University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

1995

The Genetic Tie

Dorothy E. Roberts
University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the African American Studies Commons, Bioethics and Medical Ethics Commons, Biological Engineering Commons, Genetics Commons, Health Law and Policy Commons, Health Policy Commons, Human Rights Law Commons, Law and Race Commons, Law and Society Commons, Public Policy Commons, and the Race and Ethnicity Commons

Repository Citation
Roberts, Dorothy E., "The Genetic Tie" (1995). *Faculty Scholarship at Penn Law*. 1382.
https://scholarship.law.upenn.edu/faculty_scholarship/1382

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

The Genetic Tie

Dorothy E. Roberts†

INTRODUCTION

A friend of mine recently questioned my interest in the "Baby Jessica" saga.[1] "Why are you always so fascinated by those stories?" he asked. "They have nothing to do with Black people." By "those stories," he meant the myriad of disputes occupying the headlines that involve biological claims to children. These custody battles test the importance in American law and culture of the genetic tie between parents and their offspring. How much weight should the state give this genetic relationship in settling custody disputes between biological parents and adoptive parents? Should the state honor a father's wish for a genetic inheritance in considering the legality of surrogacy contracts? Should the state respect a woman's decision to destroy frozen embryos because she no longer wants to be genetically linked to the potential children? Current debates involving surrogate mothers, un-

---

† Fellow, Program in Ethics and the Professions, Harvard University; Professor, Rutgers University School of Law—Newark; B.A. 1977, Yale College; J.D. 1980, Harvard Law School. I presented ideas from this Article at the AALS Workshop on Health Law and drafts of this Article at the Feminism and Legal Theory Workshop at Columbia Law School and at legal theory workshops at Boston University School of Law, Cornell Law School, and the University of Miami School of Law. I thank the participants for their comments. I am also grateful to Taunya Lovell Banks, Judith Greenberg, and Susan Wolf for their suggestions. I spent a month in Lee Teitelbaum's former office at the University of Utah College of Law and found his collection of family law books very useful. Thanks also to Mavel Ruiz and Lysette Toro for their research assistance and friendship. I completed research for this Article at The Program in Ethics and the Professions, with the help of Simone Sandy.

[1] Jessica DeBoer was the subject of a much-publicized custody dispute between her biological parents and the adoptive couple who had raised her for two years. See *DeBoer v Schmidt*, 442 Mich 648, 502 NW2d 649 (1993), stay denied, 114 S Ct 1 (1993); Lucinda Franks, *The War for Baby Clausen*, New Yorker 56 (Mar 22, 1993). In February 1991, the DeBoers, Michigan residents, filed a petition in Iowa to adopt the baby girl after her birthmother, Clara Clausen, relinquished the baby and the man Clausen named as the father executed a release of custody. *DeBoer*, 502 NW2d at 652. The Iowa court granted the DeBoers custody during the pendency of the adoption proceeding. Id. In March 1991, Clausen named another man, Daniel Schmidt, as the baby's father, and she and Schmidt, who subsequently married, sought to block the adoption. Id at 652 & n 6. After a two-and-a-half-year court battle, the Iowa and Michigan courts held that Schmidt was entitled to prevent his daughter's adoption and granted custody to Clausen and Schmidt. Id at 667-68.

wed fathers, adoption, and frozen embryos make clear that the role the genetic tie plays in resolving claims of parenthood is not biologically ordained. Rather, cultural forces dictate what powers we bestow upon these particles passed from parent to child.[2]

In one sense my friend is right: the images that mark these controversies appear to have little to do with Black people and issues of race. The tragedy of a rosy-cheeked girl torn from the adoptive couple who spent years battling in court to keep her; the infertile suburban housewife's agonizing attempts to become pregnant via in vitro fertilization; the blue-eyed, blonde-haired baby held up to television cameras as the precious product of a surrogacy arrangement; the complaint that there are not enough babies for all the middle-class couples who desperately want to adopt; the fate of orphaned frozen embryos whose wealthy progenitors died in an airplane crash—all seem far removed from most Black people's lives. Yet it is precisely their racial subtext that gives these images much of their emotional content. Ultimately, my attraction to the Baby Jessica case, and cases like it, stems from my interest in the devaluation of *Black* reproduction. As I have charted the proliferation of rhetoric and policies that degrade Black women's reproductive decisions,[3] I have also noticed that America is obsessed with creating and preserving white genetic ties. Trading the genetic tie on the market lays bare the high value placed on whiteness and the worthlessness accorded blackness.

This Article demonstrates the indeterminacy of the legal and social meaning of the genetic tie. The genetic tie's value is not determined by biology. Rather, it systematically varies in a way that promotes racist and patriarchal norms. I illustrate this indeterminacy by examining the genetic tie's shifting meaning in defining personal identity, creating children, and determining legal parentage. For example, the institution of slavery made the genetic tie to a slave mother critical to determining a child's social status, yet legally insignificant to the relationship between male slaveowners and their mulatto children. Although today we generally assume that the genetic tie creates an enduring bond

---

[2] See Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 J Legal Reform 865, 874-75 (1985).

[3] See, for example, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv L Rev 1419 (1991); Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 Geo Wash L Rev 587 (1993); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 Tulane L Rev 1945, 1961-69 (1993).

between parents and their children, the law often disregards it in the cases of surrogate mothers, sperm donors, and unwed fathers.

There is nothing either precious or sinister about the genetic tie by itself. The genetic tie's precise social import depends on the type of relationship to which it becomes relevant and the prevalent social conditions that influence that relationship. The genetic tie plays a role in constructing several dimensions of identity: it helps to define the person, the family, and the nation. It may inspire an intimate bond between a parent and child,[4] as well as constitute a legislated prerequisite for inclusion in an entire race of people.[5] In a time of social crisis, the dominant group will embrace genetic connections to buttress its borders, both physical and metaphysical, against intrusion by outsiders.[6] Thus, the genetic tie is inherently paradoxical. It is at once a means of connection and a means of separation. It links individuals together while it preserves social boundaries.[7] This Article suggests an alternative vision of the genetic tie, inspired by definitions of self, family, and community in Black American culture, that recognizes genetic bonds without giving them the power to devalue and exclude other types of relationships.

In this society, perhaps the most significant genetic trait passed from parents to child is race.[8] The inheritability of one's

---

[4] See, for example, Phyllis Chesler, *Sacred Bond: The Legacy of Baby M* 22-23 (Times Books, 1988) ("[H]ow can we deny that women have a profound and everlasting bond with the children they've birthed; that this bond begins in utero . . . .").

[5] See, for example, Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 195 (Knopf, 1956) (discussing how statutes enacted in the antebellum southern states classified people according to race based on their genetic makeup).

[6] See, for example, Benno Müller-Hill, *Murderous Science: Elimination by scientific selection of Jews, Gypsies, and others, Germany 1933-1945* 36-37 (Oxford, 1988) (George R. Fraser, trans) (quoting speeches and reports given in Germany in 1939 and 1940).

[7] I am indebted to Haesook Kim and Hyunah Yang for helping me to see this paradox by sharing with me the parallels in the genetic tie's meaning in both Korean and American society.

[8] The concept of race—like the meaning of the genetic tie—is a cultural artifact. For an extended discussion of how race is constructed in our culture, see Part I.C. For critiques of using racial classifications to understand human diversity, see generally Ashley Montagu, ed, *The Concept of Race* (Free Press, 1964); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 Georgetown L J 437 (1993). Gender, of course, is another genetic trait that fundamentally determines the nature of a person's life. I do not mean to suggest that race is a more significant feature of identity than gender. American law and society, however, have structured the inheritance of race to a far greater extent than the genetic determination of gender. Nevertheless, some new reproductive technologies allow parents to control the sex of their children. See generally Neil G. Bennett, ed, *Sex Selection of Children* (Academic, 1983); Owen D. Jones, *Sex Selection: Regulating Technology Enabling the Predetermination of a Child's Gender*, 6 Harv J L & Tech 1, 1-25 (1992).

racial identity has profoundly shaped the social meaning of the genetic tie. Yet most scholarship on the subject either ignores race altogether or gives it ancillary consideration. The literature on reproductive technologies designed to create genetic ties, for example, divides mainly into liberal defenses that promote the individual's right to procreate without government interference on the one hand[9] and feminist critiques that view these technologies as a means of gender oppression on the other hand.[10] While acknowledging that poor women of color are the most vulnerable to reproductive control, the feminist critique identifies male domination as the central source of an oppressive understanding of the genetic tie.

The debate over Baby Jessica's custody similarly divided into two camps that neglected the influence of race on claims to parenthood. Those who supported Jessica's return to her biological parents stressed the importance of the genetic tie, describing the value of children sharing their genetic makeup with their parents as a "biological imperative."[11] Those who advocated that Jessica

---

[9] See, for example, Lori B. Andrews and Lisa Douglass, *Alternative Reproduction*, 65 S Cal L Rev 623, 640 n 56 (1991); John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* 22-42 (Princeton, 1994); John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 L Med & Health Care 18, 19 (1988).

[10] There is an extensive feminist literature criticizing new reproductive technologies for objectifying women and diminishing women's power by appropriating reproductive control. See, for example, Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (Harper & Row, 1985); Janice G. Raymond, *Women as Wombs: Reproductive Technologies and the Battle Over Women's Freedom* (HarperSanFrancisco, 1993); Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* 40-64 (W.W. Norton, 1989). See also Emily Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* 139-55 (Beacon, 1987) (discussing Caesarian sections and episiotomies).

Not all feminists oppose new reproductive technologies, however. See, for example, Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L Med & Health Care 72, 78 (1988) (arguing that feminist rationales opposing surrogacy "could undermine a larger feminist agenda"); Lynn M. Paltrow, *Test-Tube Women: What Future for Motherhood?*, 8 Women's Rts L Rptr 303, 303 (1985), reviewing Rita Arditta, Renate Duelli Klein, and Shelley Minden, eds, *Test-Tube Women: What Future for Motherhood?* (Pandora, 1984) (criticizing some feminists' condemnation of new reproductive technologies for being based on "a false view of women as powerless in a monolithic patriarchy"); Michelle Stanworth, *Birth Pangs: Conceptive Technologies and the Threat to Motherhood*, in Marianne Hirsch and Evelyn Fox Keller, eds, *Conflicts in Feminism* 288, 295-96 (Routledge, 1990) (criticizing some feminists' opposition to new reproductive technologies as not being the best way to help women of all social groups).

[11] See, for example, Lorraine Dusky, *Custody Case Affirms Biological Ties That Bind: Origins Do Matter*, NY Times A18 (July 24, 1993) (letter to the editor) (basing her approval of Jessica's return to her biological parents on the "growing body of evidence that demonstrates that adoption by strangers is always and ultimately psychologically damaging to the individual and that the damage is never really healed"); John Taylor, *Biological*

remain with her adoptive parents stressed the need to facilitate adoptions for middle-class families and played down the harm that terminating parental rights without adequate protection may cause birth mothers.[12] Both positions seemed incomplete to me. Neither accounted for the systematic devaluing of the bond—genetic and otherwise—between Black women and their children. Additionally, the rhetoric surrounding the Baby Jessica case missed the more important truth that valuing the bond between parents and their children need not entail cherishing their genetic tie as an essential component of personal or group identity.

This Article explores how race, along with gender, continues to determine the meaning of the genetic tie, how that meaning reinforces white supremacy in a patriarchal society, and why that meaning seems to be so different for many Black people. Part I examines the role that the genetic tie plays in defining personal identity. We seem to believe that the genetic tie between parents and children usually creates a powerful and enduring attachment. The growing social power of genetics exaggerates the increasingly popular conception of personhood as derived from genetic heritage. I explain how the inheritability of race has shaped the social meaning of the genetic tie to maintain a racial caste system based on white superiority and racial purity. I also explore the reasons why the genetic tie seems less important to most Blacks' creation of their own identities. Part II discusses how gender and race influence efforts to create genetic ties. New reproductive technologies are often used as a means of fulfulling men's desire to have genetically related children. The legitimacy of these technologies, however, depends on the production of white children; the harm of these technologies is rooted as much in the devaluation of Black humanity as in the commodification of women.

Finally, Part III examines the genetic tie's role in determining legal parentage. The law concerning the parental rights of unwed fathers and sperm donors demonstrates more interest in protecting the patriarchal family than in acknowledging fathers' genetic ties to their children. Race, however, ultimately deter-

---

Imperative: The Battle for Jessica, NY Mag 12, 13 (Aug 16, 1993) (favoring Jessica's return to her biological mother because "[t]he fierce attachment of the mother to the child is primordial").

[12] See, for example, Elizabeth Bartholet, *Blood Parents Vs. Real Parents*, NY Times A19 (July 13, 1993) (arguing that "[c]hildren are paying a high price for the priority we place on blood ties").

mines claims to children. Rules governing legal paternity and female marital fidelity have served to preserve the racial caste system. For example, courts have discarded the traditional presumption of paternity in order to deny a white father's connection to a Black child and have rejected the traditional presumption of maternity in order to deny a Black mother's connection to a white child. In addition, Black mothers' genetic bonds to their children are devalued.

At the same time, this Article argues that, however important the biological bond is as a basis for family relationships, it need not be the exclusive bond. In fact, blood ties are less significant to the definition of family in the Black community than they traditionally have been for white America.

Feminist debates about adoption, surrogacy, and new reproductive technologies are part of a critical project to transform the family into a relationship that rejects restrictive patriarchal norms.[13] This project must fundamentally include uncovering and eliminating the racist understanding of the genetic tie. It must eradicate the law's preference for white genetic ties, as well as its facilitation of male genetic desires. The feminist project should reconceive the genetic tie as a nonexclusive bond that forms the basis for a more important social relationship between parents and children. This reconstruction will benefit from attending to Black people's view of the genetic tie as neither a valuable end in itself nor the essence of personal, family, and group definitions.

I. The Genetic Tie and Personal Identity

A. The Importance of Genetic Connection

The meaning of the genetic tie involves interrelated questions of both personal identity and social power.[14] The social value we place on the genetic tie centers on the role it plays in

---

[13] See, for example, Martha Albertson Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (Routledge, 1994); Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Houghton Mifflin, 1993). See also Naomi R. Cahn, *Family Issue(s)*, 61 U Chi L Rev 325, 328-29 (1993), reviewing Bartholet, *Family Bonds*; Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 Harv L Rev 913, 922-23 (1994), reviewing Bartholet, *Family Bonds*.

[14] See, for example, Cornel West, *Race Matters* 66 (Beacon, 1993) (discussing the connection between identity and social structures and arguing that "issues of black identity—both black self-love and self-contempt—sit alongside black poverty as realities to confront and transform").

our sense of self and depends on social hierarchies of power. The desire to have genetically related children is not entirely natural, but is determined by our political and cultural context.

We often perceive a special relationship created by a shared genetic identity. When a new baby enters a family, one of the first responses is to figure out whom she resembles. Most parents probably feel great satisfaction in having children who "take after" them. Bringing into the world children who bear their likenesses gives many people both the joy of creating another life and the comfort of achieving a form of immortality passed down through the generations.[15] Joe Saul, the protagonist of John Steinbeck's play *Burning Bright*, expressed his tormenting desire to have a child in terms of an eternal charge:

> A man can't scrap his blood line, can't snip the thread of his immortality. There's more than just my memory. More than my training and the remembered stories of glory and the forgotten shame of failure. There's a trust imposed to hand my line over to another, to place it tenderly like a thrush's egg in my child's hand.[16]

In our society, people often see the inability to produce one's own children as one of nature's most tragic curses.[17] Infertile people often suffer horribly, and even people who have voluntarily decided to remain childless often refuse to cut off the possibility of creating children through sterilization.[18] The desire to have children of one's own is so intense that it is commonly attributed to nature. Thus, the opening paragraph of a popular guide to infer-

---

[15] Andrews and Douglass, 65 S Cal L Rev at 626-27 (cited in note 9); John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 NYU L Rev 353, 389 (1991). See also Katherine Bishop, *Prisoners Sue To Be Allowed To Be Fathers: Artificial Insemination Sought on Death Row*, NY Times A14 (Jan 5, 1992) (reporting claim by California death row inmates that their "right to procreate" required the state to preserve their sperm for implantation); John A. Robertson, *Posthumous Reproduction*, 69 Ind L J 1027 (1994) (discussing the "procreative liberty" interests of individuals to have genetically related offspring after they die through cryopreservation of sperm and embryos and maintenance of brain-dead pregnant women).

[16] John Steinbeck, *Burning Bright* 29 (Viking, 1950). I am grateful to John Jacobi not only for suggesting that I read this obscure play, but for finding it for me.

[17] On the stigma our society attaches to infertility, see Alison Solomon, *Infertility As Crisis: Coping, Surviving—and Thriving*, in Renate D. Klein, ed, *Infertility: Women Speak Out About Their Experiences of Reproductive Medicine* 169 (Pandora, 1989). See also Germaine Greer, *Sex and Destiny: The Politics of Human Fertility* 36-58 (Harper & Row, 1984) (discussing the importance of fertility cross-culturally).

[18] See Elaine A. Lissner, *Frontiers in Nonhormonal Male Contraceptive Research*, in Helen Bequaert Holmes, ed, *Issues in . . . Reproductive Technology I: An Anthology* 53, 55 (Garland, 1992).

tility treatment declares: "Call it a cosmic spark or spiritual fulfillment, biological need or human destiny—the desire for a family rises unbidden from our genetic souls."[19] Blood ties are also a powerful cultural symbol of stability in human relationships—"the only real guarantee against loneliness and isolation" amid the fragility of contemporary friendships and marriages.[20] Some legal scholars have argued that an individual's interest in having offspring of his own genes is so great that it amounts to a constitutionally protected procreative liberty.[21]

Many also believe that certainty about one's genetic heritage benefits children.[22] According to this view, genetic derivation is a critical determinant of self-identity, as well as biological makeup. Adopted children may struggle not only with the question, "Who are my real mother and father?," but also with the more profound inquiry, "Is genetic relatedness necessary for an au-

---

[19] Sarah Franklin, *Deconstructing "Desperateness": The Social Construction of Infertility in Popular Representations of New Reproductive Technologies*, in Maureen McNeil, Ian Varcoe, and Steven Yearley, eds, *The New Reproductive Technologies* 200, 207 (St. Martin's, 1990). More scholarly works make similar claims. See, for example, Robert G. Edwards and David J. Sharpe, *Social Values and Research in Human Embryology*, 231 Nature 87, 87 (1971) ("[T]he desire to have children must be among the most basic of human instincts, and denying it can lead to considerable psychological and social difficulties.").

[20] Michelle Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood*, in Michelle Stanworth, ed, *Reproductive Technologies: Gender, Motherhood and Medicine* 10, 21 (Minnesota, 1987), quoting Irena Klepfisz's essay in Stephanie Dowrick and Sibyl Grundberg, eds, *Why Children?* 18 (Women's Press, 1980).

[21] See, for example, Andrews and Douglass, 65 S Cal L Rev at 640 n 56 (cited in note 9); Robertson, *Children of Choice* at 29-34 (cited in note 9); Robertson, 16 L Med & Health Care at 19 (cited in note 9). See also Barbara Stark, *Constitutional Analysis of the* Baby M *Decision*, 11 Harv Women's L J 19, 26-33 (1988) (criticizing the *Baby M* trial court's decision for confusing the procreation right with a natural parent's liberty interest in his or her child); *Lifchez v Hartigan*, 735 F Supp 1361, 1376-77 (N D Ill 1990) (holding that the right of privacy includes the interest in using reproductive technologies to procreate).

Robertson argues that procreative liberty includes a constitutional right to state enforcement of surrogacy agreements. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S Cal L Rev 942, 1002-03, 1013-15 (1986); Robertson, *Children of Choice* at 131-32 (cited in note 9); Robertson, 16 L Med & Health Care at 21 (cited in note 9). For an argument that childless couples do not have a privacy right protecting their surrogacy arrangements, see Anita L. Allen, *Privacy, Surrogacy, and the* Baby M *Case*, 76 Georgetown L J 1759 (1988).

[22] See Leon R. Kass, *"Making Babies" Revisited*, 54 Pub Interest 32, 47 (1979) ("Clarity about [one's] origins is crucial for self-identity, itself important for self-respect."). For an argument about the importance of such knowledge in the context of hereditary diseases, see *Coburn v Coburn*, 384 Pa Super 295, 558 A2d 548, 554 (1989) (Cirillo concurring) ("[K]nowledge of one's biological parents and hereditary history is crucial in ordering one's affairs and making life's decisions.").

thentic sense of self?"[23] Taken to its extreme, this perspective defines personhood according to genetic attributes.[24]

This conception of identity rooted in genetic heritage underlies the most extreme rhetoric of advocates who support adoptees' searches for their birth parents.[25] Critics of adoption claim that adopted children suffer from "genealogical bewilderment"—a condition stemming from ignorance of their genetic orgins.[26] One adoptee writes about the alienation created by disrupting the genetic bond:

> [T]he adoptee, by being extruded from his or her own biological clan, forced out of the natural flow of generational continuity, feels forced out of nature itself. The adoptee feels an alien, an outsider, an orphan, a foundling, a changeling—outside the natural realm of being.[27]

Some genetics scientists also apparently see identity as defined by genetics. One Harvard biologist, for example, declared that understanding human genetic composition is "the ultimate answer to the commandment, 'Know thyself.'"[28]

Our belief in the strength of the genetic tie involves not only the value of having a genetic tie, but also the value of *not* having one. This question typically arises when clients of fertility clinics must decide what to do with fertilized embryos that are not implanted.[29] Although most of the ethical inquiry has centered on

---

[23] Betty Jean Lifton, *Brave New Baby in the Brave New World*, in Elaine Hoffman Baruch, Amadeo F. D'Adamo, Jr., and Joni Seager, eds, *Embryos, Ethics, and Women's Rights: Exploring the New Reproductive Technologies* 149, 151 (Harrington Park, 1988). These questions may also trouble children whose genetic fathers are anonymous sperm donors. See, for example, Margaret R. Brown, *Whose Eyes Are These, Whose Nose?*, Newsweek 12 (Mar 7, 1994).

