the mother of the child after the birth of the child and acknowledges that he is the natural father.” These provisions suggest that Mr. Low must have a biological tie to the child in order to fulfill the statutory requirements of paternity. However, to clarify and interpret the intended meaning of declarations of paternity in the wording of sections 4(1) and 5, the Ontario Court of Justice interpreted the provisions as follows:

80 Divorce Act, supra note 50. Under s. 16, an application (i.e., an application for custody or access in relation to a child of the marriage) can be made by either or both spouses or by any other person. Pursuant to ibid., s. 2(2)(b), a “child of the marriage” includes “any child of whom one is the parent and for whom the other stands in the place of a parent.” Therefore, one can acquire quasi-parental rights and obligations under the legislation without being the legal parent of a child.

81 CLRA, supra note 78. Pursuant to the CLRA, there are two means by which a declaration of paternity can be granted. Section 4(1) permits “any male person having an interest” to apply for a declaration that he is “recognized in law” to be a father. Section 4(2) links the presumption of paternity under s. 8 to the legal declaration of paternity in this section. Where the court finds that a presumption of paternity exists under s. 8, and this presumption is not rebutted on the balance of probabilities, a declaratory order of paternity pursuant to s. 4 in favour of the presumed father shall be granted. A declaration of paternity can also be granted when a presumption of paternity does not arise. Section 5 allows any male person to apply for a declaration that he is the father of a child. When the court finds, on the balance of probabilities, that the “relationship between father and child” has been established, the court can make a declaratory order of paternity.

82 Ibid. Section 1 establishes equal status for children by abolishing illegitimacy: children born within and outside of marriage are considered the children of their “natural” parents.
sections suggests the intention of a meaning broader than mere “biological” father, in those sections... the declaration authorized in s. 4(1) is not that a male person is the “natural father,” rather that he is “recognized in law” to be the “father” of the child. This also suggests an intention of a meaning broader than merely the “biological” father... Nowhere in s. 5 is there any suggestion that the “relationship of father and child must have a biological and genetic character... I conclude that this expression must mean something broader than a mere biological relationship.

The provisions of the CLRA were broadly construed in order to make the paternal relation more than a “natural” or biological relationship with a child.

The court noted that while no Canadian jurisprudence exists that establishes the husband of a woman inseminated with donor sperm is the father of the child pursuant to section 5, a number of United States cases have come to this conclusion. The court stated that a declaration of paternity under section 5 would be issued. While, on the facts, the presumption of paternity under sections 8(1)(1) and 8(1)(5) was raised by both Mr. Low’s marriage to Mrs. Low at the time of birth, and the certification of his paternity under the Vital Statistics Act, the court chose not to consider whether or not the presumption of paternity is rebutted by donor insemination. It would have had to consider this if it had followed a subsection 4(2) analysis. But it avoided this consideration by making a declaration of paternity pursuant to section 5.

In Zegota, the trial court also allowed the social, or intending, father to assert paternal status through a declaration of paternity. Like Low, the wife within a married couple conceived through artificial insemination with donor sperm. The parties, however, separated before the child was born and Ms. Wakeman wanted to deny access to Mr. Zegota. Mr. Zegota sought a declaration of paternity and asserted a claim for access, while Ms. Wakeman sought a declaration that Mr. Zegota was not the father of her child, Robin.

By virtue of the fact that he was not Robin’s “natural or biological father,” Ms. Wakeman asserted that Mr. Zegota “[did] not qualify as a ‘parent’ at law.” The court not only declared that Robin was a child of the marriage pursuant to the Divorce Act, but also that Mr. Zegota was father

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83 Low, supra note 76 at 113.
84 The court relied upon section 10 of the Interpretation Act, R.S.O. 1990. c. I-11, which authorizes the fair, large, and liberal interpretation of statutes for the public good.
85 She was also known by her former married name, Zegota.
86 Zegota, supra note 75 at 388.
of the child and should receive liberal access rights. Mr. Zegota’s marriage to Ms. Wakeman at the time of Robin’s birth raised the presumption of paternity under section 8(1)(1). However, the trial court declared Mr. Zegota to be the father pursuant to section 5, which pertains to circumstances where there is “no person recognized in law” to be the father of a child. The court adopted the reasoning of Low without providing any additional reasoning concerning how the relationship of father and child had been established on the facts of this case, as required under section 5 or why a declaration under section 4(2) was not granted when indeed, a presumption of paternity had been raised because the parties were legally married at the time of the birth.

The assertion that artificial insemination rebuts the presumption of paternity, made in both Low and Zegota, has yet to receive direct judicial comment. This is likely due to the desire of the courts in certain situations to apply the presumption of paternity even in light of the biological certainty of paternity. The courts appear reluctant to state unequivocally that paternity can be determined on a purely biological or genetic basis even though biological certainty in the realm of paternity can now be established beyond question. In both Low and Zegota, although the presumption of paternity was raised, rather than examining whether in fact Messrs. Low and Zegota were the “fathers” of the children on the balance of probabilities, the courts opted to forego the section 4(2) analysis in order to engage directly with the section 5, declaratory provision. This may also have occurred because of the absence of a biological “father” in the lives of these particular children. These cases demonstrate that even in light of technological developments in the area of reproduction, many situations exist where it is desirable for the court to preserve the socially-based paternal relations established within law. However, in order to keep these provisions operative in cases where the courts do want to find the biological father the legal father of the child, the courts have had to avoid ruling on whether the presumption of paternity is rebutted in cases of donor insemination.

