Does Sperm Have a Flag? On Biological Relationship and National Membership

Lois Harder*

Abstract

Drawing primarily from the Canadian case, this paper explores the process of birthright citizenship determination for children born abroad through the use of assisted reproductive technologies. The determination of parentage is central to these cases, raising issues of how parental status is defined in the law—through biology, intentionality, and/or matrimony. Moreover, the complexities of defining who is a child and who is a parent, in order to determine who is a citizen, reveal fundamental contradictions in the consent-based model of liberal citizenship.

Keywords: citizenship, birthright, parentage, reproductive technologies, Canada

Résumé

S'appuyant principalement sur le cas canadien, cet article explore le processus par lequel la citoyenneté des enfants nés à l'extérieur du pays à l'aide de technologies reproductives assistées est déterminée. L'établissement d'un lien de filiation est fondamental dans ces cas, soulevant la question de comment le statut filial est défini par la loi—par la biologie, l'intentionnalité ou le mariage. Par ailleurs, l'acte complexe de définir qui est un enfant et qui est un parent afin de déterminer qui est un citoyen comporte des contradictions fondamentales au sein du modèle basé sur le consentement de la citoyenneté libérale.

Mots clés : citoyenneté, droit de naissance, filiation, technologies de reproduction, Canada

In recent years, a number of news and public interest stories have addressed the unforeseen consequences of developments in reproductive technologies. Sperm donation has elicited court cases, journalistic accounts, movies and sitcoms focused on the prospect of untold numbers of children produced from an

* My thanks to Leah Ward for her research assistance and to Peter Nyers, Kate Bedford, Sally Sheldon, Robert Leckey, Eric Adams, and two anonymous reviewers for their encouragement and advice on various elements of the argument. Any errors, of course, are solely attributable to me.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2014, Volume 30, no. 1, pp. 109–125. doi:10.1017/cls.2014.24

especially generous and anonymous donor.[1] These stories often include an alleged right to know the identity of one's biological father in order to know one's own identity and medical history, and to protect oneself against romantic entanglements with one's biological siblings. The development of an international market for fertility treatment and surrogacy services has led to concerns about foreign medical credentials, safety, and exploitation.[2] And, though less explored, these developments have also exposed a minefield of citizenship issues.

Because all countries grant national citizenship based on criteria of birth, and because parental status generally implies the right to confer citizenship on one's progeny, the legal determination of parentage is directly associated with the legal determination of citizenship. Since biology and law tend to align often enough in our everyday experiences of family, identifying parents and children seems straightforward, with the law simply stating the obvious. Parental status then appears to be a kind of legal alchemy in which biology grounds the conceptual bond between parents and children but law provides the imprimatur of status. It would seem that the biological relatedness of family drives the law, rather than the law being engaged in actively defining families.

With regard to citizenship status, this alchemical interaction between law and biology is reversed. Citizens of liberal democracies think of the relationship between state and citizen as formal and rule governed, a product of consent and a terrain of legal rationality rather than a biological process.[3] Citizenship ceremonies, with their pledges of allegiance and rituals of national fealty, offer regular re-enactments of the nation-state's democratic founding.[4] Of course, we know that most people within the national space did not become citizens by way of explicit consent, but rather through birth (birth in the territory—*jus soli*, birth to citizen parents—*jus sanguinis*). And even people who attain citizenship through the immigration process are understood to be "naturalized": an ecological metaphor denoting the integration of a foreign species within a new environment, complete with the capacity of that species to reproduce in its new surroundings.[5] Yet the assertion that biological relationship is a fundamental characteristic of citizenship

---

1 Examples range from *Pratten v British Columbia (Attorney General)* 2012 BCCA 480; CBC Radio, "Brave New Family," *Ideas*, 12 March 2009, http://www.cbc.ca/ideas/episodes/2009/03/12/brave-new-family-part-1/; Jacqueline Mroz, "One Sperm Donor, 150 Offspring," *New York Times*, 5 September 2011, http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all&_r=0; *The Kids are Alright* (2010); *Starbuck* (2011); *Seed* (2013).

2 Services are advertised online. See, for example, http://www.fertility-docs.com; weecaresurrogacy.com/IndiaSurrogacy; www.conceptualoptions.com. Journalistic commentary has been extensive, but see CBC Radio, "Of Mothers and Merchants: Commercial Surrogacy," *The Current*, 28 March 2012, http://www.cbc.ca/thecurrent/episode/2012/03/28/of-mothers-merchants-commercial-surrogacy/.