[24] See Rochelle Cooper Dreyfuss and Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 Vand L Rev 313, 318-21 (1992).

[25] See, for example, Betty Jean Lifton, *Journey of the Adopted Self: A Quest for Wholeness* (Basic Books, 1994); Betty Jean Lifton, *Lost and Found: The Adoption Experience* (Bantam, 1981).

[26] See Lifton, *Brave New Baby* at 150. See also Paul Sachdev, *Adoption Reunion and After: A Study of the Search Process and Experience of Adoptees*, 71 Child Welfare 53, 54, 58 (1992) (describing adoptees' search for their genetic roots as "nearly a universal phenomenon" and as motivated by a "compelling need to attain a more cohesive identity"); *In re Dixon*, 116 Mich App 763, 323 NW2d 549, 550 n 2 (1982) (quoting a psychiatrist's letter stating that "there is generally a deep-seated need on the part of adoptees to know their biological origins, regardless of the quality of family life in their adopted families").

[27] Lifton, *Brave New Baby* at 150.

[28] Jerry E. Bishop and Michael Waldholz, *Genome* 218 (Simon & Schuster, 1990), quoting Professor Walter Gilbert.

[29] See Howard W. Jones, Jr., *Policy Considerations for Cryopreservation in In Vitro Fertilization Programs*, in Helen Bequaert Holmes, ed, *Issues in . . . Reproductive Technol-*

discarding embryos, embryo donation also raises troublesome questions.[30] The possibility of implanting an embryo in a willing woman's womb disengages the genetic tie from a woman's interest in bodily integrity that would preclude forced embryo implantation or pregnancy. A woman's constitutional right to terminate her pregnancy[31] does not necessarily give the woman control over an embryo or fetus not physically connected to her.[32] Her interest—if any—in the disconnected embryo lies primarily in their *genetic* relationship. Should the state respect an individual's desire to *avoid* a genetic tie because she does not wish to contribute genes to the creation of another human being?[33] And should this desire be considered a right that takes precedence over the state's interest in seeing the embryo develop into a child?[34] However these difficult questions are answered, their

---

ogy I: An Anthology 209, 211-12 (Garland, 1992) (describing problems that arise in connection with the disposition of embryos and advocating "prefreeze" agreements); Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J Legis 97, 102-03, 110-22 (1990) (discussing various possible regulations for disposition of frozen embryos and proposing model legislation). Many clinics require couples to sign a contract choosing whether to discard the unused embryos or to donate them to another couple. Tom Hundley, *Embryos face another court date: Ohio woman seeks to prevent destruction of frozen cells*, Chi Trib A26 (Sept 28, 1989); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 Ohio St L J 407, 409-10 (1990).

[30] See Clifford Grobstein, *Tempest in a Petri Plate: The Moral Uses of 'Spare' Embryos*, Hastings Ctr Rep 5, 5 (June 1982); Note, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 Syracuse L Rev 1021, 1025, 1039-40 (1985); Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U Miami L Rev 803, 806-07 (1992).

[31] *Roe v Wade*, 410 US 113 (1973).

[32] See Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S Cal L Rev 1079, 1093 (1986). See also Mark Tushnet, *An Essay on Rights*, 62 Tex L Rev 1363, 1366 (1984) (noting that a woman's right to terminate her pregnancy may not include a right to destroy the fetus once technology makes it possible to remove the fetus without destroying it).

[33] Or *his* desire to avoid genetic parenthood. See *Davis v Davis*, 842 SW2d 588, 604 (Tenn 1992). See also text accompanying notes 131-37.

[34] See Robertson, 59 S Cal L Rev at 979-80 (cited in note 21) (describing people's differing perceptions of the burdens entailed by an unwanted genetic link); Tushnet, 62 Tex L Rev at 1367 (positing that the woman "may not want to worry for the rest of her life whether a person she saw on the street, who vaguely resembled her grandmother, might be her daughter," and raising the possibility of a property-based right in one's genetic heritage). One student in my civil liberties class insisted that she had a protectible interest in not playing any part—even a purely genetic one—in bringing a child into an unjust world. For arguments that procreative liberty does not encompass destroying embryos in order to avoid a genetic tie, see Robertson, 59 S Cal L Rev at 980 (cited in note 21) (suggesting that the state might constitutionally require donation of unwanted embryos if it does not impose gestational or rearing obligations on the genetic parents); Note, 59 S Cal L Rev at 1097 (cited in note 32) (concluding that the genetic parents' "discomfort" does not outweigh the state's interest in protecting the embryo's development).

complexity attests to our frequent vision of the genetic tie—whether it is valued or avoided—as a powerful and enduring basis of human attachment.

B. The Social Power of Genetics

The importance of "blood ties" is not a relic of ancient mythology. To the contrary, recent years have witnessed a resurgence of public interest in genetics that has intensified the genetic tie's social importance.[35] Rochelle Cooper Dreyfuss and Dorothy Nelkin note a trend in science, law, and popular culture toward "genetic essentialism," the view that "personal traits are predictable and permanent, determined at conception, 'hard-wired' into the human constitution."[36] The Human Genome Initiative, an ongoing government-sponsored project to map the complete set of genetic instructions that form the structure of inherited qualities, is "the largest biology project in the history of science."[37] Scientists are attempting to detect genetic markers that indicate a predisposition to complex conditions and behaviors, as well as single-gene disorders.[38] They anticipate creating

---

[35] See generally Ruth Hubbard and Elijah Wald, *Exploding the Gene Myth: How Genetic Information is Produced and Manipulated by Scientists, Physicians, Employers, Insurance Companies, Educators, and Law Enforcers* 1-6 (Beacon, 1993) (describing and critiquing the current trend toward explaining health and behavior in terms of genetics). See also Raymond, *Women as Wombs* at 108-37 (cited in note 10) (discussing the ways that the medical profession and the media promote new reproductive technologies as progress). A recent edition of The New York Times Book Review, for example, reviewed five books concerning the link between genetics and human behavior. Its cover displayed a face woven into a model of DNA and the question "How Much of Us Is in The Genes?" See NY Times Book Rev 1 (Oct 16, 1994).

[36] Dreyfuss and Nelkin, 45 Vand L Rev at 320-21 (cited in note 24). See also Troy Duster, *Backdoor to Eugenics* 164 (Routledge, 1990) (observing that contemporary society perceives human traits and behaviors through a "prism of heritability" that "attributes the major explanatory power to biological inheritance"); Abby Lippman, *Prenatal Genetic Testing and Screening: Constructing Needs and Reinforcing Inequities*, 17 Am J L & Med 15, 19 (1991) (describing the process of "geneticization" by which human biology is incorrectly equated with human genetics and the differences between individuals are reduced to their genes).

[37] Dreyfuss and Nelkin, 45 Vand L Rev at 314 & n 2 (cited in note 24) (noting that the project is expected to last three to fifteen years, costing approximately $3 billion). See generally George J. Annas and Sherman Elias, eds, *Gene Mapping: Using Law and Ethics as Guides* (Oxford, 1992) (collecting essays discussing social policy and ethical concerns about the genome project); U.S. Department of Health and Human Services and U.S. Department of Energy, *Understanding Our Genetic Inheritance: The U.S. Human Genome Project: The First Five Years FY 1991-1995* ix (1990) (presenting the official view of the genome project and projecting costs of $200 million per year for about fifteen years).

[38] Dreyfuss and Nelkin, 45 Vand L Rev at 314 (cited in note 24).

genetic tests that will be able to predict a person's susceptibility to hemophilia, mental illness, heart disease, and alcoholism.[39]

Researchers claim to have discovered not only the genetic origins of *medical* conditions, but also biological explanations for *social* conditions.[40] Policymakers and theorists increasingly enlist biology to explain social problems, thereby dismissing the need for social change. The Bush Administration, for example, embarked on a "violence initiative," which included research premised on the theory that criminality may have a biochemical or genetic cause.[41] This research project sought to establish the existence of a genetic marker that would identify children at high risk of becoming criminals in the hopes of deterring their criminal behavior through pharmacological treatment and other therapies.[42]

---

[39] See Department of Health and Human Services and Department of Energy, *The U.S. Human Genome Project* at vii (cited in note 37). On the potentially discriminatory uses of genetic screening, see generally Dorothy Nelkin and Laurence Tancredi, *Dangerous Diagnostics: The Social Power of Biological Information* 75-132 (Basic Books, 1994) (discussing how schools and employers use genetic information); Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 Am J L & Med 109 (1991) (describing genetic discrimination against workers and insureds and legal mechanisms to redress it); Patricia A. King, *The Past as Prologue: Race, Class, and Gene Discrimination*, in George J. Annas and Sherman Elias, eds, *Gene Mapping: Using Law and Ethics as Guides* 94 (Oxford, 1992) (discussing the potential for correlations between genetic susceptibility to disease and group membership being used to discriminate against racial and ethnic minorities). For an argument opposing the use of antidiscrimination law to address genetic discrimination, see Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 BU L Rev 1, 13-19 (1994).

Genetic information also contributes to the legal fact-finding process, as in the use of DNA to identify criminals or determine paternity. See generally Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 Stan L Rev 465 (1990); Roger Lewin, *DNA Typing on the Witness Stand*, 244 Science 1033 (June 2, 1989).

[40] See Hubbard and Wald, *Exploding the Gene Myth* at 60 (cited in note 35).

[41] See Lynne Duke, *Controversy Flares Over Crime, Heredity: NIH Suspends Funding for Conference*, Wash Post A4 (Aug 19, 1992) (discussing controversy over the government's biological research on crime); Daniel Goleman, *New Storm Brews On Whether Crime Has Roots in Genes*, NY Times C1 (Sept 15, 1992). The project was planned to last five years, with a budget of $400 million. Fox Butterfield, *Dispute Threatens U.S. Plan on Violence*, NY Times A12 (Oct 23, 1992). Scientists recently identified a genetic defect that they claim predisposes some men toward violence. See Natalie Angier, *Gene Tie to Male Violence is Studied*, NY Times A21 (Oct 22, 1993).

[42] See Duke, *Controversy Flares Over Crime, Heredity* at A4; Goleman, *New Storm Brews* at C1. Dr. Frederick Goodwin, director of the Alcohol, Drug Abuse, and Mental Health Administration, indicated that the government program would be largely directed at inner-city youth:

> Now, one could say that if some of the loss of social structure in this society, and particularly within the high impact inner-city areas, has removed some of the civilizing

In their controversial and much publicized book, *The Bell Curve: Intelligence and Class Structure in American Life*, Richard J. Herrnstein and Charles Murray use studies comparing the cognitive functioning of ethnic groups to assert that egalitarian social programs, as a means of improving society, are futile.[43] They claim that intelligence levels differ among ethnic groups, that Blacks are on average less intelligent than whites, and that lower group intelligence explains social problems, such as poverty, unemployment, and welfare dependency. According to their logic, the higher reproductive rates of groups with lower cognitive ability have caused the overall distribution of intelligence scores in America to decline and social disparities to increase. Although Herrnstein and Murray refuse to state definitively the relative importance of genetics and environment, they endorse claims that genetics contributes substantially to racial differences in intelligence and therefore to social class. Moreover, by grounding the reasons for social problems in reproduction, they accentuate the importance of the genetic tie to our individual and collective well-being.[44]

> evolutionary things that we have built up and that maybe it isn't just the careless use of the word when people call certain areas of certain cities jungles, that we may have gone back to what might be more natural, without all of the social controls that we have imposed upon ourselves as a civilization over thousands of years in our own evolution.

Philip J. Hilts, *Federal Official Apologizes For Remarks on Inner Cities*, NY Times A6 (Feb 22, 1992). See also Peter R. Breggin, *The Real Crime is Neglecting Inner-City Youths*, Wash Post A18 (Aug 31, 1992) (letter to the editor) (criticizing the government's proposed violence initiative as racist and eugenic).

[43] Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (Free Press, 1994). The press gave *The Bell Curve* prominent attention, including excerpts from the book in The Wall Street Journal, reviewing it in a New York Times book review, and profiling Charles Murray on the cover of a New York Times Magazine. See *Richard J. Herrnstein and Charles Murray, The Aristocracy of Intelligence*, Wall St J A12 (Oct 10, 1994); Malcolm W. Browne, *What Is Intelligence, and Who Has It?*, NY Times Book Rev 3 (Oct 16, 1994); Jason DeParle, *Daring Research or 'Social Science Pornography'?*, NY Times Mag 48 (Oct 9, 1994). The New Republic published an issue entitled "Race & I.Q.," featuring an essay by Herrnstein and Murray based on their book and a series of critical essays. See New Republic (Oct 31, 1994). For commentary on the "hype" surrounding *The Bell Curve*, see Randall Kennedy, *The Phony War*, New Republic 19, 19-20 (Oct 31, 1994) (observing that Herrnstein and Murray are "popularizers" of old theories about intelligence and social differences, rather than "intellectual pioneers").

[44] Herrnstein and Murray do not propose eugenic measures, such as sterilization of less intelligent people, but their logic would support such measures. See Michael Lind, *Brave New Right*, New Republic 24, 26 (Oct 31, 1994) (tying Herrnstein and Murray's theories to "long-suppressed ideas about hereditary racial inequality"); Jeffrey Rosen and Charles Lane, *Neo-Nazis*, New Republic 14 (Oct 31, 1994) (arguing that Herrnstein and Murray's sources consist of "a chilly synthesis of the findings of eccentric race theorists

At the same time, new reproductive technologies promise to fulfill parents' yearning to share a genetic tie with their children.[45] They also make it possible to use the new genetic knowledge to create children with superior traits, a possibility that some wish to provide with constitutional protections.[46] Pregnant women may choose to abort a fetus determined through amniocentesis, ultrasonography, or other diagnostic techniques to have a genetic defect.[47] In vitro fertilization allows parents to select sperm or ova from donors who possess favored qualities; in the future, it might allow the direct manipulation of the genes contained in the fertilized embryo to enhance their encoded mes-

---

and eugenicists").

[45] Reproductive technologies include a variety of means that allow people to control reproduction from conception to birth. Susan Sherwin, *No Longer Patient: Feminist Ethics and Health Care* 117 (Temple, 1992). They encompass contraceptive devices, abortion, and measures that intervene in pregnancy. The term "new reproductive technologies" usually refers to "a variety of technologies that are employed to facilitate conception or to control the quality of fetuses that are produced," such as artificial insemination, in vitro fertilization, prenatal screening, embryo donation, and surrogacy. Id. For descriptions of new reproductive technologies, see Lori B. Andrews, *New Conceptions: A Consumer's Guide to the Newest Infertility Treatments, Including* In Vitro *Fertilization, Artificial Insemination, and Surrogate Motherhood* 4-7, 120-263 (St. Martin's, 1984); Andrews and Douglass, 65 S Cal L Rev at 630-32, 641-78 (cited in note 9); Robertson, 59 S Cal L Rev at 942-43, 947-51 (cited in note 21); Developments in the Law, *Medical Technology and the Law*, 103 Harv L Rev 1519, 1537-42 (1990).

[46] See John B. Attanasio, *The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide*, 53 U Chi L Rev 1274, 1280 (1986). See also id at 1285-93 (considering a constitutional right to bear genetically superior children); Robertson, *Children of Choice* at 154 (cited in note 9) (arguing that "a wide range of negative and positive selection activities are likely to fall within the bounds of procreative freedom"); Owen D. Jones, *Reproductive Autonomy and Evolutionary Biology: A Regulatory Framework for Trait-Selection Technologies*, 19 Am J L & Med 187, 197-210 (1993) (arguing that trait selection should be constitutionally protected as an important reproductive strategy). Negative genetic engineering attempts to eliminate undesirable genes, while positive genetic engineering seeks to reproduce desirable genes. Attanasio, 53 U Chi L Rev at 1277 n 19.

[47] Robert L. Shinn, *Fetal diagnosis and selective abortion: an ethical exploration*, in Charles Birch and Paul Abrecht, eds, *Genetics and the Quality of Life* 74, 74 (Pergamon, 1975). See generally Sherman Elias and George J. Annas, *Reproductive Genetics and the Law* 53-142 (Year Book Medical, 1987) (discussing the medical, legal, and ethical aspects of genetic screening and prenatal diagnosis); Hubbard and Wald, *Exploding the Gene Myth* at 23-38 (cited in note 35) (discussing the eugenic implications of prenatal testing); Dorothy C. Wertz, *How Parents of Affected Children View Selective Abortion*, in Helen Bequaert Holmes, ed, *Issues in . . . Reproductive Technology I: An Anthology* 161 (Garland, 1992) (describing parents' abortion decisions after prenatal screening). On women's experience of prenatal diagnosis, see Barbara Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* (Viking, 1986); Rayna Rapp, *Moral Pioneers: Women, Men and Fetuses on a Frontier of Reproductive Technology*, in Elaine Hoffman Baruch, Amadeo F. D'Adamo, Jr., and Joni Seager, eds, *Embryos, Ethics, and Women's Rights: Exploring the New Reproductive Technologies* 101, 105-14 (Harrington Park, 1988).

sages or remedy genetic disorders.[48] Of course, people may have long been practicing genetic selection, without the aid of new reproductive technologies, when they have chosen a mate.[49] It would be hypocritical to condemn people who resort to new reproductive technologies for having the same desires for their children as more conventional parents, whose decisions are not so scrutinized. My purpose is not to judge individuals' motivations, but to examine the legal and political context which both helps to create and gives meaning to individuals' motivations. Our ability to tinker with the genes children inherit, as well as the belief that these genes determine human nature, exaggerates the genetic tie's importance in defining personal identity.

C. The Inheritability of Race

The genetic tie's prominence in defining personal identity arose in the context of a racial caste system that preserved white supremacy through a rule of racial purity. In America, perhaps the most socially significant product of the genetic link between parents and children continues to be race. The inheritability of one's race—which determines one's social status—radically distorts the lens through which we view the biological relationship between generations. It is crucial, then, to examine the historical interplay between concepts of race, social status, and genetic connection.

1. The invention of race.

Scientific racism places great value on the genetic tie, as it understands racial variation as a biological distinction that determines superiority and inferiority.[50] Whites justified their en-

---

[48] See Hubbard and Wald, *Exploding the Gene Myth* at 108-16 (cited in note 35); Edward M. Berger and Bernard M. Gert, *Genetic Disorders and the Ethical Status of Germ-Line Gene Therapy*, 16 J Med & Phil 667 (1991); John C. Fletcher, *Moral Problems and Ethical Issues in Prospective Human Gene Therapy*, 69 Va L Rev 515, 530-31 (1983). For a summary of the recent innovations in reproductive and genetic technologies, see Gina Kolata, *Reproductive Revolution Is Jolting Old Views*, NY Times A1, C12 (Jan 11, 1994).

[49] Michael H. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, 28 USF L Rev 647, 663 (1994). Compare Jones, 19 Am J L & Med at 217 n 149 (cited in note 46) (noting that a latent component of all parent-child relationships is that "children, in part, are created to satisfy parental desires").

[50] See Nancy Stepan, *The Idea of Race in Science: Great Britain, 1800-1960* (Archon, 1982). See generally Nancy Leys Stepan and Sandra L. Gilman, *Appropriating the Idioms of Science: The Rejection of Scientific Racism*, in Dominick LaCapra, ed, *The Bounds of Race: Perspectives on Hegemony and Resistance* 72 (Cornell, 1991); Stephen Jay Gould,

slavement of Africans by the idea of a hierarchical ordering of the races.[51] Only a theory rooted in nature could systematically explain the anomaly of slavery existing in a republic founded on a radical commitment to liberty, equality, and natural rights.[52] In this view, the physical differences between Africans, Indians, and whites separated them into distinct "races" that, in turn, evinced a natural ordering of human beings in which whites were created superior to Blacks and Indians.[53] More specifically, the racial myth asserted that nature had perfectly adapted Africans' bodies to the heavy agricultural labor needed in the South, as well as fitted their minds to bondage.[54]

As late as the 1960s, judges and legislators explicitly subscribed to the notion of a natural separation between the races. For example, in a 1965 opinion, quoted by the Supreme Court in *Loving v Virginia*, Circuit Court Judge Leon Bazile defended Virginia's antimiscegenation law as necessary to maintain a divinely ordained racial purity:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated

---

The Mismeasure of Man (Norton, 1981) (describing and debunking examples of biological determinism, which holds that social and economic differences among human groups arise from inherited distinctions). For a contemporary example of scientific racism, see J. Philippe Rushton, *Race, Evolution, and Behavior: A Life History Perspective* (Transaction, 1995) (explaining the evolutionary origins of physical differences between races, including brain size).

[51] See generally Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* 482-511 (North Carolina, 1969) (discussing the notion of a natural racial hierarchy in post-revolutionary American thought); Ronald T. Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America* (Knopf, 1979) (describing white colonists' definitions of Blacks and Indians that justified slavery and land appropriation); Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 New Left Rev 95, 101-09 (1990) (giving a historical account of American racial ideology).

[52] Fields, 181 New Left Rev at 114; Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 Chi Kent L Rev 1009, 1011 (1993). See also Toni Morrison, *playing in the dark: whiteness and the literary imagination* xiii (Harvard, 1992) (describing America as "a nation of people who *decided* that their world view would combine agendas for individual freedom *and* mechanisms for devastating racial oppression").

[53] See Takaki, *Iron Cages* at 47-48, 105. In recognition of the social invention of "races," some scholars surround the term with scare quotes. See, for example, K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* 149, 149 n 1 (Princeton, 1994).

[54] Stampp, *The Peculiar Institution* at 7-9 (cited in note 5).

the races shows that he did not intend for the races to mix.[55]

Scientific racism explained domination by one group over another as the natural order of society. Blacks were biologically destined to be slaves, and whites were destined to be their masters. Whites invented the hereditary trait of race and endowed it with the concept of racial superiority and inferiority in order to resolve the contradiction between slavery and liberty.