Johnson-Steeves v. Lee\textsuperscript{87} illustrates court recognition of the biological progenitor as the father of a child regardless of the existence of an accompanying legally-recognized social relationship between the man,
woman and child.\textsuperscript{88} Ms. Johnson-Steeves and Dr. Lee had a longstanding, platonic friendship before they agreed to conceive a child through sexual intercourse. Ms. Johnson-Steeves intended the arrangement to be analogous to that of a donor insemination where she maintained custody and primary decision-making powers; both parties understood that Dr. Lee would provide financially for the child and not be the primary decision-maker. After the birth of Nigel, disagreement arose about whether Dr. Lee should have access as he desired. Ms. Johnson-Steeves sought an order of permanent custody, an order that Dr. Lee be denied access to Nigel, and an order for child support pursuant to Alberta’s \textit{Domestic Relations Act (DRA)}.\textsuperscript{89} Under section 56(1) of the \textit{DRA}, a mother or father may apply to the court for an order for a right of access. The court may make, “any order it sees fit” regarding the custody of a child and the right of access of either parent. Dr. Lee contested the no access claim on the grounds that it was not in Nigel’s best interest.

To determine whether Dr. Lee had the right to assert a claim for access to Nigel, the trial court turned first to the definition of “father” in the \textit{Parentage and Maintenance Act (PMA)}\textsuperscript{90} and found Lee was the biological father of the child as defined under section 1(g). After determining that Dr. Lee was indeed the “father” for the purpose of maintenance, the court then held that he may apply for a right of access pursuant to the \textit{DRA}.\textsuperscript{91} In so doing, Dr. Lee was also recognized by the court as Nigel’s “parent.” This distinction seems to arise from the interpretation of section 56(1)(a) of the \textit{DRA} which refers to the mother and father of the child as well as its “parents.” The court characterizes Dr. Lee’s relationship in response to Ms. Johnson-Steeves argument that it is essential to maintain the difference between biological and social fathers.\textsuperscript{92} Biological fathers, in

\textsuperscript{88} Legally recognized relationships are marriage or cohabitation within a relationship of “some permanence.”

\textsuperscript{89} R.S.A. 2000, c. D-14.

\textsuperscript{90} R.S.A. 2000, c. P-1.

\textsuperscript{91} Surprisingly, the trial court judgment did not discuss or analyze the relevant provisions of the \textit{DRA} as applied to the facts of this case. The court of appeal only clarified this omission to the extent that it located the decision as resting upon Part 9 of the \textit{DRA}, \textit{supra} note 89, entitled “Establishing Parentage,” which sets out the circumstances in which declarations of parentage can be made. It is uncertain, however, whether the court actually declares Dr. Lee to be Nigel’s legal father pursuant to what was then s. 64(1) (now s. 79(1)). Since the issue at hand was access, and not a determination of full legal paternity, both courts appear to have skirted the issue.

\textsuperscript{92} The court of appeal declined to consider whether such a distinction should be adopted in Alberta. \textit{Johnson-Steeves C.A., supra} note 87 at para. 20.
her view, do not act as a “parent” to the child and should therefore not have an entitlement to access: “... where there is not a relationship between the parties and no intended relationship between the parties then it is not in the child’s best interest to create a social father from a biological father.”93

Using the doctrine of equitable estoppel, Ms. Johnson-Steeves argued Dr. Lee’s access rights should not be recognized because he had no social relationship with Nigel. Both courts held Dr. Lee was not estopped from seeing the child. Rather, both courts found it was Ms. Johnson-Steeves’ active and express denial of his constant requests to visit Nigel that resulted in the tenuous relationship. The court of appeal acknowledged the most glaring inconsistency with the simple sperm donation argument was Dr. Lee’s agreement to financially support the child and found it was “incomprehensible” that anyone would want to financially support a child without intending to develop a relationship.94

Ms. Johnson-Steeves, on the other hand, sought to deny access to Nigel on the basis of her belief that, if the courts were to confer a right of access upon Dr. Lee, her chosen “family” form would be threatened. The notion that a woman should be able to choose to have a child who does not have, in law, a father is entirely valid for this author but the court was of the view that “society and biology have not yet reached the point where we have dispensed with fathers or mothers completely. They form an integral part of each child’s life whether or not they reside with their children.”95 It would seem that in situations characterized by the absence of a man who has developed a socially based paternal relationship with a child, when the courts are able to identify a biological father they are most likely to do so. It is also obvious that the court did not want to change the “nature” or structure of the legal family or recognize its continuing social transformation. However, the existence of familial relationships between lesbian or gay partners and their children, those of single parent families, and families created through the use of ARTs provide ample evidence to the contrary.

The claim by Ms. Johnson-Steeves that she had created a family without a legal father was problematic on the facts of her case because Dr. Lee did not seek legal recognition as the child’s father, but only the limited parental right of access. The fact that the courts recognized Dr. Lee as

93 Johnson-Steeves Trial, supra note 87 at para. 48 (emphasis added).
94 Johnson-Steeves C.A., supra note 87 at para. 16.
95 Johnson-Steeves Trial, supra note 87 at para. 53.
Nigel’s “father” as a result of the operation of the statutes involved in the claims regarding access, in combination with Ms. Johnson-Steeves’ desire to have a maintenance obligation affixed upon the man she considered to be “a sperm donor,” resulted in a decision that awarded access on the basis of a finding of legal paternity, a standard not required for the determination of limited parental rights or responsibilities.96 When determinations of legal paternity are not at issue, the relationship between the man’s responsibility of providing maintenance for a child, and the issue of whether he should then be afforded access on that basis, is not complicated. Financial maintenance for a child by a man should not automatically vest in him a right of access, contrary to the court of appeal in Johnson-Steeves.97 Both the man’s relations with the child, and the mother need to be assessed by the courts because men often use the right of access to assail a functioning, non-traditional family.