3 Jacqueline Stevens, *Reproducing the State* (Princeton: Princeton University Press, 1999).

4 Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 75. This consent-based myth obviously ignores histories of colonialism, slavery, conquest, and war, which provide a more accurate history of nation-state formation.

5 Siobhan Somerville notes the connection between the naturalization of plants and the naturalization of people. The process of naturalization, she observes, is one in which the difference between the indigenous and the imported is effaced. Most significantly, the process of naturalization automatically entitles the children of naturalized citizens to citizenship by birth. See "Notes toward a Queer History of Naturalization," *American Quarterly* 57, no. 3 (2005): 667, 669.

sounds, at first hearing, like a twinge-inducing dissonance. In short, we appear to have failed a basic word association task when we connect family with law and citizenship with biology.

This article asks, Does sperm have a flag? It is a saucy question, to be sure, but I pose the research problem in this way to emphasize how formal legal processes invoke lineage (as determined by blood, genes, and biology) to determine political membership. Rather than taking birthright citizenship as a given, I want to explore the laws that give meaning to birth, demonstrating their complexities, their anachronistic gendered and sexual presumptions, their racial underpinnings, and our nonetheless-persistent adherence to birthright citizenship as fundamentally just—or at least the best that we can do. The bigger—and unanswered—question, then, is could we devise other means for membership? In the pages that follow I outline the basic principles of parentage status and citizenship determination in Canada. I then turn to the complications that arise, first with regard to naming parents in cases of assisted conception, and second in terms of how those difficulties have begun to play out in the citizenship context. I conclude the paper with a set of reflections on the relationship between blood and national belonging, and our difficulties in recognizing the persistence of family as the basis for the democratic nation-state. These findings suggest that parentage and citizenship should be delinked and that we might strive to establish a foundation for political membership that is based on mutual respect and care, rather than luck, exclusivity, and risk aversion.

Parentage Law—The Basics

Legal parents, as I have already suggested, are not necessarily biological parents. Historically, marriage has provided the institutional filter through which parental designations were realized. In the English common law tradition, in the Napoleonic Code, and in Sharia law, a husband is the father to any children of his marriage (*pater est quem nuptia demonstrant*—father is to whom marriage points).[6] Given the inability to determine paternity with certainty, the formal status of marriage and husband served as a proxy for biological proof of paternity. The law has historically been less concerned with defining mothers since birth itself was seen to do this work. Thus, while men needed the law to bring them into a paternal relationship with children, women became mothers naturally.

The interaction between law and biology in the context of marriage also ensured the legal status of children, a status that, particularly for boys, included the right to inherit, to pass on the family name, and to acquire and pass on one's citizenship.[7] In the absence of marriage, children were deemed *filius nullius* (child

[6] Tabitha Freeman and Martin Richards, "DNA Testing and Kinship: Paternity, Genealogy and the Search for the 'Truth' of our Genetic Origins," in *Kinship Matters*, ed. Fatemeh Ebtehaj, Bridget Lindley, and Martin Richards (Oxford and Portland, Oregon: Hart Publishing, 2006), 72; Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies," *Osgoode Hall Law Journal* 39, no. 4 (2001): 779.

[7] Mykitiuk, "Beyond Conception," 782. In the UK context, Sally Sheldon notes that until 1981, only married fathers, and in very rare circumstances, unmarried mothers, could pass along their citizenship to their children. Unmarried fathers were only granted this right in 2006. See "Unmarried Fathers and British Citizenship: The Nationality, Immigration and Asylum Act 2002 and British Nationality (Proof of Paternity) Regulations 2006," *Child and Family Law Quarterly* 19, no. 1 (2007): 2.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

of no one), a telling designation through which the biological fact of a child's existence was subject to legal erasure.