2. The genetic tie and social status.

The racial caste system required a clear racial demarcation between slaves and their masters. Whites maintained this line by enforcing a principle of racial purity[56] and by making slave status inheritable from the mother.[57] The rule determining slave status departed from the traditional English view of the genetic tie in two ways.[58] First, the inheritance of slave status violated the expectation that most English men and women were born free.[59] The English introduced into the American colonies various forms of white servitude for debtors, convicts, and poor people,[60] and during most of the seventeenth century, the relative legal status of Negro and white servants remained unsettled.[61] By the eighteenth century, however, whites had imposed a distinctive form of bondage on Africans. African chattel slavery,

---

[55] *Loving v Virginia*, 388 US 1, 3 (1967). See generally Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 Duke L J 624 (examining nineteenth- and early-twentieth-century courts' reliance on prevailing scientific views about racial separation).

[56] American law enforced a rule of racial purity for nearly three centuries. A. Leon Higginbotham, Jr. and Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Georgetown L J 1967, 1967-68 (1989). The prohibition against interracial marriage in Virginia lasted from 1691 until the Supreme Court declared it unconstitutional in *Loving*, 388 US 1. Higginbotham and Kopytoff, 77 Georgetown L J at 1968 nn 5-6.

[57] Stampp, *The Peculiar Institution* at 193 (cited in note 5); Finkelman, 63 Chi Kent L Rev at 1014 n 36 (cited in note 52). A Virginia Act of 1662, for example, declared, "all children borne in this country shalbe [sic] held bond or free only according to the condition of the mother . . . ." Higginbotham and Kopytoff, 77 Georgetown L J at 1971, citing 2 Va Stat 14 Charles II act XII (Hening 1823). For a discussion of such laws in Virginia and Georgia, see A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* 42-45, 252 (Oxford, 1978). Barbara Jeanne Fields notes that seventeenth-century laws determining children's status were framed in terms of slave and free, rather than white and Black: "*Race* does not explain that law. Rather, the law shows society in the act of inventing race." Fields, 181 New Left Rev at 107 (cited in note 51).

[58] See Higginbotham and Kopytoff, 77 Georgetown L Rev at 1971 n 20.

[59] Id.

[60] Stampp, *The Peculiar Institution* at 15-16 (cited in note 5).

[61] Id at 21-22.

unlike white servitude, was a perpetual, lifelong condition passed on to the next generation: "[E]ven [the slave's] children . . . are infected with the Leprosie of his father[']s bondage."[62] The law presumed that Blacks were slaves and that whites were free.[63] Under the American institution of slavery, then, the genetic tie took on supreme importance. It determined the most critical feature of the human condition—whether a child would be deemed a free human being or chattel property.

Second, the principle of *partus sequitur ventrem*[64] violated the long-standing patriarchal tenet that the social status of the child follows the male line.[65] If children took on the status of their fathers, the mulattoes produced by sexual liaisons between white men and their female slaves would have been born free. The slave system rejected this possibility. Thus Frederick Douglass, for example, saw no hope for freedom in a possible genetic tie to his master:

> The whisper that my master was my father, may or may not be true; and, true or false, it is of little consequence to my purpose whilst the fact remains, in all its glaring odiousness, that slaveholders have ordained, and by law established, that the children of slave women shall in all cases follow the condition of their mothers . . . .[66]

Under this system, Black women bore children who were legally slaves and thus replenished the master's capital assets, while white women bore white children to continue the master's legacy. The racial purity of white women's children was guar-

---

[62] Jordan, *White Over Black* at 53 (cited in note 51), quoting Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* 47 (Companie of Stationers, 1611).

[63] Stampp, *The Peculiar Institution* at 194-95 (cited in note 5); Finkelman, 68 Chi Kent L Rev at 1014 (cited in note 52). For an example of a court using this presumption, see *State v Harden*, 29 SCL (2 Speers) 152, 155 (1832) ("By law, every negro is presumed to be a slave . . . ."). For other cases stating this presumption, see Charles S. Mangum, Jr., *The Legal Status of the Negro* 2 n 2 (North Carolina, 1940).

[64] The child inherits the condition of the mother. Stampp, *The Peculiar Institution* at 193 (cited in note 5).

[65] See Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* 42 (Columbia, 1994) ("Perhaps the most peculiar [custody issue arising from the institution of slavery] was the legal and practical connection of the slave child to its mother and the complete repudiation of the father; the reverse of the situation in a free white family."). Orthodox Jewish doctrine similarly provides that a child is considered a Jew only if his mother is Jewish. See Bruno Bettelheim, *The Children of the Dream* 30 (Macmillan, 1969).

[66] Frederick Douglass, *Narrative of the Life of Frederick Douglass: An American Slave* 49 (Penguin, 1982) (Houston A. Baker, Jr., ed).

anteed by a violently enforced taboo against sexual relations between white women and Black men[67] and by antimiscegenation laws that punished interracial marriages.[68] Courts virtually ignored the far more common sexual laisons between white men and female slaves.[69]

Race came to define an entire caste of second-class members of society: "While some blacks in the South ceased to be slaves, freedom only relieved them of the burdens of servitude; it could never lead to full equality."[70] Both Northern and Southern states denied free Blacks many of the rights and privileges enjoyed by white citizens, such as voting, participation in certain professions, and liberty of movement.[71] Such laws made every Black person in America, whether free or slave, subordinate to every white person.

---

[67] White slavemasters preserved racial purity by controlling the sexual behavior of white women, rather than their own. See Higginbotham, *In the Matter of Color* at 40-47 (cited in note 57); Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 Harv Women's L J 115, 115 (1984).

[68] See Higginbotham, *In the Matter of Color* at 45-46 (cited in note 57). Like the rules determining slave status, the prohibition of interracial marriage "was an American innovation without English precedent." Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 126 (North Carolina, 1985). The mandate of racial purity also helped to justify laws that excluded Blacks generally from white social spheres on the ground that interracial associations created the potential of polluting the white race. See Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 606 (Harper, 1944) ("No excuse for other forms of social segregation and discrimination is so potent as the one that sociable relations on an equal basis between members of the two races *may possibly* lead to intermarriage."); Hovenkamp, 1985 Duke L J at 627-37 (cited in note 55) (discussing scientific theories concerning the wisdom of separating the races that justified de jure racial segregation). See also *Berea College v Commonwealth*, 123 Ky 209, 94 SW 623, 628 (Ky App 1906) (upholding the criminal prohibition of integrated education based on the necessity for racial purity, arguing that "[f]rom social amalgamation it is but a step to illicit intercourse, and but another to intermarriage").

[69] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan L Rev 581, 598-99 (1990) (discussing the nonexistence of laws criminilizing rape of Black women); Higginbotham and Kopytoff, 77 Georgetown L J at 2003 (cited in note 56). On the sexual exploitation of slave women by their masters, see bell hooks, *Ain't I A Woman: black women and feminism* 23-36 (South End, 1981); Deborah Gray White, *Ar'n't I A Woman? Female Slaves in the Plantation South* 34-35, 68, 152-53 (W.W. Norton, 1985).

[70] Finkelman, 68 Chi Kent L Rev at 1014 (cited in note 52).

[71] Id at 1014-15. On the legal status of free Blacks prior to the Civil War, see generally Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (Pantheon, 1974) (discussing the denial of the rights of free Blacks in the South); John Hope Franklin, *The Free Negro in North Carolina: 1790-1860* 58-120 (Russell & Russell, 1969); Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago, 1961) (discussing political, educational, and economic repression of Blacks in the free states).

3. The genetic tie and race.

In eighteenth-century America, the genetic tie legally determined one's race, as well as one's status. The previous Section described how race came to determine one's social status at birth: most Blacks were slaves; all were subordinate to whites. This Section discusses how the law determined one's race according to genetic inheritance. Statutory definitions of race were based on ancestry, or genotype, instead of physical appearance, or phenotype, which was used in South African law.[72] A person's race depended on the proportion of white, Black, and Indian blood he or she inherited. People with mixed Black and white ancestry—mulattoes—were treated the same as Negroes and denied the rights and privileges of whites.[73] As Winthrop Jordan observed, "the separation of slaves from free men depended on a clear demarcation of the races, and the presence of mulattoes blurred this essential distinction."[74] Classifying mulattoes as Black denied the fact of racial intermixture which—if acknowledged—would have undermined the logic of racial slavery.[75]

Courts and legislatures took pains to define the precise amount of Black ancestry that barred inclusion in the white race. In 1705, for example, a Virginia statute that barred mulattoes, Negroes, Indians, and criminals from holding public office defined mulattoes as "the child of an Indian, or the child, grandchild, or great grandchild of a Negro."[76] Thus, a person with one-eighth Negro ancestry—with a single Negro great-grandparent—was legally mulatto and was excluded from white privileges. Even into the twentieth century, racial definitions ensured that "any

---

[72] See Higginbotham and Kopytoff, 77 Georgetown L J at 1975-81, 1983 n 73 (cited in note 56) (discussing statutory definitions of race during the eighteenth and nineteenth centuries and the South African use of phenotypes). South Africa's phenotype definition, however, contains the genetic presumption that white women will bear white children. Patricia Williams recounts her South African friend's story about how the Afrikaaner government placed a child with Black features born to white parents with a more appropriate "browner" family. Patricia J. Williams, *The Alchemy of Race and Rights* 223 (Harvard, 1991).

[73] See Marvin Harris, *Patterns of Race in the Americas* 37, 56 (Walker, 1964) (describing the rule of hypodescent, which classifies as subordinate the offspring of one superordinate and one subordinate parent).

[74] Jordan, *White Over Black* at 178 (cited in note 51).

[75] Id.

[76] See 3 Va Stat 4 Anne ch IV (Hening 1823), quoted in Higginbotham and Kopytoff, 77 Georgetown L J at 1977 (cited in note 56). See also Cheryl I. Harris, *Whiteness as Property*, 106 Harv L Rev 1707, 1738-39 (1993) (discussing court decisions that defined "Negro").

trace of Negro blood would disqualify a person from being considered white under the law."[77]

Legal racial classifications thus created and preserved racial *purity* and racial *domination*.[78] They maintained the myth of a "pure white race,"[79] members of which alone were entitled to hold positions of power.[80] The law paradoxically rendered the genetic tie at once supremely important and supremely insignificant. It determined one's most basic condition—free or slave—at birth and declared the Black genetic tie, no matter how miniscule, both contaminating and subordinating. Despite the importance of biological descent in race-based slavery, people with predominantly white blood were held as slaves because they descended from a slave woman.[81] The law made their white genetic tie invisible in the name of racial purity.

This racial hierarchy rested on the assumption that the genetic tie to a Black parent automatically passed down a whole set of inferior traits. Racist ideology dictated that Black bodies, intellect, character, and culture were all inherently vulgar.[82] The

---

[77] Higginbotham and Kopytoff, 77 Georgetown L J at 1981 (cited in note 56). In 1924, for example, a Virginia antimiscegenation statute, entitled "Preservation of Racial Integrity," defined a "white" person as someone who had "no trace whatsoever of any blood other than Caucasian." Id at 2020-21. This racial definition remained in effect until 1967, when the Supreme Court declared such statutes unconstitutional. See *Loving*, 388 US 1.

[78] Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan L Rev 1, 26-27 (1991).

[79] Higginbotham and Kopytoff, 77 Georgetown L J at 1983 (cited in note 56).

[80] See 3 Va Stat 4 Anne ch IV (disqualifying Negroes, mulattoes, and Indians from holding office).

[81] Higginbotham and Kopytoff, 77 Georgetown L J at 1972 (cited in note 56); Paul Finkelman, *The Color of Law*, 87 Nw U L Rev 937, 950-57 (1993), reviewing Andrew Kull, *The Color-Blind Constitution* (Harvard, 1992).

[82] West, *Race Matters* at 85-86 (cited in note 14). See also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv L Rev 1331, 1373 (1988) (describing how racist ideology reflects an oppositional dynamic wherein whites are associated with positive characteristics, while Blacks are associated with the opposite, aberrational qualities). This oppositional dymnamic became not only the mode of whites' definition of Blacks, but also of whites' definition of themselves. Whiteness is valued only in relation to blackness. As Toni Morrison observed in her examination of blackness in the white literary imagination:

> Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less, but historical; not damned, but innocent; not a blind accident of evolution, but a progressive fulfillment of destiny.

Morrison, *playing in the dark* at 52 (cited in note 52). James Baldwin made a similar observation about the dependence of whites' identity on their imagination of blackness: "[I]t is one of the ironies of black-white relations that, by means of what the white man imagines the black man to be, the black man is enabled to know who the white man is." James Baldwin, *Notes of a Native Son* 167 (Beacon, 1984), quoted in Henry Louis Gates,

Black genetic tie was not a valued promise for future generations, but an indelible mark that doomed a child to an inhumane future. Conversely, the white genetic tie—if legally free from the taint of blackness—was an extremely valuable attribute to be preserved and protected. Cheryl Harris has detailed the evolution of the concept of whiteness as a form of treasured property that originated in slavery and persists in current perceptions of racial identity.[83] The status of being white in America brings with it benefits and privileges that whites have come to expect. By ratifying these expectations, the law in effect recognizes a property interest in whiteness.[84]

The rigidly guarded racial line supported a view of whiteness as purity and blackness as pollution, taint, blemish, corruption, and contamination. For whites, racial intermingling "was stamped as irredeemably illicit; it was irretrievably associated with loss of control over the baser passions, with weakening of traditional family ties, and with breakdown of proper social ordering."[85] White colonists described the sexual union of Blacks and whites as the mixture of "bloods"—the intermingling of two radically and permanently distinct kinds of people.[86] They complained that interracial unions "polluted the blood of many amongst us," and "smutted our blood."[87] Thus, the meaning of the genetic tie in American law and culture was infused with the paramount objective of keeping the white bloodline free from Black contamination.

D. The Genetic Tie and Black Identity

Part of the reason for my friend's reaction to the Baby Jessica case (recounted in the Introduction) may be that the

---

Jr., *The Welcome Table*, in Gerald Early, ed, *Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation* 144, 151-52 (Allen Lane, 1994).

[83] Harris, 106 Harv L Rev at 1713 (cited in note 76).

[84] Id.

[85] Jordan, *White Over Black* at 144 (cited in note 51).

[86] Id at 166.

[87] Id at 167, quoting James Fontaine, *Memoirs of a Huguenot Family* (G.P. Putnam & Sons, 1872) (Ann Aaury, trans). See also Harris, 106 Harv L Rev at 1738 (cited in note 76) ("[T]he law uniformly accepted the rule [that] . . . racial identity was governed by blood, and white was preferred."); Jones, 82 Georgetown L J at 451-56 (cited in note 8) (discussing the metaphor of blood in American discourse about race). A modern image of Black genetic contamination is Patricia Williams's parable of New Age guerilla warfare involving "smuggl[ing] small hermetically sealed vials of black sperm into the vaulted banks of unborn golden people . . . ." Williams, *The Alchemy of Race and Rights* at 188 (cited in note 72). See also text accompanying notes 148-48.

genetic tie has a different meaning for most Black people than for most whites. Of course, both Black and white individuals desire to produce and raise their own genetically related children. In both groups, this biological bond often forms the basis of a cherished relationship. Nevertheless, shared genetic material seems to be less significant to Black people's identity. This observation does not presume an essential or authentic Black identity. It does presume that Black people in America share a common culture that shapes Black individuals' view of themselves; they "have a sense of shared past and similar origins" and "believe themselves to be distinctive from others in some significant way."[88] Black cultural definitions of group and self center less on the genetic tie than white cultural definitions do.

In America, whites have historically valued the genetic tie and controlled its official meaning. As the powerful class, they are the guardians of the privileges accorded to biology and have a greater stake in maintaining the importance of the genetic tie. Therefore, the legal regulation of racial boundary lines during the slavery period, for example, concerned *whites*, not Blacks: "The statutes punishing voluntary interracial sex and marriage were directed only at whites; they alone were charged with the responsibility for maintaining racial purity."[89]

In addition, two related aspects of Black history and culture—the meaning of race and the importance of self-definition—minimize the centrality of the genetic tie to concepts of personhood. First, genetic makeup is not critical to the meaning

---

[88] James W. Green, *Cultural Awareness in the Human Services* 9 (Prentice-Hall, 1982). See generally Robert C. Smith and Richard Seltzer, *Race, Class, and Culture: A Study in Afro-American Mass Opinion* (SUNY, 1992) (analyzing racial differences in mass culture and exploring how race, class, and culture interact in shaping Black attitudes); Gerald Early, ed, *Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation* (Allen Lane, 1994) (collecting essays by twenty Black intellectuals pondering the shaping of Black Americans' identity).

[89] Higginbotham and Kopytoff, 77 Georgetown L J at 1968 (cited in note 56). See also Jordan, *White Over Black* at 108 (cited in note 51) (noting that colonial slave codes were paradoxically aimed at disciplining *whites* to ensure maintenance of a "private tyranny" over slaves). Higginbotham and Kopytoff distinguish these laws, which concerned *voluntary* interracial sex, from criminal statutes punishing interracial rape. 77 Georgetown L J at 2008 (cited in note 56). Rape law was directed primarily at Black males and maintained aspects of white male domination other than racial purity. Laws designed to prevent interracial procreation were directed primarily at white women. On the racist construction of rape law, see Jacquelyn Dowd Hall, *"The Mind That Burns in Each Body": Women, Rape, and Racial Violence*, in Ann Snitow, Christine Stansell, and Sharon Thompson, eds, *Powers of Desire: The Politics of Sexuality* 328, 336 (Monthly Review, 1983); Harris, 42 Stan L Rev at 598-601 (cited in note 69); Note, *Rape, Racism, and the Law*, 6 Harv Women's L J 103, 104-23 (1983).

of race in African-American culture. Whites defined enslaved Africans as a biological race. Blacks in America have historically resisted this racial ideology by defining themselves as a political group.[90] Barbara Jeanne Fields explains the different meanings of race during the nineteenth century:

> Afro-Americans understood the reason for their enslavement to be, as Frederick Douglass put it, "not *color* but *crime*". Afro-Americans invented themselves, not as a race, but as a nation. They were not troubled, as modern scholars often are, by the use of racial vocabulary to express their sense of nationality. Afro-American soldiers who petitioned on behalf of "These poor nation of colour" and "we Poore Nation of a Colored rast [race]" saw nothing incongruous about the language.[91]

By the turn of the twentieth century, Black Americans had developed a race consciousness rooted in a sense of peoplehood that laid the foundation for later civil rights struggles.[92] Blacks use terms that connote genetic relationships—"brother," "sister," and "blood"—to refer to people related to them by links of racial solidarity.[93] Most Blacks downplay their white genetic heritage to identify socially with other Blacks.[94] For them, ethnic identity

---

[90] See, for example, Fields, 181 New Left Rev at 115 (cited in note 51) ("Afro-Americans invented themselves, not as a race, but as a nation.").

[91] Id, quoting Frederick Douglass, *My Bondage and My Freedom* 90 (Dover, 1969). See generally Stepan and Gilman, *Appropriating the Idioms of Science* at 81-83 (cited in note 50) (discussing Black resistance to scientific racism).

[92] David Gordon Nielson, *Black Ethos: Northern Urban Negro Life and Thought, 1890-1930* xv-xvi (Greenwood, 1977). See generally Gary Peller, *Race Consciouness*, 1990 Duke L J 758 (comparing Black nationalist and integrationist ideologies and strategies). A contemporary exception is an extreme version of Afrocentrism that links Africans' intellectual and cultural contributions to the genetic trait of melanin—the pigment in dark skin. See Anthony Flint, *Black Academics Split on Afrocentrism*, Boston Globe 1 (Sept 27, 1994).

[93] It was common for slaves to address elderly members of their community as "Uncle" and "Aunt." Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925* 216-17 (Pantheon, 1976). Gutman suggests that this practice "socialized [children] into the enlarged slave community and also invested non-kin *slave* relationships with symbolic kin meanings and functions." Id at 217. See also Nathan Irvin Huggins, *Black Odyssey: The Afro-American Ordeal in Slavery* 168 (Pantheon, 1977) (speculating that the genetic tie was less important to slave men because they had no property to devise to their heirs).

[94] Even children of interracial couples (having one Black and one white parent) tend to identify themselves as Black, often as a political choice. See Ana Mari Cauce, et al, *Between a Rock and a Hard Place: Social Adjustment of Biracial Youth*, in Maria P.P. Root, ed, *Racially Mixed People in America* 207, 213 (Sage, 1992); Robert E.T. Roberts, *Self-Identification and Social Status of Children of Black-White Marriages in Chicago* 27

is a conscious decision based primarily on considerations other than biological heritage: "The choice is partly cultural, partly social, and partly political, but it is mostly affectional."[95] Black people's search for their ancestral roots has focused on cultural rather than genetic preservation. Their "ancestors" are not connected to them directly by a bloodline; they are all African people of a bygone era. Discovering one's African heritage is a means of recovering from the social death caused by whites' obliteration of slaves' collective genealogical and cultural memory.[96]

This distinction between cultural and genetic unity is reflected in Black opposition to transracial adoptions.[97] Some Blacks take the position that Black adoptive children should be placed only with Black families to ensure the transmission of Black cultural traits. The National Association of Black Social Workers, for example, has long opposed transracial adoptions because "Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future."[98]

& table 14 (unpublished paper presented at IXth International Congress of Anthropological and Ethnological Sciences, Aug 20, 1983) (on file with U Chi L Rev). Others refuse to identify with one race or the other, preferring to define themselves as both Black and white, mixed, or simply human. See Ruth G. McRoy and Edith Freeman, *Racial-Identity Issues among Mixed-Race Children*, 8 Soc Work in Educ 164, 165 (1986); Paul R. Spickard, *The Illogic of American Racial Categories*, in Maria P.P. Root, ed, *Racially Mixed People in America* 12, 21 (Sage, 1992). See also Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 L & Inequality 183, 184 (1993) (asserting that a growing number of individuals identifying themselves as "multiracial" are seeking official recognition as a distinct social unit). This identification is often a refusal to base identity on biological inheritance.