Johnson-Steeves will likely serve to continue to limit the ability of women to create families without legal fathers. Women who try to create “fatherless families” are faced with inconsistent legal results depending on whether the source of the sperm used for conception is known. In cases of known donors, law operates to thwart attempts by women to create non-traditional families in circumstances even where the parties have agreed that the man will not play a role in the child’s life. The current construction of family legislation, and the interpretive approach used by the courts always leaves open the possibility of finding fathers, or at least conferring parental rights and responsibilities on a male figure. Women, in the case of anonymous donation, can opt to have a fatherless family precisely because the man has expressly chosen not to be recognized as the father. Moreover, single and lesbian women are often denied access to anonymous donor sperm, resulting in certain rights being accorded to a known donor whether these women want this or not.

96 See Goudie v. Goudie, [1993] B.C.J. No. 1049. See also, Keeping v. Pacey, [1996] O.J. No. 2274 (C.A.). Both cases demonstrate that a biological tie is not required for a man to acquire certain parental rights to, and responsibilities for a child such as maintenance and access. In these cases, actual paternity was not at issue, rather the courts had to determine whether the men had a sufficient social relationship with the children to establish legal rights and duties.

97 This assertion has to be made in light of the understanding that the financial support obligations for children do not establish the type of relationship that should fall upon individual men in the absence of a relationship with the child; this should be a responsibility of the state. Where a man is compelled to pay maintenance, in order for him to assert a right of access (or another parental right), he must have a social relationship with the child. This view conforms with the ruling in S (C.E.), supra note 48, and several American cases. See e.g. Lehr v. Robertson, 463 U.S. 248 (1983); and Matter of Robert O. v. Russell K., 604 N.E. 2d 99 (N.Y. 1992).
Low, Zegota, and Johnson-Steeves illustrate the various ways a man may legally become a father while presenting maternity as absolute and verifiable. Statutes, presumptions of paternity and declarations of paternity all incorporate notions of social and biological relatedness and appear to be flexible in their application of standards depending on the operative relationships within a particular case. At present, statutes preclude the creation of alternative family forms, and alternative versions of relatedness by preserving men’s choice whether or not they desire legal recognition. Law needs to better account for the motivations of the parties to the conception of a child in order to determine the significance of the relationships created.

B. The Maternity Cases

In Buist v. Greaves,98 the lesbian co-mother of a child asked the court for a declaration under section 4 of the Children’s Law Reform Act (CLRA) that she was a mother of a child conceived by artificial insemination and gestated by her former partner. Buist also asked the court to grant an order for sole or joint custody of the child and an order that he not be removed from Ontario by his biological co-mother who sought to relocate to British Columbia. Ms. Buist was not asking the court to recognize her as Simon’s sole mother. Instead, she asked the court to recognize that Simon had two legal mothers based on her active and involved caring for Simon.

To support this position, Buist pointed to the “precedent for a child having two mothers in the case of same-sex adoption.”99 In refusing to declare Ms. Buist a co-mother, the Ontario Court of Justice stated that the language of section 4, and specifically the use of the definite article “the” before “mother,” indicates that the drafters of the legislation intended that

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99 Ibid. at para. 34. For a discussion of the legal recognition of same sex step-parent adoption see below. Note the court does not explicitly state that the children in question in Re K have two legally recognized mothers. Whether intentionally or not, they state only that the definition of spouse in the Human Rights Code, which is incorporated into the Child and Family Services Act, violates s. 15(1) of the Charter of Rights and Freedoms by denying to gay or lesbian people the right to apply for adoption as a couple. The legal concept under dispute in the step-parent cases and legislation is that of spouse, not maternity, paternity or filiation. Technically, there is no jurisprudence which states that a child has two legal mothers. Of course, the effect of an adoption order (including an adoption order in the context of a step-parent adoption) is to confer all of the rights and responsibilities of legal parenthood on the individual adopting the child(ren), and the birth of certificate of the child is altered to reflect this but courts and legislatures have avoided express alternation of the underlying basis of the construction of maternity and filiation.
only one person could be the mother of a child. Moreover, even if it was possible for the courts to make such a declaration, Ms. Buist had not satisfied the court on a balance of probabilities that the relationship of mother and child has been established as required by section 4(3).\textsuperscript{100} To make this conclusion, Justice Benotto was particularly persuaded by what he referred to as “Simon’s perspective”: the fact that Simon called Ms. Greaves “mama” but called Ms. Buist “gaga,” which is short for Peggy, and that when he was with Ms. Buist for extended periods of time without Ms. Greaves, he became distraught. Of additional significance to the court was the finding that Ms. Buist did not refer to Simon as her son until after the separation of the parties and that during the relationship when Simon was sixteen months old, Ms. Buist, a lawyer, drafted and commissioned a Statutory Declaration sworn by Ms. Greaves which included the following sentence: “[There is no other parent of [Simon] who is known to me or who has any legal claim for parental rights including custody.” The court held that while the relationship between Simon and Ms. Buist was very close, Simon considered Ms. Greaves his mother.\textsuperscript{101} Moreover, even if the court had the jurisdiction to declare that a child could have two mothers under section 4, it would not have exercised its discretion to do so in these circumstances.

The case of co-mothering in \textit{Buist} highlights the court’s inability to extend legal motherhood to more than one woman, and, in comparison with the paternity cases discussed earlier, demonstrates the limited way(s) in which a woman may acquire parental status. If Ms. Buist had been a man, she would have been favourably situated to claim legal status as a co-parent, and the legal avenues available to her in which to do this would have been much greater.