In the contemporary period, myriad family forms and a robust market in reproductive technologies offer the prospect for parental status to be even more readily acquired through social, rather than biological, ties. On the other hand, our current context also offers the promise of biological certainty, most notoriously through paternity testing. In Canadian family law, however, the *presumption* (rather than the certainty) of biological relatedness of parents and children has been retained, and perhaps even intensified. Note, for example, the language defining parentage in the *Family Law Acts* of Alberta and British Columbia. In both provinces, the rules of parentage declare that a child's parents are his or her birth mother and biological father, with exceptions carved out for cases of adoption or when conception was achieved with the assistance of reproductive technologies.[8] That sounds fairly clear and definitive, and it suggests a departure from the long-established principle that "marriage turns husbands into fathers." We seem to have arrived at a point at which sperm creates fathers, at least if conception happens in "the natural way." And yet in both jurisdictions, it takes another several qualifying paragraphs to establish who the presumptive "biological" father of a child is in the law. In brief, the law presumes that a man is a biological father if he is or was married or cohabiting with the mother in close temporality to the child's conception or birth. That is, sperm plus relationship - sex plus commitment - makes a presumptive father. In this, the law performs what Jacqueline Stevens has described as a "telling semantic mistake."[9] In the insistence that fathers are biologically related to their children, even when provincial family law statutes do not, in fact, insist on establishing proof of biological relationship and go to great lengths to establish elaborate criteria for paternal presumption, the legal fiction of fatherhood as biological relatedness is enforced. Legal fathers thus acquire recognition as biological fathers even when biological relatedness is not established.[10]

The ambivalent relationship between law and biology in parentage can also be witnessed in the struggles for parental recognition faced by same-sex partners. Equal marriage (and equal legal standing for different and same-sex cohabiting relationships) has not included equality in the realm of parentage law.[11] In part, the constitutional division of powers in Canada, in which marriage is a federal

8 Alberta, *Family Law Act* s 7.2, *Statutes of Alberta* 2003 F-4.5; British Columbia, *Family Law Act* s 26.1, *Statutes of British Columbia* 2011, c 25, Part 3.

9 Stevens, *Reproducing the State*, 231.

10 It is also worth noting that Alberta law (as well as other Canadian jurisdictions) states that a man is a legal father if a court of competent jurisdiction in Canada says that he is a father for any purpose. As Fiona Kelly and Jenni Millbank have ably demonstrated, this flexibility in the definition of legal fatherhood has enabled Canadian courts to insert fathers—biologically related or not—into the families of sole parents and lesbian co-mothers against the mothers' expressed wishes. See Fiona Kelly, "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family," *Canadian Journal of Women and the Law* 21, no. 2 (2009): 315–51, and Jenni Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family," *International Journal of Law, Policy and the Family* 22, no. 2 (2008): 149–77.

11 For an insightful discussion of the parental presumption situation faced by Canadian same-sex partners see Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families," *University of New Brunswick Law Journal* 64 (2013): 253–82.

jurisdiction, while the provinces regulate all other domestic relationships, explains this lapse. But the transformation of the paternal presumption into a parental presumption has also faced arguments about the impossibility of overcoming "the biological facts." Vital statistics offices in British Columbia and Ontario, for example, initially refused to allow lesbian co-mothers to register themselves as parents on their children's birth certificates.[12] Provincial officials argued that birth registration was designed to record biological relationship. When challenged to provide evidence that heterosexual parents had to provide proof of biological relationship when registering their children's births, neither Ontario nor British Columbia could do so, and the women ultimately succeeded in being named parents. Saskatchewan has been less willing to acknowledge the legal fiction that establishes parentage law, insisting that the refusal to grant parental rights to a lesbian co-mother was not a violation of her equality rights, but simply a recognition of the biological facts. As a woman, she could not have provided "the seed," and the court could not "aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal treatment before the law."[13] The Saskatchewan court did note that parentage was about more than biology, but in the judge's reasoning, it seemed that the possibility, if not the reality, of biological relationship, was essential to establish a presumption of parentage.[14] To be clear, same-sex partners can acquire parental status through adoption in all Canadian provinces and territories. Adoption provides an obvious legal override of previous parental relationships as well as the legal fictions that attend them. But the point I want to make regarding the presumption of parentage is that the presumption, in itself, is a legal provision that masquerades as enabling a biological fact. In fact, paternal presumptions are biological fictions that enable legal truths.