[95] Stephen L. Carter, *The Black Table, the Empty Seat, and the Tie*, in Gerald Early, ed, *Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation* 55, 64 (Allen Lane, 1994). See also Adele Logan Alexander, *Ambiguous Lives: Free Women of Color in Rural Georgia, 1789-1879* 9 (Arkansas, 1991), discussing W.E.B. Du Bois, *The Significance of Henry Hunt*, in 1 *The Fort Valley State College Bulletin: Founder's and Annual Report* 6, 7 (Oct 1940) (explaining why a nineteenth-century Georgia family of mixed racial heritage chose not to "pass" as white: "They and others chose to remain and identify with the darker race for two predominant reasons: responsibility and love . . . ."); West, *Race Matters* at 26 (cited in note 14) ("[B]lackness is a political and ethical construct.").

[96] See Orlando Patterson, *Slavery and Social Death: A Comparative Study* 35-76 (Harvard, 1982) (describing the rituals of enslavement in various cultures that contributed to the slave's social death); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv L Rev 985, 1015 & n 86 (1990) (describing slaves' brutal detachment from African society).

[97] See generally Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 NYU Rev L & Soc Change 33 (1993-94) (comparing an individualistic, color-blind approach to transracial adoptions with a community-oriented perspective).

[98] Position Paper developed at the National Association of Black Social Workers'

These children are not genetically linked to their new families, but, according to this view, they should be tied to the Black community.

A Black parent's essential contribution to his or her children is not passing down genetic information but sharing lessons needed to survive in a racist society. Black parents transmit to their children their own cultural identity and teach them to defy racist stereotypes and practices, teaching their children to live in two cultures, both Black and white.[99] Some feel they must cultivate in their children what W.E.B. Du Bois described as a double consciousness;[100] others see their task as preparing their children "to live among white people without *becoming* white people."[101]

This focus on cultural, rather than biological, preservation is complicated by the fear of Black genocide.[102] In a society in

---

Conference in Nashville Tenn, Apr 4-9, 1972, reprinted in part in Rita James Simon and Howard Altstein, *Transracial Adoption* 50 (John Wiley, 1977). See also Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J Family L 51, 117 (1990-91) ("Because race is so significant in this society, the interests of all individual Black persons are tied to the status of Blacks as a group, and a strong and thriving Black community benefits all Black children.").

[99] See Suzanne C. Carothers, *Catching Sense: Learning from Our Mothers To Be Black and Female*, in Faye Ginsburg and Anna Lowenhaupt Tsing, eds, *Uncertain Terms: Negotiating Gender in American Culture* 232, 239-40 (Beacon, 1990) (recounting a Black woman's description of how she learned from her grandmother "to deal with white people"); Patricia Hill Collins, *The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships*, Sage 3, 7 (Fall 1987) ("Black daughters must learn how to survive in interlocking structures of race, class and gender oppression while rejecting and transcending those very same structures."); Janice Hale, *The Black Woman and Child Rearing*, in La Frances Rodgers-Rose, ed, *The Black Woman* 79, 82 (Sage, 1980) ("Black children have to be prepared to imitate the behavior of the culture in which they live and at the same time take on those behaviors that are needed in order to be upwardly mobile."). Some Black sociologists have opposed transracial adoption on the ground that only Black parents are capable of teaching Black children necessary "survival skills." Perry, 29 J Family L at 110-11. See also Joyce A. Ladner, *Mixed Families: Adopting Across Racial Boundaries* 80 (Anchor, 1977) (describing "Black survival techniques" as a "broad repertoire of psychological attitudes and behavioral acts on the overt and covert level"); Joyce A. Ladner, *Mixed Families: White Parents and Black Children*, Society 70, 77-78 (Sept/Oct 1977) (discussing difficulties white parents are likely to experience in raising emotionally healthy Black children).

[100] See W.E.B. Du Bois, *The Souls of Black Folk* 45 (Signet, 1969).

[101] Hale, *The Black Woman and Child Rearing* at 80.

[102] See Robert G. Weisbord, *Genocide?: Birth Control and the Black American* (Greenwood and Two Continents, 1975) (discussing the view held by some Blacks that family-planning programs are a potential means of race genocide); William A. Darity and Castellano B. Turner, *Family Planning, Race Consciousness and the Fear of Race Genocide*, 62 Am J Pub Health 1454, 1454-56 (1972) (same). See also Kay Mills, *This Little Light of Mine: The Life of Fannie Lou Hamer* 274 (Dutton, 1993) (discussing Black activist Fannie Lou Hamer's view of abortion and birth control as a form of genocide). Black

which Black traits are consistently devalued, a focus on the genetic tie will more likely be used to justify limiting Black reproduction rather than encouraging it.[103] Although some Blacks believe that government reproductive health policies, such as white-controlled family planning, literally threaten Black survival, such arguably eugenic policies serve primarily an ideological function.[104] The chief danger of these policies is not the physical annihilation of a race or social class; it is the legitimation of an oppressive social hierarchy. Proposals to solve social problems by curbing Black reproduction make social inequality appear to be the product of nature rather than power. Donald MacKenzie observed that eugenic social theory is "a way of reading the structure of social classes onto nature."[105] In the same way, the primary threat to the Black community posed by the social emphasis on the genetic tie is not the actual elimination of Black genes; it is the biological justification of white supremacy. Opposition to policies that devalue Black reproduction, then, need not

---

males' aversion to contraceptive sterilization might reflect an attachment to the genetic tie. Only 0.5 percent of Black men are contraceptively sterile, compared to 8.4 percent of white men and 24 percent of Black women. See Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 Yale J L & Feminism 255, 273 (1992); Felicia Halpert, *Birth Control for Him*, Essence 20 (Nov 1990). Halpert surmises, however, that Black men's "big fear about vasectomy" derives from its association with castration rather than its prevention of genetically related offspring. Id.

[103] On the connection between current policies that discourage procreation by Black women and eugenic ideology, see Roberts, 104 Harv L Rev at 1473-76 (cited in note 3); Roberts, 67 Tulane L Rev at 1961-69 (cited in note 3).

[104] Claims that current government policies that penalize Black reproduction are eugenic in nature are sometimes misinterpreted as an unwarranted fear of racial genocide. See, for example, John R. Kramer, *Introduction to Symposium: Criminal Law, Criminal Justice, and Race*, 67 Tulane L Rev 1725, 1733-34 (1993) (criticizing my argument that reproductive punishments for crime are eugenic in nature, arguing that "Black women need not fear that their right to bear children is under serious attack . . . nor do black birth rates suggest that they do"). It could as easily be argued that mandatory sterilization laws enforced during the first half of the twentieth century posed no serious danger since they resulted in the sterilization of only seventy thousand persons. See George P. Smith II, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J Contemp Health L & Policy 71, 77 n 35 (1988). Nevertheless, eugenic ideology may facilitate truly genocidal actions. The Nazi compulsory sterilization law of 1933 foreshadowed the Holocaust. See Müller-Hill, *Murderous Science* 28-38 (cited in note 6); Robert Proctor, *Racial Hygeine: Medicine Under the Nazis* 95-117 (Harvard, 1988).

[105] Donald A. MacKenzie, *Statistics in Britain, 1865-1930: The Social Construction of Scientific Knowledge* 18 (Edinburgh, 1981). See also Howard L. Kaye, *The Social Meaning of Modern Biology: From Social Darwinism to Sociobiology* 5 (Yale, 1986) (describing sociobiological theories as "dramatic and often anthropomorphized representations of how the world works that arouse our emotions, validate our hopes, answer our most troubling questions, and lend both cosmic and scientific sanction to a new order of living").

arise from a desire for Black genetic proliferation. Such opposition can arise from the struggle to eradicate white supremacy.

Social preferences for white traits have also affected Blacks' culturally focused identity, however. Some Blacks have valued particular genetic traits, such as light skin color and straight hair, because of their desire to look whiter. In some Black bourgeois communities, whiter features signified higher social standing.[106] The Black elite of Washington, D.C., at the turn of the century, for example, was well known for requiring a white appearance for entry into its circle.[107] Some Blacks took advantage of their genetic makeup by "passing" as white in order to gain the economic and social privileges whites normally denied a Black person.[108] The connection between skin color and social status within the Black community, as well as the dominant society, certainly has shaped the genetic tie's significance for some Black parents. Patricia Williams tells the story of her godmother, Marjorie, whose mother left her with darker-skinned relatives because the child's skin was too dark to allow her mother to pass as white, to marry a white man, and (presumably) to bear white-looking children.[109] Although skin color no longer determines social status in Black communities to this extent, preference for white features continues to influence some Black people's family relationships.[110]

---

[106] See Nielson, *Black Ethos* at 157-72 (cited in note 92); Kathy Russell, Midge Wilson, and Ronald Hall, *The Color Complex: The Politics of Skin Color Among African Americans* 24-29 (Harcourt Brace Jovanovich, 1992). See also E. Franklin Frazier, *The Negro Church in America* 30-31 (Schocken, 1963) (observing that in post–Civil War Black Methodist and Baptist denominations, there were separate organizations based on distinctions of color).

[107] Nielson, *Black Ethos* at 163 (cited in note 92).

[108] See id at 168-71; Harris, 106 Harv L Rev at 1712-13 (cited in note 76). Harris explains why her Negro grandmother presented herself as a white woman when she sought employment at a major retail store in Chicago in the 1930s:

> Becoming white meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival. Becoming white increased the possibility of controlling critical aspects of one's life rather than being the object of others' domination.

Harris, 106 Harv L Rev at 1713 (cited in note 76).

[109] Williams, *The Alchemy of Race and Rights* at 223 (cited in note 72).

[110] See generally Russell, Wilson, and Hall, *The Color Complex* at 94-123 (discussing how the desire for light skin and other "white" physical features has created tension and influenced marital decisions in some Black families). For a personal testimony of the hurt caused by a Black family's preference for white features, see Carolyn Edgar, *Black and Blue*, 2 Reconstruction 13, 13 (No 3, 1994). Edgar confesses,

> Despite the pain I've suffered from my family's obsession with hair texture, skin complexion, and eye color, I now also feel that the job of producing the good-haired,

Despite this history, sharing genetic traits seems less critical to Black identity than to white identity. The notion of racial purity is foreign to Black folk. Our communities, neighborhoods, and families are a rich mixture of languages, accents, and traditions, as well as features, colors, and textures. Black life has a personal and cultural hybrid character.[111] There is often a melange of physical features—skin and eye color, hair texture, sizes and shapes—within a single family. We are used to "throwbacks"—a pale, blond child born into a dark-skinned family, who inherited stray genes from a distant white ancestor. My children play with a set of twins who look very different from each other. The boy has light skin, green eyes, and "kinky" sandy-colored hair; the girl has dark skin, brown eyes, and long, black, wavy hair.[112] We cannot expect our children to look just like us.

Second, Blacks' view of the genetic tie is shaped by the importance of self-definition, which escapes the constraints of inherited traits. If personal identity is not dependent on one's biological "race," then it must be deliberately chosen. Blacks have defied the inferior status of blackness that whites attached to their biology by inventing their own individual identities.[113] As Lerone Bennett, Jr. declared, "Identified as a Negro, treated as

---

> fair-skinned, light-eyed grandchild has fallen to me. No matter what my future mate looks like, I know I will spend a couple anxious months waiting to see from which side my first baby takes its coloring, its hair, its eyes.

Id. My own sense is that the embrace of physical diversity in Black families and communities far outweighs divisions based on genetic traits.

[111] Cornel West writes about these two forms of "hybridity" in Black American life. He notes, for example, the "cultural hybridity" of Black religion and music, "in which the complex mixture of African, European, and Amerindian elements are constitutive of something that is new and black in the modern world." West, *Race Matters* at 101 (cited in note 14) (emphasis omitted). He also refers to Malcolm X's "personal hybridity," owing to Malcolm's white grandfather, "which blurred the very boundaries so rigidly policed by white supremacist authorities." Id at 103.

[112] Of course, there are physical differences among white siblings as well, but those differences do not have the same social import. My eight-year-old daughter, who has yet to realize the full consequences of racial difference in America, thinks the twins look alike. See also Fields, 181 New Left Rev at 118 (cited in note 51) (noting that in our society "physical description follows race, not the other way around").

[113] In fact, the image of the individual shackled to his genetic destiny conflicts with the basic tenets of liberalism; it contradicts a definition of personhood centered on the autonomous, self-determining individual and denies the possibility of individual choice. See John Rawls, *A Theory of Justice* 513-20 (Harvard, 1971). As Laurence Tribe observed, "one's sense of 'selfhood' or 'personhood,' and the related experience of one's autonomous individuality, may depend, at least in some cultural settings, on the ability to think of oneself as neither fabricated genetically nor programmed neurologically . . . ." Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S Cal L Rev 617, 648 (1973).

Negro, provided with Negro interests, forced, whether he wills or no, to live in Negro communities, to think, love, buy and breathe as a Negro, the Negro comes in time to see himself as a Negro. . . . He comes, in time, to invent himself."[114] The theme of willful self-creation is especially strong in the writings of Black women.[115] For example, Angela Harris recognizes in the fiction of Zora Neale Hurston an insistence on a "conception of identity as a construction, not an essence" stemming from the fact that "[B]lack women have had to learn to construct themselves in a society that denied them full selves."[116] Denied self-ownership and rejected from the dominant norm of womanhood, Black women have defined themselves apart from the physical aspects of race.

---

[114] Lerone Bennett, Jr., *The Negro Mood and Other Essays* 84 (Ballantine, 1964). Bennett's words are reminiscent of W.E.B. Du Bois's classic description of Black Americans' striving for a self-created identity:

> It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness, an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.
>
> The history of the American Negro is the history of this strife, this longing to attain self-conscious manhood, to merge his double self into a better and truer self.

Du Bois, *The Souls of Black Folk* at 45 (cited in note 100).

[115] See Joyce Pettis, *Self Definition and Redefinition in Paule Marshall's* Praisesong for the Widow, in Harry B. Shaw, ed, *Perspectives of Black Popular Culture* 93 (Bowling Green, 1990). Examples of Black female fictional characters who invent themselves are Toni Morrison's Pilate in *Song of Solomon* and her protagonist in *Sula*, and Alice Walker's Shug Avery and Celie in *The Color Purple*. See Toni Morrison, *Song of Solomon* (Knopf, 1977); Toni Morrison, *Sula* (Knopf, 1974); Alice Walker, *The Color Purple* (Harcourt Brace Jovanovich, 1982). For criticism of the theme of self-definition in Black women's fiction as failing to examine the characters' politics, see bell hooks, *Black Looks: Race and Representation* 47-60 (South End, 1992). For Black women's autobiographical accounts of self-creation, see, for example, Mary Helen Washington, *Invented Lives: Narratives of Black Women 1860-1960* (Anchor, 1987); Williams, *The Alchemy of Race and Rights* at 183 (cited in note 72) ("I am brown by my own invention . . . . One day I will give birth to myself, lonely but possessed."); Kristin Hunter Lattany, *Off-Timing: Stepping to the Different Drummer*, in Gerald Early, ed, *Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation* 163, 171 (Allen Lane, 1994) ("I have chosen to integrate my personality around a unified core of thoroughly accepted inner blackness.").

[116] Harris, 42 Stan L Rev at 613 (cited in note 69), discussing Zora Neale Hurston, *How It Feels to Be Colored Me*, in Alice Walker, ed, *I Love Myself When I Am Laughing . . . And Then Again When I Am Looking Mean and Impressive* 152, 155 (Feminist, 1979).

II. Creating Genetic Ties

New reproductive technologies enable infertile individuals to produce children who are genetically related to them. Using technology to create genetic ties focuses attention on the particular value placed on this form of connection and the social hierarchies that allocate their creation. The feminist critique of new reproductive technologies has demonstrated powerfully that they enforce traditional patriarchal roles that privilege men's genetic desires and objectify women's procreative capacity. This Part will examine how race interacts with gender to structure the creation of genetic ties.

A. Gender and the Desire for a Genetic Tie

New reproductive technologies, such as in vitro fertilization and surrogacy, function primarily to fulfill men's desire for genetically related offspring. These technologies resolve the male anxiety over ascertaining paternity: By uniting the egg and sperm outside the uterus, they "allow[ ] men, for the first time in history, to be absolutely certain that they are the genetic fathers of their future children."[117] Some feminists have questioned the forces that drive so many women to endure the emotional trauma and physical manipulations of in vitro fertilization.[118] For example, their desire to bear children is influenced by the stigma of infertility and the expectation that all women will become mothers.[119] Children may also be the only source of emotional fulfillment for many women or their only way to secure their relationship to their husband.[120]

---

[117] Carol Smart, *'There is of course the distinction dictated by nature': Law and the Problem of Paternity*, in Michelle Stanworth, ed, *Reproductive Technologies: Gender, Motherhood and Medicine* 98, 100 (Minnesota, 1987).

[118] See, for example, Corea, *The Mother Machine* at 166-85 (cited in note 10); Rothman, *Recreating Motherhood* at 29-47 (cited in note 10); Judith Lorber, *Choice, Gift or Patriarchal Bargain? Women's Consent to* In Vitro *Fertilization in Male Infertility*, in Helen Bequaert Holmes and Laura M. Purdy, eds, *Feminist Perspectives in Medical Ethics* 169 (Indiana, 1992). See also Raymond, *Women as Wombs* at xix-xx (cited in note 10) (describing new reproductive technologies as a form of medical violence against women).

[119] See Mardy S. Ireland, *Reconceiving Women: Separating Motherhood from Female Identity* 1-16 (Guilford, 1993); Jane M. Ussher, *The psychology of the female body* 99-100 (Routledge, 1989); Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, in Joyce Trebilcot, ed, *Mothering: Essays in Feminist Theory* 287, 293 (Rowman & Allanheld, 1984).

[120] Sherwin, *No Longer Patient* at 132 (cited in note 45). See also Linda S. Williams, *Biology or Society? Parenthood Motivation in a Sample of Canadian Women Seeking* In Vitro *Fertilization*, in Helen Bequaert Holmes, ed, *Issues in . . . Reproductive Technology*

In addition to the desire to be a mother is the desire to produce a genetically related child. Despite very low rates of live births resulting from in vitro fertilization ("IVF"),[121] some women feel a "duty" to undergo the ordeal before they give up on the possibility of genetic parenthood.[122] However, many—if not most—women who undergo IVF, a gruelling and risky means of conception, are themselves physiologically *fertile*, although their husbands are not.[123] These women could therefore become pregnant using a much less difficult process—artificial insemination, for example. Underlying women's desire to undergo IVF, then, is often their husbands' insistence on having a genetic inheritance.[124] Moreover, fertility clinics routinely deny their services

I: An Anthology 261, 265-70 (Garland, 1992) (finding that women were motivated to attempt in vitro fertilization by their views on the connections between motherhood, femininity, marriage, and creating a family).

[121] See Gena Corea and Susan Ince, *IVF A Game for Losers at Half of US Clinics*, 3 Med Trib 12 (1985) (half of IVF clinics responding to survey reported no live births); J. Jarrell, et al, *An* in vitro *fertilization and embryo transfer pilot study: Treatment-dependent and treatment-independent pregnancies*, 154 Am J Obstetrics & Gynecology 231 (1986) (pilot IVF program treating fourteen infertile couples produced only one healthy baby); Robert Pear, *Fertility Clinics Face Crackdown: U.S. Says Success Rates Are Overstated and Wins Ban Against Such Claims*, NY Times A15 (Oct 26, 1992) (less than 15 percent success rate per procedure); Michael R. Soules, *The in vitro fertilization pregnancy rate: let's be honest with one another*, 43 Fertility & Sterility 511, 511-513 (1985) (criticizing widespread practice of exaggerating IVF pregnancy rates and noting that fifty-eight IVF teams reported overall 13 percent viable pregnancy rate per active IVF cycle).

[122] Christine Crowe, *"Women Want It"*: In-Vitro *Fertilization and Women's Motivations for Participation*, 8 Women's Stud Intl F 547, 551 (1985); Kirsten Kozolanka, *Giving Up: The Choice That Isn't*, in Renate D. Klein, ed, *Infertility: Women Speak Out About Their Experiences of Reproductive Medicine* 121, 121 (Pandora, 1989) ("I have never [ ] taken seriously the idea of giving up. You see, giving up, for the infertile, is not really an option at all."). See also Bartholet, *Family Bonds* at 24-38 (cited in note 13) (describing how society makes adoption the last resort for infertile couples who want children); id at 187-98 (describing the author's own efforts to become pregnant through in vitro fertilization).

[123] See Raymond, *Women as Wombs* at 6 (cited in note 10) ("Between 23 and 60 percent of women undergo IVF treatment because of their male partners' infertility."); Lorber, *Choice, Gift or Patriarchal Bargain?* at 171 (cited in note 118) (noting that mostly women undergo infertility treatments even though they are responsible for less than 40 percent of infertility).