In the United States, the courts have considered legal determinations of maternity in a greater number of cases. \textit{Johnson v. Calvert}\textsuperscript{102} involved gestational surrogacy and the claim for legal parenthood

\textsuperscript{100} \textit{Ibid.} at para. 35. This provision states that “[w]here the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.” Section 4(2) provides that “[w]here the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.”

\textsuperscript{101} \textit{Ibid.}

status of the surrogate mother against the non-biological, or intending mother, and the father of the child. Anna Johnson was a woman of African American, Aboriginal and Irish heritage. She worked as a vocational nurse at the same hospital as Crispina Calvert, a registered nurse of Filipino heritage. Johnson contracted to gestate and give birth to an embryo formed by the sperm of Mark Calvert, who is white, and the ovum of his wife Crispina. There was a falling out during the course of the pregnancy and both parties filed suit approximately one month before the child was born, each seeking a declaration of legal parenthood in their favour. Johnson based her claim to maternity on the fact that she gave birth to the child. The Calverts claimed that Crispina's genetic relationship to the child established that she was the mother. In California, a child can have only one “natural” mother under law.

The case illuminates two key concerns. The first is that restrictive legal definitions of “mother” can intensify oppression for women who are poor and who face racial discrimination. The second is the alacrity with which the courts relied on genetic evidence to establish filiation in this case. In a social climate where genetic explanations of individual characteristics and behaviour are given increasing prominence, courts may tend to rely on genetic evidence to establish filiation.

The trial court ruled in favour of the Calverts, finding that they were the natural parents of the child irrespective of the gestational role played by Johnson because they had provided both the ovum and the sperm.\[103\] Despite recognizing the novelty of the circumstances, the California Court of Appeal affirmed the trial court decision. The decision was based upon the results of blood tests which, predictably, showed no genetic link between Johnson and the child. On this basis, the court held that Johnson could not be the “natural” mother of the child. For the first time, however, the court acknowledged that two women had legitimate claims to motherhood based on biological links to the child.\[104\]

The appeal court resolved Johnson’s claim to maternity on the basis of section 895 of the Evidence Code which directs courts to determine paternity on the basis of credible expert evidence and verified blood tests. The court concluded that:

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\[104\] In other cases in which the custody of children was contested in the context of a surrogacy arrangement, the principle that the woman who gives birth is the natural mother of the child was not questioned. See e.g. Matter of Baby M., 537 A.2d 1227 (1988); and Adoption of Matthew B.-M., 232 Cal. App. 3d 1239 (1991).
We must “resolve” the question of Anna’s claim to maternity as we would resolve the question of a man’s claim to (or liability for) paternity when blood tests positively exclude him as a candidate ... section 895 determines who is the “natural” mother of the child. We must conclude it is not Anna.\footnote{Johnson, C.A., supra note 102 at 376 [emphasis added].}

Relying upon gender neutrality provided for in the Uniform Parentage Act (\textit{UPA}),\footnote{\textit{Cal. Civ. Code}, Part 7, Division 4, (§§ 7000-7021), online: WL (CA CIVIL). The \textit{UPA} bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents.” See \textit{Johnson C.A.}, supra note 102 at 374, n. 14. According to § 7015: “any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.”} the court applied the same standards used to determine the natural father to determine the natural mother. In so doing, it refuted Johnson’s claim that she was the “natural” mother on the basis of blood test evidence.

As has been noted in many other contexts, often the greatest inequalities result from treating unlike situations in a like manner. Even with the advent of ARTs, the biological contribution of men is limited to the provision of genetic material. However, a woman’s biological contribution embraces both the provision of genetic material and gestation. Johnson argued that she was the child’s mother as a result of gestation and giving birth. The court, however, erased her bodily contribution to the creation of the child by relying on section 7003 of the \textit{UPA}\footnote{\textit{Ibid.}, § 7003 suggests that “[b]etween a child and the natural mother it may be established by proof of her giving birth to the child, or under this part.” (emphasis added)} and, digging in its heels, concluded that “with the exception of this and the relatively few other ‘gestational’ surrogacy cases, the ‘natural mother’ is always the person who gives birth to the child. The statute does not say that the woman who gives birth to the child is the natural mother.”\footnote{Johnson C.A., supra note 102 at 377.}

The court refused to interpret this section to say that the woman who gives birth to a child is \textit{automatically} the natural mother, preferring to hold that it only offers a woman whose maternity was disputed one way to establish a parent-child relationship.\footnote{\textit{Ibid}. at 377.} Surprisingly, the court went on to recognize that, “[t]he fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological
bond.”  This insight, however, was used to uphold the importance of genetics—not gestation—as a powerful factor in the creation of human relationships.

The court also devalued opinions which supported the position that genetics alone should not be the exclusive factor in determining parental rights. Instead, they remarked on the uniqueness and importance of the genetic contribution, rendering the contribution of the surrogate literally without value. It appears, on this reasoning, that “any womb” will do.

The majority of the supreme court of California affirmed the decision of the court of appeal. However, the supreme court disagreed with the court of appeal’s reading of section 7003(1) of the Civil Code. It did not interpret the statute as requiring a woman to first demonstrate through blood test evidence that she is the “natural” mother of a child before her evidence of having given birth can establish that she is the child’s natural mother. The court held that it is not true that only a “natural” mother can attempt to establish a mother and child relationship by having given birth. Both giving birth and genetic connection as means of establishing a mother-child relationship, were found to exist as alternative methods of proof under the statute. On the issue of who the “natural” mother is according to the UPA, the California Supreme Court held:

[I]n our view, the term “natural” as used in subdivision (1) of Civil Code section 7003 simply refers to a mother who is not an adoptive mother. Section 7003 does not purport to answer the question before us, i.e., who is to be deemed the natural mother when the biological functions essential to bringing a child into the world have been allocated between two women.