If the relationship between biology and parentage is tenuous even in the context of heterosexual marriage, it is hardly surprising that naming parents becomes more complex with the advent of reproductive technologies. Sperm and egg donors, intentional parents, and gestational mothers, might all vie for parental designations. And because paternal presumptions are also in play, the spouses or common law partners of the various contributors might also be prospective legal parents. In a situation in which two intentional parents contract with a surrogate mother who gestates an embryo created from donated sperm and ova, seven people might claim to be the resulting child's parents.[15]

In this complicated scenario, it is telling that different jurisdictions have approached the determination of parentage differently. In Canada, for example, where surrogacy contracts are considered unenforceable, gestational mothers

---

12 *Gill and Maher, Murray and Popoff v Ministry of Health* 2001 BCHRTD no 34; *MDR v Ontario (Deputy Registrar General)* 2006.

13 *PC v SL* 2005 SKQB 502, 262 DLR (4th) 157 at paras 17, 20.

14 Ibid. at para 21. It should also be noted that while Saskatchewan's parentage provisions have not been amended, the province's *Vital Statistics Act* 2009 SS 2009m c V-7.21 sec 20(3)(c) does make provision for the registration of "any additional parent."

15 Mykitiuk, "Beyond Conception," 810. Mykitiuk states that eight people might claim to be the parents, but by my reading, this assumes that the partner to the sperm donor might assert a claim to parentage. Given that there is no maternal presumption in the law, this seems to be incorrect.

have the first claim on motherhood.[16] In Alberta, the *Family Law Act* allows for a court declaration through which the surrogate mother can revoke her status to the genetic mother or the wife/partner of the man who provided the sperm and intended to be the father.[17] The *Act* is very clear that the husband/partner of the surrogate is not the father.[18] In the absence of this clause, the surrogate's husband/partner would be the presumptive father of the child. But more importantly, for our purposes, the inclusion of this clause is significant because it demonstrates that in the first instance, paternity is matrimonial not biological. In a number of US jurisdictions, by contrast, the intentional parents—that is, the people who put the process in motion—are considered parents and the surrogacy contract is considered enforceable.[19] There are, of course, important arguments to be made surrounding the conceptualization of gestation as a form of labour akin to other forms of manual work, as well as the social conditions that might lead women to regard this "service" as a viable form of wage-earning.[20] For the purposes of this discussion, however, I will only note those important issues.

The increasing use of reproductive technologies both reveals the opportunities to delink biology and parentage, and, paradoxically, seems to reinforce the pre-eminence of biological relationship as central to the parent-child relationship. First, we might observe that despite all of the potential parents who can emerge from the reproductive technologies scenario, the law has refused (with the notable exception of British Columbia's *Family Law Act*—discussed below—and one Ontario case—*AA v BB*) to grant parental status to more than two parents.[21] Thus, the appearance of biological relationship is maintained. Second, people often pursue assisted conception options as a way of acquiring a biologically related child when natural methods have failed. Reproductive technologies thus facilitate a preference for biologically-related progeny over adoptive children, particularly for people of relative affluence. Third, the broader context of genetic knowledge, the human genome project, and the promises made on behalf of genetic science for foretelling all that might be known about humanity, our individual selves, and our futures, has fuelled a hype that, in the public and policy-making imaginations at

16 *Assisted Human Reproduction Act* SC 2004, c 2 s 6; *Family Law Act* SA 2003, c F-4.5, s 8.2(8)(a); art 538 CCQ (1991).

17 *Family Law Act* SA 2003, c F-4.5, s 8.2(1).

18 *Family Law Act* SA 2003, c F-4.5, s 8.1(3). Other provinces have not yet addressed surrogacy, as a recent Manitoba case vividly demonstrates. In this situation, an embryo was created with the gametes of a married heterosexual couple. The woman's sister volunteered to be the surrogate mother and twins resulted. While all of the parties are in agreement about the arrangement, and, indeed, the biological parents are actively raising the children, Manitoba law continues to insist that the children's parents are the gestational mother and her husband. See CBC News, "Winnipeg Family Wants Changes to Surrogacy Laws," 7 May 2013, http://www.cbc.ca/news/canada/manitoba/story/2013/05/07/mb-surrogate-parents-manitoba.html.

19 Darra Hofman, "'Mama's Baby, Daddy's Maybe:' A State-by-State Survey of Surrogacy Laws and their Disparate Gender Impact," *William Mitchell Law Review* 35 (2008–2009): 449–68.

20 Alison Bailey, "Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy," *Hypatia* 26, no. 4 (2011): 715–41, France Winddance Twine, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market* (New York: Routledge, 2011).