[124] See Judith Lorber, In Vitro *Fertilization and Gender Politics*, in Elaine Hoffman Baruch, Amadeo F. D'Adamo, Jr., and Joni Seager, eds, *Embryos, Ethics, and Women's Rights: Exploring the New Reproductive Technologies* 117, 124 (Harrington Park, 1988) ("Despite our culture's emphasis on motherhood, men are often the dominant partner in reproductive decisions."); Lorber, *Choice, Gift or Patriarchal Bargain?* at 176-77 (cited in note 118) (describing fertile women's agreement to undergo IVF as a "patriarchal bargain"). Some scholars have observed that men value the genetic tie more than women do. See, for example, Andrews and Douglass, 65 S Cal L Rev at 628 (cited in note 9); John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 Case W Res L Rev 1, 13 (1988-89). The man involved in the first American attorney-arranged surrogate contract also made this distinction: "I guess for some women,

to single women, lesbians, women with genetic disorders, and women who are not considered good mothers.[125] In vitro fertilization thus serves more to help married men produce genetic offspring than to give women greater reproductive freedom.[126]

Surrogacy also fulfills the father's desire to pass his own genes on to a child. William Stern, for example, explained that, as the only survivor of a family that had been annihilated in the Holocaust, he wanted a genetically related child in order to perpetuate his family's bloodline.[127] Martha Field observed that the very term "surrogate" emphasizes the arrangement's purpose—allowing a man to be a genetic father rather than enabling a woman to become a mother: "The woman is a 'surrogate'—a surrogate uterus or a surrogate wife—to carry *his* genes."[128]

---

as long as they have a child, it's fine. But . . . I need to know that he's really mine." Noel P. Keane and Dennis L. Breo, *The Surrogate Mother* 30 (Everest House, 1981). Men are far less likely than women to be sterilized, either voluntarily or coercively: in 1982, 19 percent of the fifty-four million American women ages fifteen to forty-four had had tubal ligations or hysterectomies, while only 6 percent had husbands with vasectomies. William D. Mosher, *Fecundity and Infertility in the United States*, 78 Am J Pub Health 181, 182 (1988). Another reason why men are less likely to be sterilized than women may be that fathers are given less responsibility for children than mothers.

A husband and wife may also seek in vitro fertilization in order to share a child who is genetically related to both of them. See, for example, Lesley Brown and John Brown, *Our Miracle Called Louise: A Parents' Story* 95 (Paddington, 1979) (father of Louise Brown, the first "test tube baby," stating that he wanted his second wife to have his baby even though he already had a biological child).

[125] Sherwin, *No Longer Patient* at 127 (cited in note 45). Most IVF clinics only accept heterosexual married couples as clients. Thomas A. Shannon, In Vitro *Fertilization: Ethical Issues*, in Elaine Hoffman Baruch, Amadeo F. D'Adamo, Jr., and Joni Seager, eds, *Embryos, Ethics, and Women's Rights: Exploring the New Reproductive Technologies* 155, 163 (Harrington Park, 1988). Moreover, most proposed or enacted legislation governing new reproductive technologies contemplates their use by married couples. See Bartha M. Knoppers and Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 Am J L & Med 329, 332-33, 346-47 (1991) (reviewing international legislation during the period from 1987 to 1991); Lisa C. Ikemoto, *Destabilizing Thoughts on Surrogacy Legislation*, 28 USF L Rev 633, 636-37 (1994) (reviewing bills proposed and enacted in the United States in 1993 and 1994).

[126] Sherwin, *No Longer Patient* at 127 (cited in note 45).

[127] Robert Hanley, *Reporter's Notebook: Grief Over Baby M*, NY Times B1 (Jan 12, 1987). See also *In the Matter of Baby M*, 109 NJ 396, 537 A2d 1227, 1235 (1988). For commentary on the relationship between Stern's surrogacy arrangement and his Jewish identity, see Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 Berkeley Women's L J 29, 57-58 (1993) (concluding that Jewish experience and philosophy should lead to a rejection of surrogacy).

[128] Martha A. Field, *Surrogate Motherhood* 51 (Harvard, 1988). See also Margaret Jane Radin, *Market-Inalienability*, 100 Harv L Rev 1849, 1930 (1987) ("[W]omen—their reproductive capacities, attributes, and genes—are fungible in carrying on the male genetic line.").

Surrogacy also holds the possibility of reproductive resistance, however. Informal surrogacy arrangements between women may serve as a means of self-help for women

Surrogacy arrangements devalue the mother's genetic tie to the child in order to exalt the father's. Most surrogate mothers intentionally donate their genetic material, as well as their wombs, to bear a child who will not be legally theirs. Not surprisingly, then, most of the money contracting couples pay to surrogates when they receive the baby pays for the surrogate's surrender of her parental rights—her legal claim to the child arising from their biological bond.[129] In custody disputes, courts typically discount the surrogate's genetic claim to legal maternity.[130] Surrogate

---

who face legal or biological barriers to having children, and require no government approval, medical intervention, or even sexual intercourse. See Juliette Zipper and Selma Sevenhuijsen, *Surrogacy: Feminist Notions of Motherhood Reconsidered*, in Michelle Stanworth, ed, *Reproductive Technologies: Gender, Motherhood and Medicine* 118, 137-38 (Minnesota, 1987). See also Lori B. Andrews, *Between Strangers: Surrogate Mothers, Expectant Fathers, & Brave New Babies* 10-57 (Harper & Row, 1989) (describing the experiences of Carol Pavek, a feminist midwife, who viewed her surrogacy as "helping other women" and a "natural adjunct to other reproductive choices"); Cahn, 61 U Chi L Rev at 336-37 (cited in note 13) ("[S]urrogacy has the positive potential to disrupt the nuclear family by creating more than one mother with a genetic (or social) relationship to a child."); Sharon Elizabeth Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, in Diana Tietjens Meyers, Kenneth Kipnis, and Cornelius F. Murphy, Jr., eds, *Kindred Matters: Rethinking the Philosophy of the Family* 102, 132-33 (Cornell, 1993) ("[S]urrogacy may be one of the best ways for a homosexual man to fulfill his needs or desires to have children."). On feminist grass-roots activism around reproductive technologies, see Gail O. Mellow, *Sustaining Our Organizations: Feminist Health Activism in an Age of Technology*, in Kathryn Strother Ratcliff, et al, eds, *Healing Technology* 371, 371-72 (Michigan, 1989).

[129] Note, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 Colum Hum Rts L Rev 525, 539 (1992). See *Baby M*, 537 A2d at 1240 (stating that in surrogacy arrangements "the money is being paid to obtain an adoption and not . . . for the personal services of [the surrogate mother]"). See also Carmel Shalev, *Birth Power: The Case for Surrogacy* 144 (Yale, 1989) (noting that the only way contracting parents can protect themselves against the possibility of the surrogate withholding her consent to termination of her parental rights is to withhold payment of the fee); Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 16 L Med & Health Care 7, 10-11 (1988) (arguing that the state should allow payment to a surrogate mother for her gestational services, but not for her binding agreement to terminate her parental rights). Mary Beth Whitehead, for example, would have received only $1,000 for her services if she delivered a stillborn. *Baby M*, 537 A2d at 1241. The contract she signed provided: "$10,000 shall be paid to MARY BETH WHITEHEAD, Surrogate, *upon surrender of custody* to WILLIAM STERN, the natural and biological father of the child born pursuant to the provisions of this Agreement . . . ." Id at 1266 (emphasis added).

[130] Even judges who do not enforce surrogacy contracts, and base custody instead on the best interests of the child, tend to grant custody to the contracting couple in part because of their class advantages. See Kelly Oliver, *Marxism and Surrogacy*, in Helen Bequaert Holmes and Laura M. Purdy, eds, *Feminist Perspectives in Medical Ethics* 266, 270-73 (Indiana, 1992). The court in the *Baby M* case, for example, awarded the Sterns joint custody in large part "on the basis of financial security, access to education, music lessons, and psychotherapy." Id at 273.

Some feminists support a rule favoring mothers as custodians of children at birth, not because the mother's genetic tie is more important than the father's, but because the mother has already established a relationship with the baby. See, for example, Chesler,

mothers are valued for their service to the biological father—facilitating his more important genetic tie to the child.

Conversely, couples also remain childless to fulfill the husband's wishes. One study of childless couples found that when the wife wanted a child and the husband did not, they remained childless; when the husband wanted a child and the wife did not, they usually divorced.[131] One case, *Davis v Davis*, presents an extreme example of the emphasis placed on the man's desire to avoid genetic fatherhood.[132] *Davis* involved a dispute over the fate of a divorcing couple's "frozen embryos."[133] The wife, Mary Sue, wanted custody of the embryos so that she could have them implanted in her own uterus and become pregnant or donate them to other childless couples.[134] The husband, Junior, wanted the embryos frozen indefinitely because he did not want to be the biological father of any child whom they might generate.[135] The Supreme Court of Tennessee concluded that Junior's interest in avoiding genetic parenthood outweighed Mary Sue's interest in creating it.[136] The court noted that while implantation would saddle Junior with a child he did not want and could not control, Mary Sue had other options for becoming a mother if she wished to do so.[137]

Sacred Bond at 23 (cited in note 4); Field, *Surrogate Motherhood* at 124 (cited in note 128). In surrogacy disputes, this rule would grant custody to the surrogate mother who decides she wants to keep the baby.

[131] See Teresa Donati Marciano, *Male Pressure in the Decision to Remain Childfree*, 1 Alternative Lifestyles 95, 101 (1978).

[132] 842 SW2d 588 (Tenn 1992).

[133] Id at 589-90. See Marilyn Milloy, *7 Embryos in Divorce Tug-of-War*, NY Newsday 15 (Aug 6, 1989); Ronald Smothers, *Tennessee Judge Awards Custody of 7 Frozen Embryos to Woman*, NY Times A13 (Sept 22, 1989). The embryos were cryogenically preserved (frozen in nitrogen) and stored at subzero temperatures in a Knoxville fertility clinic. 842 SW2d at 592.

[134] 842 SW2d at 589-90.

[135] Id at 589. Junior Davis subsequently opposed Mary Sue's request to donate the embryos and sought to have them discarded. Id at 590.

[136] Id at 604. The court discounted not only Mary Sue Davis's interest in the future of the embryos, but also her greater contribution to generating them. Id. See Raymond, *Women as Wombs* at 60 (cited in note 10) (noting that Mary Sue Davis underwent five tubal pregnancies resulting in the rupture of a fallopian tube before attempting IVF and two unsuccessful implantations); Thomas C. Shevory, *Through A Glass, Darkly: Law, Politics, and Frozen Human Embryos*, in Helen Bequaert Holmes, ed, *Issues in . . . Reproductive Technology I: An Anthology* 231, 243-44 (Garland, 1992) (comparing Mary Sue Davis's laparoscopic egg removal to Junior Davis's sperm donation).

[137] 842 SW2d at 604 (suggesting future in vitro fertilization attempts or adoption).

B. Race and the Value of Genetic Ties

1. Creating white babies.

New reproductive technologies, however, should not be understood only as patriarchal tools. One of the most striking features of these technological efforts to provide parents with genetically related offspring is that they are used almost exclusively by affluent white people. The use of fertility clinics does not correspond to rates of infertility. Indeed, the profile of people most likely to attempt IVF is precisely the opposite of those most likely to be infertile. The people in the United States most likely to be infertile are older, poorer, Black, and poorly educated.[138] Most couples who use IVF services are white, highly educated, and affluent.[139] New reproductive technologies are so popular in American culture not simply because of the value placed on the genetic tie, but because of the value placed on the *white* genetic tie.

The high cost of fertility treatment largely restricts its availability to only the affluent. The expense of these procedures, however, cannot fully explain the racial discrepancy in their use. There are many Black middle-class infertile couples who could afford them. Besides, inability to afford a medical procedure need not preclude its use. The government could increase the availability of new reproductive technologies to the poor through public funding. As George Annas noted, "[a]lthough black couples are *twice* as likely as white couples to be infertile, [surrogacy] is not promoted for black couples, nor has anyone openly advocated

---

[138] Sevgi O. Aral and Willard Cates, Jr., *The Increasing Concern With Infertility: Why Now?*, 250 JAMA 2327, 2327 (1983); W.F. Pratt, et al, *Infertility—United States, 1982*, 34 Morbidity & Mortality Weekly Rep 197, 197-99 (1985). See also U.S. Department of Health & Human Services, *Health Status of Minorities and Low Income Groups* 58 (1985) (23 percent of Black couples are infertile compared to 15 percent of white couples); Laurie Nsiah-Jefferson and Elaine J. Hall, *Reproductive Technology: Perspectives and Implications for Low-Income Women and Women of Color*, in Kathryn Strother Ratcliff, et al, eds, *Healing Technology: Feminist Perspectives* 93, 108 (Michigan, 1989) (noting that "married black women have an infertility rate one and one-half times higher than that of married white women" and discussing reasons for this disparity). Some feminists suggest that reproductive research should shift its focus to the causes of infertility. See, for example, Sherwin, *No Longer Patient* at 135 (cited in note 45); Nadine Taub, *Surrogacy: A Preferred Treatment for Infertility?*, 16 L Med & Health Care 89, 89 (1988). The rate of infertility among white, educated, middle- and upper-income women is increasing due partly to their postponement of marriage and childbearing. Aral and Cates, 250 JAMA at 2328-29.

[139] Andrews and Douglass, 65 S Cal L Rev at 646 (cited in note 9); F.P. Haseltine, et al, *Psychological Interviews in Screening Couples Undergoing* in Vitro *Fertilization*, 442 Annals NY Academy Sci 504, 507 (1985).

covering the procedure by Medicaid for poor infertile couples."[140] It would also be possible for Black women to enter into informal surrogacy arrangements with Black men without demanding huge fees. Yet there is a stark racial disparity in the use of new reproductive technologies that seems to result from a complex interplay of financial barriers, physician referrals, and cultural preferences.

The public's affection for the white babies that are produced by reproductive technologies legitimates their use.[141] Noel Keane, the lawyer who in 1978 arranged the first public surrogacy adoption, described how this affection influenced the public's attitude toward his clients' arrangement.[142] Although the first television appearance of the contracting parents, George and Debbie, and the surrogate mother, Sue, generated hostility, a second appearance on the Phil Donahue Show with two-month-old Elizabeth Anne changed the tide of public opinion. Keane explained:

> [T]his time there was only one focal point: Elizabeth Anne, blonde-haired, blue-eyed, and as real as a baby's yell . . . .

---

[140] George J. Annas, *Fairy Tales Surrogate Mothers Tell*, 16 L Med & Health Care 27, 28 (1988). See also Robertson, 59 S Cal L Rev at 989 (cited in note 21) ("At the present time the state has no legal obligation to provide infertility services to indigents . . . ."). Indeed, a major aim of current welfare reform proposals is to *discourage* women on welfare from having children. See *GOP Welfare Plan Would Take Cash from Unwed Mothers to Aid Adoptions*, Chi Trib § 1 at 7 (Nov 14, 1994); Ronald Brownstein, *"Family Cap" on Welfare Benefits Will Get Boost*, LA Times A1 (May 26, 1994). Physicians may distribute reproductive technologies to their patients on the basis of race in subtle ways. For example, doctors characterize endometriosis, which they treat with reproductive technologies, as a white, professional woman's disease. Ikemoto, 28 USF L Rev at 639 (cited in note 125). See also Donald L. Chatman, *Endometriosis in the black woman*, 125 Am J Obstetrics & Gynecology 987, 987 (1976) ("Most textbooks of gynecology are in agreement that endometriosis is rare in the indigent, nonprivate patient and, therefore, by inference . . . uncommon in the black woman."). Doctors are more likely to diagnose Black women as having pelvic inflammatory disease, which they often treat with sterilization. Ikemoto, 28 USF L Rev at 640 (cited in note 125); Chatman, 125 Am J Obstetrics & Gynecology at 987 (reporting that over 20 percent of his Black patients, many of whom were previously diagnosed as having pelvic inflammatory disease, actually suffered from endometriosis). See also King, *Past as Prologue* at 103 (cited in note 39) (concluding that the racial disparity in the use of clinical genetic services may be related to physician referrals); Nsiah-Jefferson and Hall, *Reproductive Technology* at 95-102, 109-11 (cited in note 138) (discussing numerous barriers that restrict access by poor women and women of color to genetic counselling and new reproductive technologies).

[141] See Stanworth, *Deconstruction of Motherhood* at 27 (cited in note 20).

[142] Keane and Breo, *The Surrogate Mother* at 95-96 (cited in note 124). Keane and Breo also revealed that the doctor who assisted in the pregnancy explained his participation in terms of eugenics: "I performed the insemination because there are enough unwanted children and children of poor genetic background in the world." Id at 36.

> . . .
>
> The show was one of Donahue's highest-rated ever and the audience came down firmly on the side of what Debbie, Sue, and George had done to bring Elizabeth Anne into the world.[143]

I suspect that a similar display of a curly haired, brown-skinned baby would not have had the same transformative effect on the viewing public. It is hard to imagine a multimillion dollar industry designed to create Black children.

A highly publicized lawsuit against a fertility clinic evidenced revulsion at the technological creation of Black babies. A white woman claimed that the clinic mistakenly inseminated her with a Black man's sperm, rather than her husband's, resulting in the birth of a Black child.[144] The mother, who was genetically related to the child, demanded monetary damages for her injury, which she explained was due to the unbearable racial taunting her daughter suffered.[145] The real harm to the mother, however, was the fertility clinic's failure to deliver the most critical part of its service—a white child. The clinic's racial mix-up rendered the mother's genetic tie worthless. It is highly unlikely that the white mother would have *chosen* Black features "if allowed the supermarket array of options of blond hair, blue-green eyes, and narrow upturned noses."[146] In the American market, a Black child is indisputably an inferior product.[147]

Patricia Williams explores this modern image of Black seed contaminating white wombs in her parable of "guerilla insemination," wherein New Age warriors, aided by white male college

---

[143] Id at 96.

[144] See Williams, *The Alchemy of Race and Rights* at 186 (cited in note 72); Robin Schatz, *"Sperm Mixup" Spurs Debate Questioning Safeguards, Regulations*, NY Newsday 3 (Mar 11, 1990).

[145] Williams, *The Alchemy of Race and Rights* at 186 (cited in note 72). Of course, most Black children have been injured by racial taunting and other indignities due to racism. Patricia Williams asks, "Do black mothers get to sue for such an outcome, or is it just white mothers?" Id.

[146] Id at 188.

[147] A dramatic cross-cultural example is Elizabeth Bartholet's story about her efforts to get a Peruvian doctor to treat the child she adopted. Bartholet, *Family Bonds* at 88-89 (cited in note 13). Assuming the baby was of mixed Indian and Spanish heritage, the doctor suggested that Bartholet simply trade in the sick baby for another. It was only when the doctor discovered that the baby was "unusually white" that he understood Bartholet's desire to keep him. Bartholet observes, "[i]t was overwhelmingly clear that Michael's value had been transformed in the doctor's eyes by his whiteness. Whiteness made it comprehensible that someone would want to cure and keep this child rather than discard him." Id at 89.

graduates, smuggle vials of Black sperm into sperm banks: "What happens if it is no longer white male seed that has the prerogative of dropping noiselessly and invisibly into black wombs, swelling ranks and complexifying identity? Instead it will be disembodied black seed that will swell white bellies . . . ."[148] This futuristic vision evokes the same revulsion expressed by eighteenth-century white colonists to racial intermingling, which they feared "smutted our blood."[149]

2. Race and the harm in surrogacy.

The devaluation of the Black genetic tie also helps to explain the harm in surrogacy. Some feminists have denounced surrogacy because it exploits women and commodifies women's reproductive capacity.[150] People who hire surrogates are usually wealthier than the women who provide the service.[151] An adopting couple must be fairly well off to afford the costs of a surrogacy arrangement—typically at least $25,000.[152] But what is exploitative about paying a surrogate mother a sum of money she would not be able to obtain at other work? What distinguishes activities poor women are induced to perform for money that are exploitative from those that are not?[153] The claim that poor women are "coerced" into entering surrogacy contracts by the promise of large sums of money is meaningless by itself.[154] For instance, would it be more or less exploitative to increase the fee paid to surrogate mothers?[155] The woman's decision to enter into the

---

148 Williams, *The Alchemy of Race and Rights* at 188 (cited in note 72).

149 See text accompanying note 87.

150 See, for example, Corea, *The Mother Machine* at 213-49 (cited in note 10); Andrea Dworkin, *Right-Wing Women* 181-88 (Putnam's Sons, 1983) (comparing paid surrogacy to prostitution); Radin, 100 Harv L Rev at 1928-36 (cited in note 128).

151 Field, *Surrogate Motherhood* at 25 (cited in note 128).

152 Id.

153 See Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DePaul L Rev 1369, 1379-80 (1992), reviewing Carmel Shalev, *Birth Power: The Case for Surrogacy* (Yale, 1989) (criticizing Shalev's model of the surrogate as exercising free choice for ignoring the problem of economic exploitation, noting that surrogacy is appealing to low-income women with children because it is one of the few available jobs that do not require leaving home).

154 See Ehrenreich, 41 DePaul L Rev at 1384 (criticizing the concept of coercion in the surrogacy debate because "it fails to appreciate both the indeterminacy of the concept of choice and the extent to which individual preferences are themselves socially constructed"). See also John Lawrence Hill, *Exploitation*, 79 Cornell L Rev 631, 637-44, 691-95 (1994) (discussing and rejecting arguments that surrogacy is exploitative).

155 See Andrews and Douglass, 65 S Cal L Rev at 672-73 (cited in note 9) (arguing that unpaid surrogacy may be more coercive than an arms-length commercial arrangement with a stranger); Ruth Macklin, *Is There Anything Wrong with Surrogate Mother-*

surrogacy arrangement at least shows that she found it preferable to her other options for work.[156] Her decision may be evidence that surrogacy is *less* exploitative than other services wealthier people could buy from her—services which the law does not prohibit despite their harmful or degrading qualities and the parties' unequal bargaining power.

At bottom, the argument against surrogacy rests on the peculiar nature of childbearing that makes its sale immoral. Margaret Jane Radin and other feminists argue that surrogacy impermissibly alienates a fundamental aspect of one's personhood and treats it as a marketable commodity.[157] In Radin's words, "[m]arket-inalienability might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply."[158] Elizabeth Anderson argues that using surrogates' bodies, rather than respecting them, fails to value women in an appropriate way.[159] Surrogacy treats women as objects rather than valuable human beings by selling their capacity to bear children for a price. Directories display photographs of and vital information (height, hair color, racial origins) about women willing to be hired to gestate a baby.[160] Barbara Katz Rothman notes how the term "product of conception," often used to describe the fertilized egg to be implanted in a surrogate mother, reflects this commodification: "It

---

hood? An Ethical Analysis, 16 L Med & Health Care 57, 62 (1988) (discussing the difficulties in determining when an inducement becomes an "undue" inducement).