110 Ibid. at 380-81.

111 The amicus curiae brief from the American Civil Liberties Union Foundation of Southern California argued that the “fundamental rights of intimate association and procreative choice exercised by all of the parties” require that genetics alone not be the “exclusive factor in determining parental rights.” Ibid. at 378. As well, the court brusquely dismissed the opinion of the Committee on Ethics of the American College of Obstetricians and Gynecologists who argued that “the genetic link between the commissioning parent(s) and the resulting infant, while important, [are] less weighty than the link between surrogate mother and fetus ... .” Statutory interpretation, according to the court, did not encompass “what a group of doctors, however distinguished and learned in their field, think the law ought to be.” Ibid.

112 Johnson, Sup. Ct., supra note 102.

113 Ibid. at 499.

114 Ibid. (emphasis added).
Each woman had presented acceptable proof of maternity, the court reasoned, and it then inquired into the intention of each in order to resolve the dispute.\textsuperscript{115} The court found that but for the intention of the Calverts to have a child who was genetically related to each of them, the child would not exist and the situation was therefore not one in which the Calverts donated a zygote to Johnson.\textsuperscript{116} Although Johnson agreed to gestate the child, the court found that it was the parties intention to bring the child into the world for Mark and Crispina, and that Crispina intended to be, and was, the child’s natural mother. Thus, on the matter of the splitting of the functions of maternity between two women, the supreme court argued that:

... although the Act recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship, when the two means do not coincide within one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of the child that she intended to raise as her own—is the natural mother under California law.\textsuperscript{117}

Declining to change the zero-sum results brought about by law, the supreme court concluded that:

[A]ny parental rights Anna might successfully assert could come only at Crispina’s expense. As we have seen, Anna has no parental rights... and she fails to persuade us that sufficiently strong policy reasons exist to accord her a protected liberty interest... when such an interest would necessarily detract from or impair the parental bond enjoyed by Mark and Crispina.\textsuperscript{118}

In \textit{Re Marriage of Moschetta}\textsuperscript{119} involved a traditional surrogacy arrangement where the courts had to determine which woman—the “intending mother” or the surrogate—should be found the child’s legal mother. In this case, the surrogate was factually understood to be the child’s “natural” mother. The matter to be determined, however, was whether in the absence of a formal consent to adoption by the surrogate, the surrogacy

\textsuperscript{115} Justice Kennard, in dissent, presented an excellent critique of an “intent-based” test and argued instead for a “best-interests” test for these kinds of cases. See \textit{ibid.} at 506-519. One of the perverse results of the intention rule would be that in situations were the intended mother “withdraws” her intention to have or raise the child, the gestational mother might be viewed as a legal stranger to that child who would then be left without a legally recognized mother.

\textsuperscript{116} \textit{Ibid.} at 500.

\textsuperscript{117} \textit{Ibid.} (emphasis added).

\textsuperscript{118} \textit{Ibid.} at 504.

\textsuperscript{119} 25 Cal. App. 4th 1218 [hereinafter Moschetta].
agreement between the parties could be enforced by the court which would effectively deprive the surrogate of her legal parental tie to the child.

In 1989, Elvira Jordan was artificially inseminated with the sperm of Robert Moschetta. Robert and Cynthia Moschetta, a married couple, desired a surrogacy arrangement because of Cynthia’s infertility as well as their desire to have a “biologically related” child. In exchange for $10,000, Jordan promised to assist the Moschettas in adopting the child and give them sole custody. During Jordan’s pregnancy, however, the Moschettas experienced marital problems, a situation Jordan only learned of when she began labour. After the birth of the child, Marissa, Jordan initially refused Robert access to the child for two days while she reconsidered the surrogacy agreement but, upon the Moschettas’ promise to remain together, Jordan allowed them to take the child home. Within seven months, Robert left the family residence with Marissa.

At trial, all parties agreed as to the unenforceability of the surrogacy contract. The trial court held that Robert Moschetta and Elvira Jordan were Marissa’s legal parents and granted them joint legal and physical custody on that basis. On appeal, Robert challenged the determination of Jordan’s legal parental status by alleging an abuse of discretion on the part of the trial court and by contending that the surrogacy contract should, in fact, be enforced. He argued, on the basis of the Uniform Parentage Act (UPA), that Cynthia Moschetta was the legal mother of the child.

In Moschetta, since both the gestational and the biological aspects of maternity were located within the same woman, the trial court held that parentage was easily resolved in favour of Jordan under the terms of the UPA. The court, following Johnson, looked to the presumption of paternity embedded in the UPA as extended to the mother: “insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship.” Whereas in Johnson, both women could demonstrate a “natural” connection to the child and therefore no examination of presumptions was necessary, in Moschetta, the maternal claim made on behalf of Cynthia Moschetta was novel as it was based upon the existence of a purely social relationship.

Moschetta argued that although Cynthia and Elvira were equally the mother of Marissa, Cynthia actually intended to be the child’s mother.

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120 Ibid. at 1223.
121 Johnson, Sup Ct., supra note 102 at 498.
and, according to the Supreme Court of California in Johnson, should be found so. But, according to the California Court of Appeal, Cynthia was not equally situated to Elvira because she was not biologically related to the child and was therefore not the mother “at all.”122 Relying next on section 7541 of the UPA,123 Moschetta attempted to interpret the presumption as gender-neutral so that “husband” and “wife” could be interchanged with the result that the child of a husband cohabiting with his wife should be presumed a child of the marriage. The court rejected this interpretation because it was not absolutely conclusive and could be defeated by blood tests showing that the husband is not the genetic father of the child.124 The trial court had, on its own motion, ordered blood tests establishing Elvira Jordan as Marissa’s genetic mother which, in combination with the undisputed fact of Cynthia’s infertility, led the court of appeal to conclude, “genetic parenthood established by blood tests trumps a presumption based on the cohabitation of a married couple.”125

Robert also argued on the basis of section 7611(d) that Cynthia should be presumed the child’s natural mother because she held the child out as her own.126 The court of appeal found the argument wholly “unpersuasive.” Cynthia’s infertility entailed that she could never hold Marissa out as her “natural” child given the absence of biological, natural and genetic connections.127 Moreover, the court held that a more fundamental reason the argument did not succeed was the statutory presumption of paternity does not “reasonably apply” to surrogacy cases because:

122 Moschetta, supra note 119 at 1224.
123 12 Cal. Fam. Code § 7540, online: WL (CA FAM). The provision states that “the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”
124 Moschetta, supra note 119 at 1222-26. The court also read in the exception to the presumption contained within 12 Cal. Fam. Code § 7541, online: WL (CA FAM) concerning the primacy of blood-test evidence in defeating a finding of paternity.
125 Moschetta, ibid. at 1225. It is essential to note that the courts do not always order blood tests, especially in light of the existence of a marriage or marriage-like relationship between the parties who hold themselves out to be the parents of a child.
126 12 Cal. Fam. Code § 7611(d), online: WL (CA FAM) states that “a man is also presumed to be the natural father of a child if he receives the child into his home and openly holds out the child as his natural child.”
127 Moschetta, supra note 119 at 1226. In this brief, disturbing and close to tragic conclusion, the court failed to understand the nature of the presumption which is that it is not essential that the parent actually have a biological or genetic tie to the child; rather, the question is whether that parent has behaved in such a manner as to recognize the child as his or her own.
of the absence of doubt as to the identity of the natural mother. There is no question of biological parenthood to settle. Unlike the context of illegitimacy from which the presumption arose, in surrogacy there is no need to resort to presumptions. All parties know who gave birth and who is genetically related to whom.  

The court interpreted the presumption in light of the history and legal status of legitimacy where legitimation occurred if a man “received” a child into his household. This interpretation becomes increasingly problematic when the court goes on to state that “[w]hile the legal status of illegitimacy has been abolished, the presumption has been retained because it continues to serve the function of settling questions of biological parenthood. In essence, it removes the doubt as to the identity of a child’s biological father.”

The court appears to imply that it is always the biological father who “receives” the child into his family. However, when this presumption arises, the man who “holds out the child as his natural child” is not necessarily the child’s biological father. Judicial determinations concerning “doubt as to the identity” of a child’s father are based on an assessment of a man’s behaviour toward a woman and her child and do not always depend on a finding of biological relatedness. This is the reason for continued existence of the presumption precisely because courts want to sanction social relationships between men and women and men and children that mimic that of the traditional family.

Within Robert’s argument about the way in which Cynthia “held out the child as her natural child,” the court read the presumption as only operating to legitimate a child born outside a legal marriage when recognized by its “natural” parent. However, Robert attempted to use the presumption to allow the recognition of a non-biological mother as a legal parent where she had an established social relationship with the child’s father and the child—thus, the very notion of “holding out” the child as one’s own. The court was not willing to interpret the presumption in this manner.

The court’s notion of the appropriate application of the presumptions of paternity to a determination of maternity did not result in the achievement of substantive equality for Cynthia Moschetta. Rather than construing the presumption as one which also serves to sanction social relationships between adults and children, the court articulated its application to the facts in a narrow and asymmetrical manner. By retaining

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128 Ibid.
129 Ibid. at 1226 [emphasis added].
the requirement of a “natural” (i.e., a genetic or gestational) connection for a woman to be legally recognized as the mother of a child, the court failed to recognize the uncertainty of maternity. This uncertainty is similar to the historically uncertainty of paternity, except the uncertainty of maternity entails distinctly social and biological components that are not necessarily situated within one woman.

In addition to the fragmentation of maternity along biological lines, new relationships are being created between women and their non-biological children. However, judicial recognition of different “kinds” of mothers with causally different—or apportioned—legal parental rights has not yet followed. As a result of the decision in Moschetta, courts in the United States are blatantly willing to accept inequality of result in cases involving “traditional” and gestational surrogacy. The court of appeal appeared to accept this result:

... we are not unmindful of the practical effect of our decision in light of Johnson v. Calvert. Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman’s womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honoured in a court of law. For them and the child, biology is destiny.\footnote{130}

The court firmly held that the law, as it stands, “compelled” the affirmation of the judgment that Robert Moschetta and Elvira Jordan are Marissa’s legal father and mother. I argue, however, that the court felt compelled because of a short-sighted interpretation of the current statutory presumptions of paternity and an ideological predisposition to limit the maternity presumption to one that is based on the notion of “naturalness.”

\textit{McDonald v. McDonald}\footnote{131} is a divorce case where the wife sought a judicial declaration that she was the natural mother of the two children of the marriage for the purposes of resolving the issue of custody. Because she conceived through in vitro fertilization, she was considered the gestational, not the genetic, mother. The husband sought sole custody of the children on the grounds that he was the “only genetic and natural parent available to the children.”\footnote{132} He asserted that his wife was not the

\footnote{130} Ibid. at 1234-35. 
\footnote{131} 196 A.D. 2d 7., online WL (AD) [hereinafter \textit{McDonald}]. 
\footnote{132} Ibid. at para. 7.
“natural” mother of the children since she had used donor eggs to become pregnant. On this basis, he also sought a declaration that the children were “illegitimate... or, in the alternative, should such children be found to be... [his], that custody be granted to [him].” 133 The Supreme Court of Queen's County held that Mrs. McDonald was undisputably the children’s birth mother and granted her full custody pending trial. The Appellate Division of the supreme court perceived a Johnson-like factual scenario involving 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 ...”. 134 This line of reasoning, originating from Johnson enabled the court to designate Mrs. McDonald the natural mother of the children. Needless to say, the fact that only one woman is asserting a claim in McDonald is determinative and provides a crucial contrast to Johnson and Moschetta.