[156] Radin, 100 Harv L Rev at 1930 (cited in note 128); *Johnson v Calvert*, 5 Cal 4th 84, 19 Cal Rptr 2d 494, 502 (1993), cert denied, 114 S Ct 206 (1993) ("[T]here has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.").

[157] See, for example, Radin, 100 Harv L Rev at 1928-36 (cited in note 128); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 Phil & Pub Aff 71, 80-87 (1990); Barbara Katz Rothman, *Reproductive Technology and the Commodification of Life*, in Elaine Hoffman Baruch, Amadeo F. D'Adamo, Jr., and Joni Seager, eds, *Embryos, Ethics, and Women's Rights: Exploring the New Reproductive Technologies* 95, 95-96 (Harrington Park, 1988).

[158] Radin, 100 Harv L Rev at 1932 (cited in note 128).

[159] Anderson, 19 Phil & Pub Aff at 80-87.

[160] See Gena Corea, *The reproductive brothel*, in Gena Corea, et al, eds, *Man-Made Women: How New Reproductive Technologies Affect Women* 38, 44 (Indiana, 1987). See also A.M. Capron and M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L Med & Health Care 34, 36 (1988) (noting that surrogacy places a specific dollar value on the breeder's personal traits).

is an ideology that enables us to see not motherhood, not parenthood, but the creation of a commodity, a baby."[161]

Moreover, pregnancy impresses a surrogate's body and being into paid service to a degree distinct from other work. Unlike most paid laborers, the surrogate mother cannot separate herself from the service she performs. "Surrogacy is a 24-hour-a-day job which involves every aspect of the surrogate's life. . . . Her body becomes the machinery of production over which the contractor has ultimate control."[162] Commercial surrogacy can be seen as liberating when liberation is measured by the individual's freedom and ability to buy and sell products and labor on the market.[163] But women's wombs and pregnancy are not ordinary products or labor. Like children, organs, or sexual intimacy, women's reproductive capacities should not be bartered in the market.

The relationship between race and the genetic tie further illuminates this market inalienability. It demonstrates how surrogacy both misvalues and devalues human beings. First, Anderson and Radin argue that surrogacy values women and children in the wrong way. Why do they conclude that paying women for their gestational services will produce this harmful conception of women and their reproductive capacity? It is also possible, as John Robertson suggests, that we could view surrogates as "worthy collaborators in a joint reproductive enterprise from which all parties gain, with money being one way that the infertile couple pays its debt or obligation to the surrogate."[164] Anderson's and

---

[161] Rothman, *Reproductive Technology* at 96 (cited in note 157). But see Shapiro, 28 USF L Rev at 659 (cited in note 49) (arguing that a baby created by a surrogacy arrangement is treated as "a unique, intrinsically valuable person," rather than a commodity). For a historical examination of the changing economic and sentimental value of children in America, see Viviana A. Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (Basic Books, 1985). "While in the nineteenth century, the market value of children was culturally acceptable, later the new normative ideal of the child as an exclusively emotional and affective asset precluded instrumental or fiscal considerations. In an increasingly commercialized world, children were reserved a separate noncommercial place, *extra-commercium*." Id at 11. Zelizer argues that the shift away from seeing children in terms of labor value has led, paradoxically, to greater monetization and commercialization of children's emotional value. See id at 169-207. My focus, explained below, is on surrogacy arrangements' illigitimate valuation of the genetic tie, rather than the inappropriate valuation of the babies they produce.

[162] Oliver, *Marxism and Surrogacy* at 274-75 (cited in note 130).

[163] See, for example, Shalev, *Birth Power* at 145 (cited in note 129) (advocating a "free market in reproduction" in which the "reproducing woman" operates as an "autonomous moral and economic agent"). See also Elisabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 J Legal Stud 323, 339-41 (1978) (proposing a "market in babies").

[164] Robertson, 16 L Med & Health Care at 22 (cited in note 9). See also Shapiro, 28

Radin's sense of the immorality of commercial surrogacy may arise from the features it shares with the American institution of slavery. The experience of surrogate mothers is not equivalent to slavery's horrors, dehumanization, and absolute denial of self-determination. Yet our understanding of the evils inherent in marketing human beings stems in part from the reduction of enslaved Blacks to their physical service to whites.[165]

The quintessential commodification of human beings was the sale of slaves on the auction block to the highest bidder. Slaves were totally and permanently commodified: "Slavery as a legal institution treated slaves as property that could be transferred, assigned, inherited, or posted as collateral."[166] Surrogacy's use of women's wombs is reminiscent of Toni Morrison's character Baby Suggs's admonition about slavery's objectification of Africans: "And O my people they do not love your hands. Those they only use, tie, bind, chop off and leave empty."[167] Slave women were surrogate mothers in the sense that they lacked any claim to the children whom they bore and whom they delivered to the masters who owned both mother and child.[168] Like surrogacy, slavery forced the separation of mothers and their children when

---

USF L Rev at 654 (cited in note 49) (criticizing challenges to surrogacy that "beg empirical or value questions and build them into definitions (e.g., 'surrogacy *necessarily* treats women and children as things')").

[165] See Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 Harv J L & Pub Policy 139 (1990) (observing that surrogacy and slavery are not equivalent, but share certain features); Sarah S. Boone, *Slavery and Contract Motherhood: A "Racialized" Objection to the Autonomy Arguments*, in Helen Bequaert Holmes, ed, *Issues in . . . Reproductive Technology I: An Anthology* 349, 351 (Garland, 1992) (arguing that "African-American female enslavement and [commercialized contract motherhood] are two very different social expressions of the same underlying ideological forms").

[166] Harris, 106 Harv L Rev at 1720 (cited in note 76). See generally Stampp, *The Peculiar Institution* at 193-236 (cited in note 5) (discussing the legal status of slaves as chattel property).

[167] Toni Morrison, *Beloved* 88 (Knopf, 1987). In her autobiography, Sallie Bingham, a wealthy white heiress, makes a similar observation about the Black servants who lived in her Kentucky home: "Blacks, I realized, were simply invisible to most white people, except as a pair of hands offering a drink on a silver tray." Sallie Bingham, *Passion and Prejudice: A Family Memoir* 270 (Applause, 1991).

[168] See Allen, 13 Harv J L & Pub Policy at 140; Boone, *Slavery and Contract Motherhood* at 362. See also Morrison, *playing in the dark* at 21 (cited in note 52) (observing in a Willa Cather novel the assumption that "slave women are not mothers; they are 'natally dead . . .'"); Dorothy Burnham, *Children of the Slave Community in the United States*, 19 Freedomways 75, 75-77 (1979) (discussing slavemasters' control of slave children). Wills frequently devised slave women's children before the children were born, or even conceived. Stampp, *The Peculiar Institution* at 205 (cited in note 5) ("In Fairfield District, South Carolina, in 1830, Mary Kincaid gave a slave woman named Sillar to a grandchild and Sillar's two children to other grandchildren. If Sillar should have a third child, it was to go to still another grandchild.").

each was sold to a different master.[169] It is the enslavement of Blacks that enables us to imagine the commodification of human beings, and that makes the vision of fungible breeder women so real.[170]

Perhaps the most terrifying lesson from slavery was the law's ability to sanction it. The law did more than close its eyes to slavery; the law actively promoted slavery.[171] The slave auction, which provides the most powerful metaphor for surrogacy's commodification of human beings, was often a government event. The South Carolina courts, for example, "acted as the state's greatest slave auctioneering firm."[172] "[O]fficials and agents of the law" conducted half of the antebellum sales of slaves at "sheriffs', probate, and equity court sales."[173] As Anita Allen has observed, slavery shows that "the law can easily accommodate the commercialization of human life."[174]

The relationship between race and the genetic tie illuminates the feminist critique of surrogacy in a second way. The feminist arguments against surrogacy focus on the commodification of women's wombs. Just as critical, however, is the commodification of the genetic tie, based on a valuation of its worth.[175] Although this process devalues all women, it devalues Black women in a particular way.[176] Feminist opponents of surrogacy miss an important aspect of surrogacy when they criticize it for treating women as *fungible* commodities. A Black surrogate is not ex-

---

[169] See Stampp, *The Peculiar Institution* at 266-67 (cited in note 5).

[170] Compare Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 167-73 (Unwin Hyman, 1990) (arguing that the historical objectification of Black women's bodies laid the foundation for contemporary pornography); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 Am U J Gender & L 1, 27-28 (1993) (suggesting that racism helps to shape the regulation of white single mothers).

[171] See generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale, 1975); *Symposium on the Law of Slavery*, 68 Chi Kent L Rev 1009, 1009-1340 (1993).

[172] Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 Chi Kent L Rev 1241, 1241 (1993).

[173] Id.

[174] Allen, 13 Harv J L & Pub Policy at 145 (cited in note 165).

[175] See Robertson, 39 Case W Res L Rev at 31 n 100 (cited in note 124) ("Eugenic considerations are unavoidable, and not inappropriate when one is seeking gametes from an unknown third party."). In his discussion of egg donation, John Robertson defends recipients' desire to "receive good genes" from women who "appear to be of good stock." Id at 31. He advocates perfecting the technology of egg donation because it will "enhance the ability to influence the genetic makeup of offspring." Id at 37.

[176] See Horsburgh, 8 Berkeley Women's L J at 47 (cited in note 127) (arguing that Radin's commodification argument assumes that surrogates are white).

changeable for a white one. In one sense, Anderson and Radin are right that marketing babies misdescribes the way that we value people. Surrogacy, however, is so troubling precisely because its commercial essence lays bare how our society actually *does* value people. We must assess both the liberating and the oppressive potential of surrogacy not in the abstract realm of reproductive choice, but in the real world that devalues certain human lives with the law's approval.

III. The Genetic Tie and Legal Parentage

The genetic tie is a critical component in determining a child's legal mother and father. The genetic tie does not necessarily determine legal parentage, however. Indeed, examining the shifting significance of genetic connections in various disputes over legal parentage reveals more clearly than any other exercise the social and historical indeterminacy of this biological fact. This Part examines how both race and gender shape the genetic tie's role in claims to children.

A. Protecting the Patriarchal Family

The overriding assumption in cases determining a child's legal parentage is that families are created out of biological connections between individuals.[177] Parental rights, however, are not a biological given. Rather, the law has historically interpreted the genetic tie's significance to parenthood in a way that preserves the patriarchal nuclear family. Cases concerning the parental rights of unwed fathers and sperm donors reveal that the law's central objective is to protect the integrity of families founded on heterosexual marriage, while leaving women's autonomous bonds with their children vulnerable.

1. Unwed fathers.

Since the Industrial Revolution, the genetic tie between a man and his offspring has not conclusively determined their legal relationship. Biological fatherhood does not mean legal paternity.[178] Moreover, the law regards the role of biology differently in

---

[177] Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L Rev 637, 642 (1993). See also Bartholet, *Family Bonds* at 165 (cited in note 13) (noting the principle in American culture that blood ties are essential to parenting).

[178] Carol Smart provides a helpful lexicon: she defines paternity as "the legal status of men who are deemed to have fathered certain children," fatherhood as "the actual biologi-

determining motherhood and fatherhood. While the European-American tradition identified a child's mother by the biological act of giving birth, it presumed fatherhood through a man's relation to the child's mother.[179] At common law, a woman was the legal mother of the child to whom she gave birth.[180] A man obtained parental rights only through marriage.[181] Common law denied unwed biological fathers paternity rights and established a presumption that a mother's husband was the father of her children.[182] An illegitimate child was "*filius nullius*"—she had no legal relationship to anyone.[183]

Recent Supreme Court cases involving parental rights of unwed fathers suggest that legal paternity continues to depend more on the father's relationship with his children's mother than on a genetic tie with the children.[184] The Court granted the un-

---

cal or genetic relationship between a man and his 'offspring,'" and social fatherhood as "men's role in parenting, which may occur independently of a biological link . . . ." Smart, *Law and the Problem of Paternity* at 98 (cited at note 117). See also *Lehr v Robertson*, 463 US 248, 259-60 (1983) (recognizing a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility"). Janet Dolgin contrasts the role of a biological tie between father and child in establishing support obligations with its role in establishing a family relationship: "At stake in [support] cases is not the man's paternal role but his obligation, in large part vis-a-vis the state, to support his biological child." Dolgin, 40 UCLA L Rev at 644 n 24 (cited in note 177). See also Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 Tex L Rev 967, 989-91 (1994) (discussing "the equation of genetic fatherhood with financial fatherhood").

[179] Dolgin, 40 UCLA L Rev at 644 (cited in note 177). For historical accounts of American law governing rights to children, see generally Grossberg, *Governing the Hearth* at 196-285 (cited in note 68); Mason, *From Father's Property to Children's Rights* at 70 (cited in note 65).

[180] This rule was expressed in the maxim: *Mater est quam gestatio demonstrat* or "She is the mother whom the bearing designates." R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in Larry Gostin, ed, *Surrogate Motherhood: Politics and Privacy* 88, 104 (Indiana, 1990).

[181] *Pater est quem nuptiae demonstrant* or "He is the father whom marriage designates." William M. Blackstone, 1 *Commentaries* *434.

[182] See Field, *Surrogate Motherhood* at 118-21 (cited in note 128). The marital presumption of paternity is codified in state statutes and was held constitutional by the United States Supreme Court. See *Michael H. v Gerald D.*, 491 US 110, 118-30 (1989). Whether the presumption is rebuttable varies by state and typically can be challenged only by the mother or her husband, not by the presumptive biological father. Field, *Surrogate Motherhood* at 118 (cited in note 128). See also Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L Rev 1747, 1785-95 (1993) (citing and discussing cases considering the parental rights of married and unmarried social fathers).

[183] She was "the child and heir of no one." Grossberg, *Governing the Hearth* at 197 (cited in note 68).

[184] Dolgin, 40 UCLA L Rev at 649 (cited in note 177); Hill, 66 NYU L Rev at 376-81 (cited in note 15). See *Michael H.*, 491 US 110; *Lehr*, 463 US 248; *Caban v Mohammed*, 441 US 380 (1979); *Quilloin v Walcott*, 434 US 246 (1978).

wed biological fathers in *Stanley v Illinois*[185] and *Caban v Mohammed*[186] parental rights because they had formed relationships with the children's mothers that resembled the traditional nuclear family, while the fathers in *Quilloin v Walcott*,[187] *Lehr v Robertson*,[188] and *Michael H. v Gerald D.*,[189] who were denied parental rights, had not.[190] The plurality in *Michael H.* explained that biological fathers' constitutional rights regarding their children depended not on establishing a parental relationship, but "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[191]

Like the common law, the Court's doctrines understand legal parentage to arise definitively from female, but not male, biology.[192] A mother's biological connection to her child imposes an automatic social relationship, while fathers are free to choose whether to develop a social tie. The Supreme Court explained in *Lehr v Robertson* that "[t]he significance of the biological connection is that it offers the natural father an *opportunity* that no other male possesses to develop a relationship with his offspring."[193] Thus, the law views fathers' social relationship to their children as a chosen, cultural creation, rather than as an inevitable product of their genetic tie to their offspring.[194]

---

[185] 405 US 645 (1972).

[186] 441 US 380 (1979).

[187] 434 US 246 (1978).

[188] 463 US 248 (1983).

[189] 491 US 110 (1989).

[190] Dolgin, 40 UCLA L Rev at 662 (cited in note 177).

[191] 491 US at 123.

[192] Chief Justice Burger, dissenting in *Stanley*, based this distinction between legal presumptions about male and female parents on the evidence that mothers are more dependable protectors of their children:

> [T]he biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties.

405 US at 665-66 (Burger dissenting). See also *Caban*, 441 US at 404-09 (Stevens dissenting) (arguing that the differences between a natural mother's and a natural father's relationship to an "illegitimate" newborn justified giving the mother greater parental rights).

[193] 463 US at 262 (emphasis added).

[194] Dolgin, 40 UCLA L Rev at 648 (cited in note 177); Smart, *Law and the Problem of Paternity* at 108 (cited in note 117). See also Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L Rev 1415, 1416 (1991) (observing that courts treat women as "draftees" and men as "volunteers" to parenthood); Sylvia A. Law,

While the law denies genetic fathers' parental claims in order to preserve the marital family, it nevertheless protects genetic fathers' inchoate "opportunity interest" in their offspring by allowing them to block adoptions. Courts have refused to honor a woman's decision to place her child for adoption if the child's biological father objects.[195] For example, the court's decision to return Baby Jessica to her biological parents, despite her attachment to her adoptive family, enforced her biological father's "opportunity interest" in claiming his paternal rights to his daughter.[196] Barbara Bennett Woodhouse argues that these decisions "increasingly place[ ] the absent genetic father's future option on parenthood above the child's immediate interest in care and continuity, in the process undercutting the authority of those gestational and social fathers, as well as of mothers, who have directly participated in gestation and nurturing."[197] Thus, the law denies male genetic ties when necessary to preserve the traditional marital unit, but allows them to override women's autonomous decisions affecting male genetic interests.

2. Sperm donors.

Artificial insemination purposely contemplates the creation of a genetic tie between a man and a child unaccompanied by social fatherhood. When a doctor performs artificial insemination, the sperm donor and the woman usually do not know each

---

Rethinking Sex and the Constitution, 132 U Pa L Rev 955, 996-97 (1984) (noting that courts tend to view fathering in terms of "opportunity" and mothering in terms of "responsibility"); Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 Yale L J 187, 198-99 n 42 (1986) ("The demands of motherhood were natural, while the role of fatherhood was more voluntary.").

[195] See, for example, *Steven A. v Rickie M. (Adoption of Kelsey S.)*, 1 Cal 4th 816, 4 Cal Rptr 2d 615 (1992) (holding that statutory category of "presumed father" violated unwed father's constitutional right to prevent adoption of his biological child); *Augusta County Department of Social Services v Unnamed Mother*, 3 Va App 40, 348 SE2d 26 (1986) (invalidating entrustment agreement signed by mother who refused to reveal the identity of her child's father).

[196] See note 1; Michele Ingrassia with Karen Springen, *Standing Up for Fathers: The troubling case of Baby Jessica focuses attention on paternal rights in adoptions*, Newsweek 52 (May 3, 1993). For defenses of the biological father's role in the adoption process, see generally Daniel Callahan, *Bioethics and Fatherhood*, 1992 Utah L Rev 735, 735-46; Forman, 72 Tex L Rev at 991-1000 (cited in note 178); Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 Fordham L Rev 971, 981-96 (1992).

[197] Woodhouse, 14 Cardozo L Rev at 1806 (cited in note 182). See also Dowd, 107 Harv L Rev at 934 (cited in note 13) (proposing that absent the biological father's demonstrated commitment to the mother-child unit, "the mother should have legal control over the decision to place the child for adoption").

other's identity, nor does the biological father often know the resulting child.[198] The law generally protects these sperm donors from any responsibility toward the child.[199] In most states, for example, the sperm donor is not considered the legal father of his offspring.[200] Some women, including many lesbian mothers, have used artificial insemination to have a baby without social ties to a man—a purpose quite distinct from that of surrogacy arrangements, the latter being a way to provide a man with a genetically related child.[201]

Legal approval of artificial insemination, however, may be contingent upon a husband's embrace of the child as his own. Far from disrupting the family by creating an "illegitimate" child, sanctioned artificial insemination completes the traditional nuclear family by providing a married couple with a child.[202] As in the marital presumption cases, courts look to the mother's marital status to determine paternity in disputes arising from artificial insemination. Courts have been willing to grant parental rights to sperm donors "when no other man is playing the role of father for the child," such as when the mother is a lesbian or unmarried.[203] The law is less concerned with the genetic tie be-

---

[198] Field, *Surrogate Motherhood* at 34 (cited in note 128); Andrews and Douglass, 65 S Cal L Rev at 659-60 (cited in note 9). See also Erica Haimes, *Recreating the Family? Policy Considerations Relating to the "New" Reproductive Technologies*, in Maureen McNeil, Ian Varcoe, and Steven Yearley, eds, *The New Reproductive Technologies* 154, 156-62 (St. Martin's, 1990) (discussing the British Warnock Report's recommendation of donor anonymity).

[199] Elias and Annas, *Reproductive Genetics* at 233 (cited in note 47); Robertson, *Children of Choice* at 127-28 (cited in note 9).

[200] Field, *Surrogate Motherhood* at 115 (cited in note 128).

[201] See Renate Duelli Klein, *Doing It Ourselves: Self-Insemination*, in Rita Arditti, Renate Duelli Klein, and Shelley Minden, eds, *Test-Tube Women: What future for motherhood?* 382, 382 (Pandora, 1984); Francie Hornstein, *Children by Donor Insemination: A New Choice for Lesbians*, in Rita Arditti, Renate Duelli Klein, and Shelley Minden, eds, *Test-Tube Women: What future for motherhood?* 373, 385-87 (Pandora, 1984); Daniel Wikler and Norma J. Wikler, *Turkey-baster Babies: The Demedicalization of Artificial Insemination*, 69 Milbank Q 5, 6 (1991).

[202] Smart, *Law and the Problem of Paternity* at 107 (cited in note 117). The influential report of the British Warnock Committee, which considered the ethics of "new processes of assisted reproduction," recommended that artificial insemination, as well as other reproductive technologies, should be made available only to stable heterosexual couples. See Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* 10-12 (Basil Blackwell, 1985). Moreover, most physicians have been unwilling to assist in the insemination of single women. Robertson, 59 S Cal L Rev at 1004-05 (cited in note 21); Wikler and Wikler, 69 Milbank Q at 13-16. For an argument that this practice violates the constitutional rights of single women, see Note, *The Fourteenth Amendment's Protection of a Woman's Right To Be a Single Parent through Artificial Insemination by Donor*, 7 Women's Rts L Rptr 251, 258-80 (1982).