The case of Jaycee Buzzanca presents a legal conundrum as it involves up to eight persons to whom parental rights and responsibilities could be affixed. Jaycee Buzzanca was conceived from the ova of Erin Davidson, fertilized with the sperm of Mr. X, implanted in the uterus of Pamela Snell in 1994, and born in 1995. A contract between Pamela Snell and her husband, and John and Luanne Buzzanca, stated that upon birth Jaycee was the Buzzancas’ child. Four weeks before her birth, John Buzzanca initiated proceedings to terminate his marriage to Ms. Buzzanca alleging that the marriage had produced no children. In response, Luanne Buzzanca countered that the couple was expecting a child by way of a surrogacy contract and argued that Mr. Buzzanca, as the legal father of the child, should be responsible for child support. Given the factually complicated context, uncertainty abounds: Is the mother the woman who gestated the child and gave birth to her (the traditional answer)? What about the woman who contributed the ovum? Or the woman who wanted the child as her own? Is the father the person married to the woman who gave birth according to the common law? Is he the man who contributed the sperm? Or, is he the man who was married to the person who “commissioned” the child?

The trial court determined that Mrs. Buzzanca was not the legal mother of Jaycee because she had no genetic, gestational, or adoptive evidence of her status as such. Mr. Buzzanca could not be the legal father or owe any support also because of his lack of genetic relation to the child.
and the unwillingness of the court to consider his intent to enter into a surrogacy arrangement as sufficient evidence of legal paternity. The court also accepted a stipulation that the surrogate and her husband were not the “biological parents” of the child. At trial, Mr. Buzzanca did not object to this stipulation.

In *Jaycee B. v. John B.*, the California Court of Appeal heard arguments concerning Jaycee’s parentage in order to make a ruling regarding child support. The court of appeal likened the situation in this case to the “functional equivalent of a paternity action, where a mother who is the caretaker of a child seeks court ordered support from a man but for whose actions the child would never have come into existence.” The legal question for the court to resolve was whether the surrogacy contract constituted sufficient evidence for finding Mr. Buzzanca Jaycee’s father. Rather than having to determine whether a man was or was not the father of a child, or whether a marriage had or had not taken place, the court was faced with the task of resolving the most basic facts of the case since the dispute did not concern the facts of an agreement, but its legal effect.

In order to determine whether the surrogacy contract was sufficient evidence of Mr. Buzzanca’s paternity, the court referred to *Johnson* as both the cases involved gestational surrogacy. However, in *Johnson*, the “intended” parents were also the genetic parents and neither *Johnson* nor *Moschetta* established whether surrogacy agreements are enforceable per se. On the contrary, these cases found that these contracts constituted “a proper basis on which to ascertain the intent” of the parties. The dilemma facing the court was that in order to find that Mr. Buzzanca could not be the father of the child, the courts would have to find the surrogate birth mother the “natural” mother or else Jaycee would have no legal parents. Looking again to *Johnson* for guidance, the court speculated that finding Pamela to be the natural mother was unlikely to be the ultimate result of the case given that the court would be loathe to “burden her with ‘responsibilities’ she never contemplated and is directly ‘contrary to her

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136 After a complicated determination regarding jurisdictional competency, the court of appeal felt that its job was not to decide the actual paternity of Jaycee and it made a temporary order against Mr. Buzzanca for child support. A writ was then requested, directing the family law court to determine an appropriate child support order.
137 *Jaycee B.*, supra note 135 at 721.
expectations..."\textsuperscript{139} The court also felt that since Jaycee’s genetic parents were anonymous, they too were unlikely to be deemed the “natural parents.”

Therefore, and as dictated by \textit{Johnson}, the court turned its attention to the intention of the parties in the hope that this type of surrogacy case would be unique and that they could ascertain a rule recognizing the intending parents as the child’s legal, natural parents in compliance with the best interests of the child. Using the “intention test,” the court reasoned that Mr. Buzzanca’s signing of the surrogacy agreement showed, “by a preponderance of the evidence,” that he would likely be held to be Jaycee’s father.\textsuperscript{140} Based upon the urgency of Jaycee’s need for financial support, and upon the parental responsibilities contemplated by the surrogacy contract, the court ruled that, at first blush, the fact that Mr. Buzzanca signed the surrogacy agreement was sufficient to give the family court jurisdiction to hear the order to show cause.

\textit{Re Marriage of Buzzanca}\textsuperscript{141} determined the actual parentage of Jaycee. The court of appeal held that the trial court erred in its decision that Jaycee had no lawful parents since “Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.”\textsuperscript{142} Justice Sills held that the trial judge erred in his conclusion that legal motherhood could only be established by giving birth or through the contribution of an egg. He cited the well established body of law in which fatherhood can be established irrespective of birth or genetic relation but based upon conduct, a rule which was consistent with \textit{Johnson} and which the court thought should apply in this case:

Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The only difference is that in this case—unlike artificial insemination—there is no reason to distinguish between husband and wife.\textsuperscript{143}

The court then reversed the decision of the trial court and declared Mr. and Mrs. Buzzanca the legal parents of Jaycee.

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139 \textit{Ibid.} at 701 referring to \textit{Johnson}.
140 \textit{Jaycee B, supra} note 135 at 702.
142 \textit{Ibid.} at 1411.
143 \textit{Ibid.} at 1412.
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On appeal, Mr. Buzzanca argued that the surrogate was, in fact, Jaycee’s legal mother because, under the UPA, only two ways to establish legal maternity exist: giving birth and genetic contribution. The anonymity of the egg donor meant that the surrogate must be deemed the child’s legal mother. However, the court held that the proper interpretation of the statute did not mandate such a determination. In addition to the two tests which apply in situations of maternity, the UPA also allows paternity to be established by presumption or as a result of artificial insemination. The court held that artificial insemination by donor, and gestational surrogacy are analogous in that they both “contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie.”

Mrs. Buzzanca was found to be situated similarly to a husband in an artificial insemination case whose consent has triggered a medical procedure which results in a pregnancy and eventual birth of a child. By virtue of her consent to the procedure, the court affirmed her maternity claim and denied Mr. Buzzanca’s claim that the surrogate should be declared the legal mother. By situting Mrs. Buzzanca according to both the statutory and common law positions regarding artificial insemination, the court analogized the Buzzancas’ situation to that found in Johnson. Both Mrs. Buzzanca, and the surrogate had equal claims to maternity under the UPA, but, as per Johnson, the “tie” was broken by an examination of intention and Mrs. Buzzanca was clearly the intending mother. The court also affirmed that if the egg donor should assert a claim of maternity, Mrs. Buzzanca’s maternity would remain established, again on the basis of her intention.

Regarding Mr. Buzzanca’s paternity, the court held that “the same reasons which impel us to conclude that Luanne is Jaycee’s lawful mother also require that John be declared Jaycee’s lawful father.” Practically, and even notwithstanding the existence of the surrogacy contract, Mr. Buzzanca caused Jaycee’s conception and he was therefore properly held to be her legal father. The court even went so far as to dismiss Mr. Buzzanca’s future claim upon appeal that since Mrs. Buzzanca had promised to assume all responsibility for the child, he should not have been found the child’s

Note that the court states that it made sense not to apply the provisions containing paternity presumptions in Moschetta because they were only presumptions, thereby showing that they completely overlook the implications of the social and relational aspects of the maternity argument.

144 Buzzanca, supra note 141 at 1415.
145 Ibid. at 1419.
father. This promise, according to the court, makes no difference to his legal paternity because it is well established that parents cannot, by agreement limit or subrogate a child’s right to support. 147 Regardless of whether Mrs. Buzzanca had actually become pregnant, Mr. Buzzanca had engaged in “procreative conduct.” 148 Accordingly, the court of appeal reversed the declarations that Mrs. Buzzanca was not Jaycee’s legal mother and that Mr. Buzzanca was not Jaycee’s legal father.

The maternity cases examined in this section demonstrate the rigidity of the legal construction of maternity as “natural.” They show how the legal construction of maternity requires the presence of a biological tie even in light of alternative constructions of the maternal relationship. Cases like Moschetta create an opportunity for the courts to expand the legal construction of maternity to encompass new relationships, but, thus far, the courts have largely declined to do so unless the result they can obtain mirrors a traditional family norm. McDonald shows how the determinations of maternity differ when there is only one woman asserting a claim and this suggests that the courts will rarely acknowledge that maternity is, or ought to be, divided; Buzzanca seems to confirm this conclusion. Finally, although the intentional theory of parenthood provided the just result in Buzzanca, this finding could create problems in future cases when a genetically unrelated surrogate does want to assert rights against intentional parents and fails to recognize and value the different contribution that gestation makes by placing all maternal rights and responsibilities in one woman.

V. CONCLUSION

Closeness of biogenetic identity has, for many years, symbolized degrees of closeness between kin. 149 However, kinship could always be separated from family as an institution based on conjugal relationships and the rearing of children. A child born between two people linked them as kin. Presently new actors associated with reproductive medicine create a new field of relationships that does not overlap with traditional family relationships. Kinship has become dispersed. The child produced does not necessarily link those who will be its parents and often it brings in other

147 Ibid. at 1420.
148 Ibid.
149 “Displacing Knowledge,” supra note 21 at 351.
people through the act of assisted procreation.\textsuperscript{150} As a result, there is now a field of “procreators” whose relationship to one another is a result of procreation rather than family. Through assisted reproduction, procreation is separated from sexuality and from the body and “unrelated” others\textsuperscript{151} are introduced to the procreative process by making it possible for women and men to have children without a heterosexual partner. An expansion of parenthood should necessarily follow as a result of the number of contributions to the conception; however, it has been shown that this is often not the case.

Parenthood is a hybrid of natural, social, and cultural factors. These factors, however, have been construed by law in a gendered manner. The modern movement to reform family law in accordance with the principles of freedom of contract and gender equality has changed the context of filiation, but has not changed many of its underlying power asymmetries. Formal gender and race equality exists between the claims of “paternity” and “maternity” but the same cultural asymmetries continue to operate with respect to the ways in which the legal categories are constructed. Thus, the results have been characterized by the visible reification of the normative heterosexual, two-parent family structure. Alternative family forms created with the aid of technology will achieve legal recognition only if the ideological underpinnings of the categories of filiation are reformed. At the same time, by revealing the asymmetries of legal filiation, the ARTs can help put to rest the gendered legal fictions constructed around the alleged facts of nature by providing an opportunity and a means for the courts to expand the concept of parenthood and extend legal recognition of the number of parents a child may have to more than two.

\textsuperscript{150} This notion, referred to as, “dispersed kinship,” includes those who “produce” the child with assistance as well as those who assist. \textit{Ibid.} at 352.