[203] Field, *Surrogate Motherhood* at 116 (cited in note 128). See, for example, *C.M. v*

tween men and their children than with ensuring that the mother-child relationship conforms to the patriarchal family structure.[204] When women attempt to make autonomous decisions about their children—by placing them for adoption or bearing them outside of marriage—the law allows men to assert their genetic claim to children. Male genetic interests thwart women's ability to define their families outside of marriage.

B. Claims to Black and White Offspring

Legal rules determining the genetic tie's role in claims to children preserve the racial caste system, as well as the patriarchal family. The same laws that protect the institution of mar-

---

C.C., 152 NY Super 160, 377 A2d 821 (1977); *McIntyre v Crouch*, 98 Or App 462, 780 P2d 239 (1989). See generally Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and A Model for Legislative Reform*, 19 Am J L & Med 285, 290-300 (1993) (contrasting rights of married and unmarried biological mothers who contest claims by sperm donors). A rare exception is *Thomas S. v Robin Y.*, 157 Misc 2d 858, 599 NYS2d 377 (Fam Ct 1993), which denied a sperm donor's request for a declaration of paternity rights to his daughter, who had been raised exclusively by her lesbian biological mother and co-mother. The court held that, although the daughter understood their biological connection, she did not view the sperm donor as her parent because he never took care of her on a daily basis. Id at 380. The decision applied New York's doctrine of custodial equitable estoppel, which defeats the claim of a biological father who acquiesces for too long in the development of his child's family relationships. Id at 382. See *Terrence M. v Gale C.*, 193 AD2d 437, 597 NYS2d 333, 334 (1993) (invoking the doctrine of custodial equitable estoppel "to preserve existing ties in the face of an outsider's threatened intrusion").

In custody disputes between two lesbians, courts tend to recognize only the parental claim of the biological mother. Note, *Another Mother?: The Courts' Denial of Legal Status to the Non-Biological Parent Upon Dissolution of Lesbian Families*, 31 J Family L 981, 983 (1992-93). See, for example, *Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27 (1991) (denying standing to former lesbian partner of child's biological mother who wished to seek visitation or custody of child born using artificial insemination during the relationship). See generally Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 Georgetown L J 459 (1990) (discussing legal issues raised by lesbian parenting).

[204] Smart, *Law and the Problem of Paternity* at 114 (cited in note 117) (stating that paternity laws reflect "the legal antipathy shown towards women mothering children alone and the goal of properly attaching men to children to prevent women exercising too much independence"). See also Haimes, *Recreating the Family?* at 172 (cited in note 198) (concluding that donor anonymity "reinforce[s] established ideological notions about 'the family'"); *Johnson v Calvert*, 5 Cal 4th 84, 19 Cal Rptr 2d 494, 504 (1993) (observing that tradition "supports the claim of the [married] couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures").

Martha Fineman has demonstrated how both divorce reforms and poverty discourses also view single mothers as deviant and seek to restore the nuclear family by reinstating the missing male. See Fineman, *The Neutered Mother* (cited in note 13). See also Roberts, 1 Am U J Gender & L at 22-29 (cited in note 170) (discussing how racism and patriarchy both shape the social meaning of single motherhood).

riage typically function to ensure white men's legacy of legitimate white children. This Section will show, however, that the law discards the traditional presumptions of paternity and maternity in order to deny a white man's connection to a Black child and a Black woman's connection to a white child. Thus, race and gender intertwine to structure legal parentage in a way that maintains the family as both a white-dominated and patriarchal institution.

1. Denying white connection to Black children.

Why does the law deny some biological fathers paternal rights to their children? Why does it discount the genetic tie between some men and their offspring? As discussed above, the legal requirements for social fatherhood help to preserve the traditional patriarchal family structure. Janet Dolgin has noted that "[t]he acts that make a biological father a social and legal father are *familial* acts, acts that socialize the 'natural' facts by inserting themselves in, and thus defining themselves through, a certain ordering of the relationship between the father and his child's mother."[205] Another purpose might be to invest care of, and responsibility for, children in presumably stable husbands rather than presumably irresponsible unwed fathers.[206] Perhaps the marital presumption is a legal fiction designed to appease men's anxieties about the uncertainty of the paternity of their wives' children.[207]

Another explanation arises from the genetic tie's role in the American system of racial slavery. The law's distinction between social and genetic fatherhood freed white men from social obligations to their Black children. Since a child's legal status followed the status of her mother, white men could use Black women's bodies for sexual domination while preserving the racial demarcation necessary for slavery.[208]

---

[205] Dolgin, 40 UCLA L Rev at 672 (cited in note 177).

[206] Note, 23 Colum Hum Rts L Rev at 538 (cited in note 129); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich L Rev 463, 499 (1983). See William M. Blackstone, 1 *Commentaries* *435 (stating that the purpose of the marital presumption was to ascertain and make public the man to whom the care, protection, maintenance, and education of the child should belong).

[207] See Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 BU L Rev 101, 111 (1992).

[208] See text accompanying notes 64-69.

Uncertainty about paternity has been a universal concern throughout history.[209] Enforcing female marital fidelity was the only way a man could know that a woman's children were his offspring.[210] Under a racial caste system, female fidelity was doubly important: it guaranteed not only paternity but also racial purity. Since only white women could produce white children, they were responsible for maintaining the purity of the white race. A. Leon Higginbotham and Barbara K. Kopytoff conclude that the first laws against interracial fornication and marriage arose from legislators' "particular distaste that white women, who could be producing white children, were producing mulattoes."[211] The law punished with extra severity white women who gave birth to free mulatto children.[212] These children, unlike the racially mixed children of Black women, represented a corruption of the *white* race.

While the marital presumption was upheld to support white racial purity, it was also discarded when white women broke the rule of racial fidelity. *Watkins and Wife v Carlton* involved a will

---

[209] See Carol Delaney, *Seeds of Honor, Fields of Shame*, in David D. Gilmore, ed, *Honor and Shame and the Unity of the Mediterranean* 35, 39 (American Anthropological Association, 1987) ("A woman's value, in Turkish village society, therefore depends . . . on whether she is able to guarantee the security of a man's seed."); *Caban*, 441 US at 397 (Stewart dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."). The concern about paternity may not be misplaced. As many as 20 percent of donors in organ donor programs were not genetically related to the men whom they believed were their fathers. Rothman, *Recreating Motherhood* at 225 (cited in note 10).

[210] See Colb, 72 BU L Rev at 110 (cited in note 207). See also Richard A. Posner, *Sex and Reason* 97 (Harvard, 1992) (arguing that male sexual jealousy is a biological adaptation that "reduces the probability that a man will assist in replicating the genes of another man to whom he is not related"). Men are now able to verify paternity with 95 to 99 percent certainty by using human leukocyte antigen tests. See Note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 Vand L Rev 1587, 1588 (1983). DNA testing provides an even more accurate determination of paternity. See Comment, *DNA Fingerprinting and Paternity Testing*, 22 UC Davis L Rev 609, 620-24 (1989).

[211] Higginbotham and Kopytoff, 77 Georgetown L J at 1997 (cited in note 56). Black novelist James Baldwin pinpointed white women's role in preserving racial purity in his rebuke to a white Southerner during a television debate: "You're not worried about me marrying *your* daughter. You're worried about me marrying your *wife's* daughter. I've been marrying your daughter ever since the days of slavery." Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* 414 (Vintage, 1976).

[212] Higginbotham and Kopytoff, 77 Georgetown L J at 2007 (cited in note 56). The law in the southern colonies also treated mulatto children of white mothers more harshly than free Black children, generally requiring them to become indentured servants until thirty or thirty-one years of age. Mason, *From Father's Property to Children's Rights* at 41 (cited in note 65).

contest among three children of a white man, Carlton.[213] Two of his children, Mary and Thomas, challenged their brother William's inheritance on the ground that he was a mulatto and therefore not their father's child.[214] William's lawyer relied on the same presumption of paternity that the Supreme Court upheld in *Michael H.*:[215] he argued that Carlton was legally William's father since he was married to William's mother. Rather than upholding the presumption, the Court ordered a new trial so that the jury could consider William's racial appearance and hear expert testimony about the impossibility of "the produce of the white race being other than white."[216] The Court allowed a racial exception to the marital presumption of legitimacy, an exception never mentioned in more recent Supreme Court cases like *Michael H.* A dark-skinned child born to a white woman did not benefit from the usual presumption of paternity; he was not deemed to be the son of a white husband. The absence of a genetic tie voided any legal link between a white man and a Black child, just as surely as the law erased the genetic link between a white man and his Black offspring.[217]

---

[213] 37 Va (10 Leigh) 560, 560-62 (1840).

[214] Id at 562.

[215] 491 US 110.

[216] *Watkins*, 37 Va (10 Leigh) at 576-77 n *. See Higginbotham and Kopytoff, 77 Georgetown L J at 1999-2000 (cited in note 56) (noting that the court in *Watkins* overlooked the realities of racial mixing in nineteenth-century Virginia in order to maintain the logic of the racially based system of slavery). More recent cases have repeated this racial exception to the presumption of paternity. See, for example, *Hughes v Hughes*, 125 Cal App 2d 781, 271 P2d 172, 174 (1954), quoting *Estate of Walker*, 180 Cal 478, 181 P 792, 794-97 (1919) ("The only exception to [the marital presumption] . . . is where it is clear that, although the husband had intercourse with the wife, yet by the laws of nature it is impossible for him to have been the father, as, for instance, where husband and wife are white and the child a mullato.").

[217] A Virginia judge similarly recognized a racial exception to the liberalization of bastardy law in the 1804 case, *Stones v Keeling*, 9 Va (5 Call) 143 (1804). See Grossberg, *Governing the Hearth* at 202-03 (cited in note 68). The case concerned an inheritance battle between William Keeling's legitimate son's widow and his two daughters from an arguably bigamous marriage. Judge Roane upheld the daughters' claim under a "pathbreaking" 1785 statute that legitimated the offspring of voided marriages, reasoning that "the turpitude, or guilt of the marriage, shall not break upon the heads of their innocent offspring." Id at 203, quoting *Stones*, 9 Va (5 Call) at 146. Judge Roane's concern for racial separation, however, overrode his concern for children's rights:

> In response to an assertion that the statute would legitimate the children of a void interracial marriage, he assured his fellow white citizens that the racially blind terms of the new law were to be "construed and understood in relation to those persons only to whom that law relates; and not to a class of persons clearly not within the idea of the legislature when contemplating the subjects of marriage and legitimacy."

2. Denying Black connection to white children.

Race overrides not only the traditional presumption of paternity, but also the traditional presumption of maternity. Gestatational surrogacy separates the biological connection between mother and child into two parts—the gestational tie and the genetic tie.[218] In gestational surrogacy, the surrogate mother is implanted with an embryo produced by fertilizing the contracting mother's egg with the contracting father's sperm. The child therefore inherits the genes of both contracting parents and is genetically unrelated to her birth mother. Gestational surrogacy allows a radical possibility that is at once very convenient and very dangerous: a Black woman can give birth to a white child. White men need no longer rely on white surrogates to produce their valuable white genetic inheritance.[219] This possibility reverses the traditional presumptions about a mother's biological connection to her children. It becomes imperative to legitimate the genetic tie between the (white) father and the child, rather than the biological, nongenetic tie between the (Black) birth mother and the child.

All states except Arkansas and Nevada apply an irrebuttable presumption of legal parenthood in favor of the birth mother.[220] Yet, in *Johnson v Calvert*, a gestational surrogacy dispute, the court legitimated the genetic relationship and denied the gestational one in order to deny a Black woman's bond to the child.[221] The birth mother, Anna Johnson, was a former welfare

---

Grossberg, *Governing the Hearth* at 203 (cited in note 68), quoting *Stones*, 9 Va (5 Call) at 148. States that passed statutes like Virginia's refused to extend their protection to the children of dissolved interracial marriages. Grossberg, *Governing the Hearth* at 203 (cited in note 68).

[218] See Note, 96 Yale L J at 193 (cited in note 194) (setting up a four-part matrix). Barbara Bennett Woodhouse, using Horton from Dr. Seuss's *Horton Hatches The Egg* (Random House, 1940), and Joseph of Nazareth as examples, suggests that there are also genetic and gestational fathers. Woodhouse, 14 Cardozo L Rev at 1757-85 (cited in note 182).

[219] See Horsburgh, 8 Berkeley Women's L J at 39 (cited in note 127) (stating that white couples are much more likely to hire nonwhite women to be gestational surrogates than to be genetic surrogates). At least two Black women in Europe have been implanted with white women's eggs in order to bear a child of their own. See Abbie Jones, *Fertility doctors try to egg on donors*, Chi Trib § 6 at 1 (Mar 6, 1994) (reporting that a Black woman in Britain was implanted with the eggs of a white woman because there were no eggs from Black women available and that a Black woman in Rome underwent the procedure because she believed that "the child would have a better future if it were white").

[220] Hill, 66 NYU L Rev at 371-72 (cited in note 15).

[221] 5 Cal 4th 84, 19 Cal Rptr 2d 494 (1993), cert denied, 114 S Ct 206 (1993). See Philip Hager, *State High Court to Rule in Child Surrogacy Case*, LA Times A1 (Jan 24,

recipient and a single mother of a three-year-old daughter.[222] The genetic mother, Crispina Calvert, was Filipino, and the father, Mark Calvert, was white.[223] During her pregnancy, Anna changed her mind about relinquishing the baby and both Anna and the Calverts filed lawsuits to gain parental rights to the child.[224] The court framed the critical issue as determining the baby's "natural mother."[225] Johnson's attorney relied on the historical presumption that the woman who gives birth to a child is the child's natural, and legal, mother. The trial judge held that Ms. Johnson had no standing to sue for custody or visitation rights, and granted the Calverts sole custody of the baby. His reasoning centered on genetics: he noted the need for genetically related children and compared gestation to a foster parent's temporary care for a child who is not genetically hers.[226] The judge also equated a child's identity with her genetic composition: "We know more and more about traits now, how you walk, talk, and everything else, all sorts of things that develop out of your genes."[227] The California Supreme Court affirmed this view, reducing the legal significance of gestation to mere evidence of the

---

1992).

[222] Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA Women's L J 89, 95 (1991). Ms. Johnson had mixed African, American Indian, and Irish heritage, but was considered Black by the media. Id at 95 & n 26.

[223] Id at 95. The press paid far more attention to Anna Johnson's race than to that of Crispina Calvert. See id at 97 n 39. See also Ikemoto, 28 USF L Rev at 643-44 (cited in note 125) (observing that the stereotype of Asian women as subservient contributed to the court's approval of Crispina Calvert as the baby's mother).

[224] *Johnson*, 19 Cal Rptr 2d at 496.

[225] Id. All states apply a presumption that it is in the best interests of a child to be placed with her natural parents. Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J Family L 585, 622 (1988-89).

[226] Dolgin, 40 UCLA L Rev at 684-86 (cited in note 177), citing *Johnson v Calvert*, No X-633190, slip op at 5, 10 (Cal App Dept Super Ct, Oct 22, 1990), aff'd, *Anna J. v Mark C.*, 12 Cal App 4th 977, 286 Cal Rptr 369 (1991), aff'd, *Johnson v Calvert*, 5 Cal 4th 84, 19 Cal Rptr 494 (1993), cert denied, 114 S Ct 206 (1993). The court described the Calverts as "desperate and longing for their own genetic product." Dolgin, 40 UCLA L Rev at 687 (cited in note 177), quoting *Johnson*, No X-633190, slip op at 21. See also Robertson, 59 S Cal L Rev at 1015 (cited in note 21) (arguing that the gestational surrogate is a "trustee" for the embryo and should be kept to "her promise to honor the genetic bond").

[227] Dolgin, 40 UCLA L Rev at 685 (cited in note 177), quoting *Johnson v Calvert*, No X-633190, slip op at 8. See also *Anna J. v Mark C.*, 12 Cal App 4th 977, 286 Cal Rptr 369, 380 (1991), aff'd, *Johnson v Calvert*, 5 Cal 4th 84, 19 Cal Rptr 494 (1993), cert denied, 114 S Ct 206 (1993) (describing genetics as "a powerful factor in human relationships"). "The fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological bond. Heredity can provide a basis of connection between two individuals for the duration of their lives." 286 Cal Rptr at 380-81.

legally determinative genetic connection between mother and child.[228] By relying on the genetic tie to determine legal parenthood, the judge ensured that a Black woman could not be the "natural mother" of a white child.[229]

Gestational surrogacy invokes the possibility that white middle-class couples will use women of color to gestate their babies. Since contracting couples need not be concerned about the surrogate's genetic qualities (most importantly, her race), they may favor hiring the most economically vulnerable women in order to secure the lowest price for their services. Black surrogates would also be disadvantaged in any custody dispute: besides being less able to afford a court battle, *Johnson* demonstrates that they are unlikely to win custody of a white child.[230] Some feminists have raised "the spectre of a caste of breeders, composed of women of color whose primary function would be to gestate the babies of wealthy white women."[231] These breeders,

---

[228] *Johnson*, 19 Cal Rptr 2d at 500. Compare Alec Samuels, *Warnock Committee: Human Fertilisation and Embryology*, 51 Medico-Legal J 174, 176 (1983) (arguing that egg donors should have parental rights because of their genetic connection to the child), with Shalev, *Birth Power* at 12 (cited in note 129) (arguing that surrogate motherhood will replace a biological definition of parenthood with a social one); George J. Annas, *Redefining Parenthood and Protecting Embryos: Why We Need New Laws*, 14 Hastings Ctr Rep 50, 51 (1984) (arguing that a gestational mother is entitled to parental rights). See also Hill, 66 NYU L Rev at 383-388 (cited in note 15) (arguing that the right of procreation should protect the intention to create and raise a child, rather than the biological capacity to reproduce); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 Wis L Rev 297, 302 (same). There is little doubt that a court would not consider a woman who donated her eggs to an infertile couple to be the legal mother of the child, despite her genetic connection to the child. See Robertson, 39 Case W Res L Rev at 13, 16 (cited in note 124).

[229] See Rutherford, 4 Yale J L & Feminism at 272 (cited in note 102) ("Can a Black woman ever be the 'natural' mother of a white child?").

[230] See Anita L. Allen, *The Black Surrogate Mother*, 8 Harv Blackletter J 17, 31 (1991) ("Black gestators could be the safest surrogate mothers for white women who want white children."); Horsburgh, 8 Berkeley Women's L J at 48 (cited in note 127) (pointing out that a contracting couple might prefer a Black gestational surrogate because "a Black surrogate's claim to motherhood is bound to be seen as less valid"); Katha Pollitt, *Checkbook Maternity: When Is A Mother Not a Mother?*, Nation 825, 842 (Dec 31, 1990) (speculating that their legal advantage might have been the Calverts' motive for choosing a Black gestational surrogate).

[231] Note, 23 Colum Hum Rts L Rev at 545 (cited in note 129). See also Corea, *The Mother Machine* at 276 (cited in note 10) (envisioning a reproductive brothel in which sterilized women of color are used as breeders for the embryos of more valuable white women); Field, *Surrogate Motherhood* at 43 (cited in note 128) ("If this possibility [of gestational surrogacy] leads to a sharp increase in demand for surrogates, including gestational surrogates, the exploitation not only of the domestic poor but also of Third World women is likely to mushroom . . . ."); Rothman, *Reproductive Technology* at 100 (cited in note 157) ("Can we look forward to baby farms, with white embryos grown in young and poor Third-World mothers?"). See also Dworkin, *Right-Wing Women* at 177-82

whose own genetic progeny would be considered worthless, might be sterilized.[232] The vision of Black women's wombs in the service of white men conjures up images from slavery. Slave women were similarly compelled to breed children who would be owned by their masters and to breastfeed their masters' white children.[233] In fact, Anna Johnson's lawyer likened the arrangement Johnson made with the Calverts to "a slave contract."[234]

Some white feminists present these images of Black women's degradation in order to enhance the potential horror of reproductive technology's oppression of women. A strictly gender-focused analysis fails to confront the racism that makes these images a real possibility. In Gena Corea's futuristic scenario, for example, white women are equally exploited as compulsory egg donors in the reproductive brothel.[235] Corea does not question whether white middle-class women might collude in their husbands' use of Black women's bodies to produce their own white, genetically related children.[236]

3. Transracial adoptions.

White support for "transracial adoptions" does not fundamentally alter the rules governing claims to white and Black children. All of the literature advocating the elimination of racial

---

(cited in note 160) (envisioning the "reproductive brothel" as men's most efficient means of exploiting women's reproductive body parts); Raymond, *Women as Wombs* at 143-44 (cited in note 10) (describing the growth of reproductive clinics in developing countries that specialize in sex predetermination and foreshadow the use of Third World women as gestational surrogates).

[232] Corea, *The reproductive brothel* at 45 (cited in note 160). Corea bases her vision of sterilized breeders on reproductive engineers' repeated linkage between their new reproductive technologies and sterilization. These engineers have suggested that sterilization could be beneficial as a form of birth control. Id.

[233] See Allen, 13 Harv J L & Pub Policy at 140 (cited in note 165); Rutherford, 4 Yale J L & Feminism at 270 (cited in note 102).

[234] David Behrens, *It's a Boy! But Whose? Surrogate and genetic parents in tug-of-war*, NY Newsday 1, 15 (Sept 21, 1990).

[235] See Corea, *The Mother Machine* at 276 (cited in note 10); Corea, *The reproductive brothel* at 45 (cited in note 160).

[236] See Boone, *Slavery and Contract Motherhood* at 359 (cited in note 165) ("The top woman's advance through patriarchy (and the maintenance of her new superwoman ideal) will be possible largely because of the society's oppressive reliance upon bottom women."). See also Angela Y. Davis, *Women, Race & Class* 96-97 (Vintage, 1983) (criticizing middle-class feminists for conveniently omitting the exploitation of domestic workers from their agenda); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U Chi Legal F 139, 154 n 35 (pointing out that white middle-class women gained entry to the male public sphere by assigning domestic tasks to Black women, rather than by demanding a fundamental change in the sexual division of labor).

considerations in child placements focuses on making it easier for white parents to adopt children of color. A leading book on the subject, for example, states that "[i]n the case of transracial adoption the children are nonwhite and the adoptive parents are white."[237] Claims about the benefits of racial assimilation are only made about advantages Black children will presumably experience by living in white homes.[238]

This bias may result partly from the disproportionate number of Black children available for adoption and of white couples seeking to adopt.[239] The thought of a Black family adopting a white child, however, appears to be beyond our cultural imagination. A system that truly assigns children to adoptive parents without regard to race is unthinkable not because Black children would be placed in white homes, but because white children would be given to Black parents. Adoption of a Black child by a white family is viewed as an improvement in the Black child's social status and lifestyle and as a positive gesture of racial in-

---

[237] Rita James Simon and Howard Altstein, *Transracial Adoption* 9 (John Wiley, 1977). See also Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L Rev 487, 487 (1991) (using the term "transracial adoption" to mean "the situation in which a child with one or both birth parents of African American background is placed with a white family"). South Carolina's adoption law explicitly prohibited Black parents from adopting white children, while allowing white parents to adopt Black children:

> It shall be unlawful for any parent, relative, or other white person in this State, having the control or custody of any white child by right to guardianship, natural or acquired or otherwise, to dispose of, give or surrender such white child permanently into the custody, control, maintenance or support of a Negro.

SC Code Ann § 16-17-460 (Law Co-op 1976), repealed by 1981 SC Acts No 71 § 3. On past statutory prohibitions of transracial adoptions, see Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 Buff L Rev 303, 308-09 (1968). Courts have struck down statutory bans on transracial adoptions as unconstitutional. See, for example, *Compos v McKeithen*, 341 F Supp 264 (E D La 1972) (holding that a Louisiana statute prohibiting transracial adoption violated the Equal Protection Clause).

[238] See, for example, Bartholet, *Family Bonds* at 101-06 (cited in note 13).

[239] Id at 95-96, citing, for example, a report on a major state foster care system showing that 54 percent of children available for adoption are nonwhite while 87 percent of prospective adoptive parents are white. See also Rita J. Simon and Howard Altstein, *Transracial Adoption: A Follow-Up* 67 (Lexington, 1981). Although there are more whites pursuing formal adoptions, middle-income Black couples adopt children at a higher rate than similar white couples. Andrew Billingsley, *Climbing Jacob's Ladder: The Enduring Legacy of African-American Families* 29-30 (Simon & Shuster, 1992). In addition, many Black families informally adopt relatives. Id. Black families who attempt to use formal adoption services face numerous institutional barriers. See Dawn Day, *The Adoption of Black Children: Counteracting Institutional Discrimination* 85 (Lexington, 1979); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 Harv Blackletter J 39, 44-46 (1993).

clusion, while a Black family's dominion over a white child, on the other hand, would be seen as an unseemly relationship and an injury to the child. As a judge recognized forty years ago, allowing the adoption of a white child by his mother's Black husband would unfairly cause the child to "lose the social status of a white man . . . ."[240] A "no-preference" adoption policy with respect to race[241] would in effect be a regime that always prefers a white family. Although this policy would eliminate the preference for Black parents in adoptions of Black children, it would retain the preference for white parents in adoptions of white children. Thus, even advocates of transracial adoptions ultimately favor "a system in which white children are reserved for white families . . . ."[242] These proposals would perpetuate a system designed to provide childless white couples with babies and with the type of babies they prefer.[243]

Although it may produce significant connections between parents and their adopted children, the possibility of transracial adoptions within a racial caste system nevertheless reminds me of bell hooks's description of whites' appropriation of pieces of Black culture.[244] hooks examines the ways in which whites in-

---

[240] *In re Adoption of a Minor*, 228 F2d 446, 447 (DC Cir 1955) (reversing trial judge's denial of adoption of white child by his Black stepfather). Even the reversing appellate court agreed that "[t]here may be reasons why a difference in race, or religion, may have relevance in adoption proceedings," although the court did not find such reasons dispositive in this case. Id at 448.

[241] See Bartholet, *Family Bonds* at 115 (cited in note 13) (advocating a "no-preference regime [that] would remove adoption agencies from the business of promoting same-race placement").

[242] Perry, 21 NYU Rev L & Soc Change at 104 (cited in note 97). See also Allen, 8 Harv Blackletter J at 23 n 51 (cited in note 230) ("[I]t is virtually unheard of for an adoption agency to offer a healthy, able-bodied white child to Black parents for adoption."). The current attention to transracial adoptions should not overshadow the fact that the vast majority of white adoptive parents consider white children more desirable than Black children. See Bartholet, *Family Bonds* at 113 (cited in note 13) ("[T]he world of adoption . . . is largely peopled by prospective white parents in search of white children."); Williams, *The Alchemy of Race and Rights* at 227 (cited in note 72) ("[B]lack babies have become worthless currency to adoption agents—'surplus' in the salvage heaps of Harlem hospitals."). Even when they adopt outside their race, whites generally prefer non-Black children or Black children with white features. Fenton, 10 Harv Blackletter J at 53-54 (cited in note 239).

[243] See Fenton, 10 Harv Blackletter J at 51 (cited in note 239) (criticizing the recruitment of white families to adopt Black children solely because of the dearth of adoptable white children); Ladner, Society at 71 (cited in note 99) ("Adoption agencies came into existence for the purpose of supplying babies to white middle-class couples who were infertile."). On the historical exclusion or neglect of Black children by formal adoption institutions, see generally Fenton, 10 Harv Blackletter J at 49-54 (cited in note 239); Andrew Billingsley and Jeanne M. Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (Harcourt Brace Jovanovich, 1972).

[244] See *Eating the Other: Desire and Resistance*, in bell hooks, *Black Looks: Race and*

corporate certain elements of blackness into their own lives in order to assuage their guilt for past injustices or to add a new element of excitement to their lives.[245] Contemporary mass culture promotes racial difference and nostalgia for the primitive as a titillating departure from boring white lifestyles. Advertising, for example, exploits images of dark-skinned people to add "'a bit of the Other' to enhance the blank landscape of whiteness."[246] The fantasy of Otherness, however, does not undermine the assumed superiority of whiteness. "One desires contact with the Other even as one wishes boundaries to remain intact."[247] Similarly, transracial adoptions permit white families to embrace Black children without eliminating the structures that preserve white supremacy.

4. Devaluing Black mothers' connection to their children.

The law also weakens the presumption of maternal rights when applied to Black women's bond with their genetically related children. The historical devaluation of Black motherhood has included disrespect not only for Black women's decisions to bear children, but also for their relationship with their children.[248] The forced separation of Black mothers from their children began during slavery, when Black family members could be auctioned off to different masters.[249] Contemporary poverty rhetoric blames Black single mothers for perpetuating poverty by transmitting a deviant lifestyle to their children.[250]

Courts have been willing to terminate the parental rights of Black mothers, even while they protect the integrity of white middle-class family ties.[251] A disproportionate number of Black mothers lose custody of their children through the child welfare system, in part because of social workers' misinterpretation of

---

Representation 21 (South End, 1992).

[245] Id at 28-39.

[246] Id at 29. See also Morrison, *playing in the dark* at 59 (cited in note 52) (examining the importance of the Africanist presence to white literary characters' self-definition: "Whiteness, alone, is mute, meaningless, unfathomable, pointless, frozen, veiled, curtained, dreaded, senseless, implacable.").

[247] hooks, *Eating the Other* at 29 (cited in note 244).

[248] See Roberts, 104 Harv L Rev at 1436-44 (cited in note 3).

[249] See text accompanying notes 168-69.

[250] See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 Duke L J 274, 277-89 (linking poverty discourse's representation of single mothers as deviant to patriarchal ideology).

[251] See Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 NYU Rev L & Soc Change 539, 547 (1983-84).

their child-rearing patterns as child neglect.[252] Moreover, Black families are less likely than white families to receive services designed to *prevent* foster care placement.[253] Recently, courts have accepted drug use during pregnancy as evidence of child abuse, and states have removed infants from their mothers at birth when the infants tested positive for drugs.[254] These decisions result in widespread disruption of the bonds between mothers and children who are likely to be poor and Black.[255]

Elizabeth Bartholet's observation that "[w]e now place an extremely high value on the right to procreate and the related right to hold on to our biologic product" applies less forcefully to Black genetic ties.[256] The grossly disproportionate numbers of

---

[252] See Sylvia Sims Gray and Lynn M. Nybell, *Issues in African-American Family Preservation*, 69 Child Welfare 513, 513, 515-17 (1990); Stack, 12 NYU Rev L & Soc Change at 541, 547 (cited in note 251). Current welfare reform proposals threaten to increase this disruption of Black family ties. Proposed legislation included in the "Contract with America," recently signed by more than three hundred Republican House candidates, would eliminate welfare payments to young unwed mothers and divert the funds to programs promoting adoption and establishing orphanages and group homes. See *GOP Welfare Plan*, Chi Trib § 1 at 7 (cited in note 140).

[253] Sandra M. Stehno, *The Elusive Continuum of Child Welfare Services: Implications for Minority Children and Youths*, 69 Child Welfare 551, 554 (1990).

[254] Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 Stan L Rev 745, 749, 751-52 & n 25 (1990); Rorie Sherman, *Keeping Babies Free of Drugs*, Natl L J 1, 28 (Oct 16, 1989). See, for example, *In re Stefanel Tyesha C.*, 157 AD2d 322, 556 NYS2d 280, 282-83 (1990), appeal dismissed, 76 NY2d 1006 (1990) (holding that allegations of a positive infant toxicology, along with the mother's admitted drug use during pregnancy and failure to enroll in a drug rehabilitation program, constituted a cause of action for neglect); *In re Baby X*, 97 Mich App 111, 293 NW2d 736, 739 (1980) (holding that a drug-exposed newborn "may properly be considered a neglected child"); *In re Ruiz*, 27 Ohio Misc 2d 31, 500 NE2d 935, 939 (Ct CP 1986) (heroin use during pregnancy constitutes abuse under child abuse statute). But see *In re Valerie D.*, 223 Conn 492, 613 A2d 748, 765-66 (1992) (holding that termination of parental rights may not be based on mother's prenatal drug use alone). Several states have expanded the statutory definition of neglected children to include infants who test positive for controlled substances at birth. See, for example, Fla Stat Ann § 415.503(9)(a)(2) (West 1993); 325 ILCS 5/3 (1993); Mass Ann Laws ch 119, § 51A (Law Co-op 1975 & Supp 1994); Nev Rev Stat Ann § 432B.330(1)(b) (1991).

[255] See Roberts, 104 Harv L Rev at 1432-36 (cited in note 3).

[256] See Bartholet, *Family Bonds* at 76 (cited in note 13). See also Dowd, 107 Harv L Rev at 927 (cited in note 13) (supplementing Bartholet's analysis with a class-sensitive feminist consideration of birthparents: "The feminist concern with the role of power and class, especially in connection with the control of reproductive decisions, weighs in favor of enhancing the control and range of options that birthparents exercise in the adoption process."). Bartholet also states, "We would not dream of telling pregnant people that when they give birth, the government will decide whether they can keep the child on the basis of whether a social worker thinks that the child looks like a good match for their particular parenting profile." Bartholet, *Family Bonds* at 79 (cited in note 13). Yet social workers routinely make such determinations about poor Black mothers. See Douglas T. Gurak, David Arrender Smith, and Mary F. Goldson, *The Minority Foster Child: A Com-*

Black children in foster care is evidence of the low value placed on Black women's bond with their children.[257] The experience of Blacks in America reveals the pain caused by degrading the bond between parents and their offspring. The following Section argues that the Black family also demonstrates that the genetic tie need not be an exclusive basis for family inclusion.

C. The Genetic Tie in the Black Family

Blood ties have not held the preeminent position in Black families that they have held in white families. Blacks' incorporation of extended kin and nonkin relationships into the notion of "family" goes back at least to slavery.[258] Because families could be torn asunder at the slavemaster's whim, slave communities created networks of mutual obligation that reached beyond the nuclear family related by blood and marriage.[259] "A teen-ager sold from the Upper to the Lower South after 1815 was cut off from his or her immediate Upper South family but found many fictive aunts and uncles in the Lower South."[260] During and following the Civil War, ex-slaves throughout the South took in Black children orphaned by wartime dislocation and death who were excluded from formal adoption services.[261]

On the other hand, the system of informal adoption did not require extinguishing evidence of the genetic tie. There was no effort, for example, to keep secret the identity of an adopted child's biological parents.[262] Rather, the slave tradition was to tell children about their biological parents and what happened to them.[263] In Toni Morrison's *Beloved*, Nan, the slave woman who nursed babies, watched children, and cooked, told Sethe about her "ma'am," whom Sethe had only seen a few times before she was hanged: "She told Sethe that her mother and Nan were to-

---

parative Study of Hispanic, Black and White Children 8 (Hispanic Research Center, 1982).

[257] See Gurak, Smith, and Goldson, *The Minority Foster Child* at 82-83 (cited in note 256) ("[E]ven though Black parents are as active as Whites in seeking the return of their children, White children return home almost twice as rapidly."); Gray and Nybell, 69 Child Welfare at 513 (cited in note 252) (noting that about half of children in foster care are Black).

[258] See generally Gutman, *The Black Family* at 196-229 (cited in note 93) (describing slave extended-kin networks and nonkin social obligations).

[259] Id at 222.

[260] Id.

[261] Id at 226-27.

[262] See Ladner, *Mixed Families* at 65 (cited in note 99).

[263] Fenton, 10 Harv Blackletter J at 43 (cited in note 239).

gether from the sea. Both were taken up many times by the crew. 'She threw them all away but you . . . .'"[264]

Contemporary studies of the Black family commonly note the practice of informal adoption of children within the extended kinship network.[265] Sociologist Robert Hill estimates that over 15 percent of all Black children have been informally adopted by extended kin.[266] Children whose parents are unable to care for them, because their parents are unmarried, too young, unemployed, or overwhelmed by other children, are often absorbed into a relative's or neighbor's family.[267] Writer Ernest J. Gaines reflected the communal bonds of his Louisiana childhood in his short stories about Black families.[268] Mary Helen Washington's commentary on Gaines's short story "Just Like a Tree," which centers on an elderly Black woman named Aunt Fe, explains this nonbiological meaning of family:

> In this story, family transcends blood kin. While the final effect of "Just Like a Tree" is of a large extended family, Aunt Fe is related by blood only to Louise. She has no children of her own, no brothers or sisters, no husband. She is "like" a mother to Anne-Marie Duvall and to Leola and Emile; she is a godmother to Adrieu; she is "like" a sister to Aunt Lou. Leola and Emile are so close to Aunt Fe they have to be reminded that they are not blood kin.
>
> What constitutes family in Gaines's view is not necessarily blood kinship. These familial relationships are nourished and sustained by the accumulation of thousands of daily acts of support and care. Count the days in the year, Leola says, and that number would be close to the number of times she has washed, ironed and cooked for Aunt Fe. Aunt

---

264 Morrison, *Beloved* at 62 (cited in note 167).

265 See, for example, Billingsley, *Climbing Jacob's Ladder* at 29-31 (cited in note 239); Robert Hill, *Informal Adoption Among Black Families* (National Urban League Research Department, 1977); Elmer P. Martin and Joanne Mitchell Martin, *The Black Extended Family* 39-47 (Chicago, 1978); Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* 62-89 (Harper & Row, 1975); Andrea G. Hunter and Margaret E. Ensminger, *Diversity and Fluidity in Children's Living Arrangements: Family Transitions in an Urban Afro-American Community*, 54 J Marriage & Family 418, 418-25 (1992). See also Nancy H. Apfel and Victoria Seitz, *Four Models of Adolescent Mother-Grandmother Relationships in Black Inner-City Families*, 40 Family Relations 421, 422 (1991) (finding that grandmothers or grandmother surrogates played mothering roles to newborns of 95 percent of Black adolescent mothers interviewed).

266 See Billingsley, *Climbing Jacob's Ladder* at 30 (cited in note 239).

267 See Collins, *Black Feminist Thought* at 120-21 (cited in note 170).

268 See Ernest J. Gaines, *Bloodline* (Dial, 1968).

> Fe and Emmanuel have eaten together, fished together, walked to church together. And the stories Aunt Fe has passed on to Emmanuel about his great-grandpa become the fuel for the fire of his political passion.[269]

Black women have a rich tradition of caring for other women's children.[270] These cooperative networks have included members of the extended family—grandmothers, sisters, aunts, and cousins—as well as nonblood kin and neighbors. Patricia Hill Collins uses the term "othermothers" to describe the women who help biological mothers by sharing mothering responsibilities.[271] The relationship between othermothers and children ranges from daily assistance to long-term care or informal adoption.[272] It is not uncommon for a Black child's "Mama" to be a woman who did not give birth to her or who is not even related to her by blood. Andrew Billingsley gives the example of Reverend Otis Moss of Cleveland, Ohio, whose father died in a car accident a few years after his mother's death: "While young Otis was standing viewing the wreckage, a woman completely unrelated to him took him by the arm and said, 'Come home with me.' He grew up as a member of her family."[273] The genetic tie is not a glorified prerequisite for inclusion in the Black family.

In her short story "Adventures of the Dread Sisters," Alexis De Veaux suggests the radical potential of families consciously created out of love and political commitment, rather than biological attachments.[274] Stuck in traffic on the Brooklyn Bridge on her way to a rally, the young narrator explains her relationship to the older woman she accompanies: "Nigeria and me, we call ourselves The Dread Sisters. We're not real sisters. She's not my real mother neither. But she raised me. So we are definite family. We even look alike. Both of us short and got big eyes. Both of us got dreadlocks. Just like the Africans in the pictures in Nigeria's books."[275] This Black family is a "self-defined sister-

---

[269] Mary Helen Washington, *Commentary on Ernest J. Gaines*, in Mary Helen Washington, ed, *Memories of Kin: Stories About Family by Black Writers* 38, 39-40 (Doubleday, 1991).

[270] See Collins, *Black Feminist Thought* at 119-23 (cited in note 170); Stack, *All Our Kin* at 62-63 (cited in note 265); Collins, Sage at 5 (cited in note 99).

[271] Collins, Sage at 5 (cited in note 99).

[272] Collins, *Black Feminist Thought* at 120 (cited in note 170).

[273] Billingsley, *Climbing Jacob's Ladder* at 31 (cited in note 239).

[274] See Alexis De Veaux, *Adventures of the Dread Sisters*, in Mary Helen Washington, ed, *Memories of Kin: Stories About Family by Black Writers* 305 (Doubleday, 1991).

[275] Id at 306.

hood" that is united by shared experiences, culture, and politics—not genes—and that challenges the dominant conceptions of kinship bonds and women's roles.[276]

CONCLUSION

White colonists in America invented the genetic meaning of race to resolve the contradiction between their enslavement of human beings and their radical commitment to liberty and equality. The genetic tie took on a profound significance, determining a person's permanent condition as slave or free, inferior or superior. Racist ideology continues to understand the genetic tie in a way that preserves racial purity, values whiteness, and devalues Black family bonds. Barbara Jeanne Fields reminds us that contemporary American society has not simply inherited this interpretation of the genetic tie, but continually re-creates its meaning:

> Nothing handed down from the past could keep race alive if we did not constantly reinvent and re-ritualize it to fit our own terrain. If race lives on today, it can do so only because we continue to create and re-create it in our social life, continue to verify it, and thus continue to need a social vocabulary that will allow us to make sense, not of what our ancestors did then, but of what we ourselves choose to do now.[277]

The re-creation of a racist and patriarchal understanding of the genetic tie holds open the possibility of radical change. Historical shifts in definitions of family relationships, as well as current controversies surrounding adoption and new reproductive technologies, demonstrate that the genetic tie's meaning is not biologically preordained. Recognizing this indeterminacy frees us to think purposefully and creatively about more just conceptions of the genetic tie. Feminists have begun the project of transforming the family into a relationship that rejects oppressive patriarchal norms. This project must fundamentally include eliminating the understanding of the genetic tie rooted in white supremacy. Exploring Blacks' rejection of the dominant view of the genetic tie in their definition of self, family, and group identity is one place to start.

---

[276] Mary Helen Washington, *Commentary on Alexis De Veaux*, in Mary Helen Washington, ed, *Memories of Kin: Stories About Family by Black Writers* 310, 311-12 (Doubleday, 1991).

[277] Fields, 181 New Left Rev at 118 (cited in note 51).

How might the resolutions to legal disputes involving biological claims to children change if we eliminated the current valuing of genetic ties shaped by a racist history and ideology? A conclusive answer would depend on the social and political circumstances of each case and require further examination of alternative visions of family relationships. We would not necessarily privilege claims based on genetic relatedness nor reject them altogether. Rather, we should be guided by a particular concern for the relational bond between less powerful parents and their children, remaining especially vigilant for policies that value the genetic tie on the basis of race. In surrogacy cases, for example, the law would cease to privilege a father's wish for a genetic inheritance and give more concern to the potential harm of commercializing childbirth, including its devaluation of Black genetic contributions. At the same time, however, the law would pay more respect than it has to the genetic bond between Black parents and their children. Judgments about the wisdom of investing in new reproductive technologies would be based on an equal respect for all children and their relationships with parents, however created. We would value nonbiological ways of creating family bonds, and we would value the birth of Black children as much as the birth of white children. Thus, we would no longer place a premium on creating genetically related children, and we would eliminate the promotion of adoption and new reproductive technologies as a means for white, middle-class couples to have the children they prefer.

I hope this Article conveys a message that transcends race, as well. It presents two views of the genetic tie. One sees it as a commodity, valuable or worthless in itself, to be bartered on the market or discarded. The other sees it as a bond, among others, that forms the basis of a more important relationship developed in love and caring. This second view will guide us to a more just vision of the family.