21 *AA v BB* 2007 ONCA 2 (CanLII). Given the very specific conditions that pertained in this case, it is not clear that the decision offers a reliable precedent for all possible three-parent scenarios. See Nicole LaViolette, "Dad, Mom—and Mom: The Ontario Court of Appeal's Decision in *A.A. v B.B.*" (Case Comment), *Canadian Bar Review* 86 (2007): 665–89.

any rate, discounts social relationships in favor of scientific "facts." Geneticists tend to be more moderate about what genes can reliably predict than the claims made on their behalf, but in an environment of competitive research funding, it can be disadvantageous to downplay the hoped-for impacts of one's work.[22] Fourth, this preference for and assumption of biological relationship informs the context in which the children of reproductive technologies come of age. It is hardly surprising that they too would express a strong interest in the genetic truths of their lives by, for example, seeking out the anonymous sperm donors who made their lives possible.

British Columbia's provisions for the recognition of three parents and its explicit articulation that a donor is not automatically a parent offer compelling correctives to the intensification of biological relatedness in parentage determination. Section 30 of British Columbia's *Family Law Act* provides for a declaration of three parents when an agreement is reached among the intended parents and the potential birth mother, or the potential birth mother, her partner and a potential donor, prior to a child being conceived through assisted reproduction.[23] The three-parent provision thus allows for both the biological and social parents to be recognized equally in the law and disrupts the biological—and therefore heternormative—foundations of other provinces' parentage provisions as well as the Ontario court's decision in *AA v BB*.[24] Further, the explicit recognition that a donor is not a parent solely by virtue of biological contribution—that, at least in the context of assisted reproduction, parentage requires some form of intentionality and relationship—provides an opportunity for broadening the conversation regarding the meaning and requirements of parentage. As we shall see, however, in the context of citizenship determination, biological relationship claims preeminence.

Borders and Parentage

Parentage determination within a single legal jurisdiction is, in itself, a complicated undertaking, but setting this task within the context of international borders, birth "abroad," and citizenship determination, risks cognitive-system overload. If we begin by considering the pre-reproductive technology situation, we see that the wobbly relationship between biology and parentage in the domestic context spilled over into the determination of citizenship for children born abroad to a citizen parent (derivative citizenship). These rules have changed over time, and thus one's birth date is definitive of which rules apply. For example, in Canada, between January 1, 1947 and February 15, 1977, children born abroad to married parents inherited the citizenship of their fathers. If the parents were unmarried, the child received her citizenship from her mother. This logic repeats the certainty

[22] Tim Caulfield, *The Cure for Everything* (Toronto: Penguin Canada, 2013).
[23] *Family Law Act* SBC 2011, c 25, Part 3, s 30.
[24] In that case, the issue before the court was whether the non-biological mother, who was, in fact, a much more active and engaged parent than the biological father, could be recognized as a parent despite her lack of biological contribution to the child, and whether that recognition could happen without cancelling out the parentage of the biological dad, as would happen through an adoption proceeding.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

of maternity and the formality of marriage in bringing men into legal relationship with their children. Moreover, it ensured that the recreational activities of Canadian soldiers participating in foreign wars and peacekeeping missions did not create unwanted claims of citizenship by any resulting children.[25] These marital status provisions have now been abandoned in Canadian law, first in 2009, with the removal of wedlock conditions for people born between 1947 and 1977, and then in the spring of 2014, with the abandonment of marital status provisions for people born abroad prior to 1947—notably the "illegitimate" children of Canada's World War II veterans.[26]

Even before the advent of reproductive technologies, immigration and consular officials could be quite wary of the citizenship claims of born-abroad children. Court documents indicate that in determining the legitimacy of these citizenship claims, officials have demanded evidence ranging from affidavits from people who witnessed the birth of the child, to photographs of the pregnant mother and testimony from the parents about the time and circumstances of the conception.[27] Tellingly, however, demands for DNA proof of parentage are not regarded as mandatory in the first instance, as indeed, they have not been required in the domestic context.[28] As more Canadians seek out foreign reproductive services, however, immigration and consular officials have received guidance that genetic relationship should be the sole means for acquiring "derivative" citizenship for children born abroad with the assistance of reproductive technologies. Citizenship and Immigration Canada's Operational Bulletin 381 explicitly states:

> Children born through AHR [assisted human reproduction] and/or surrogacy arrangements undertaken by Canadian intentional parents who, following a DNA test, have been found to have no genetic link to the Canadian parents, are **not eligible** for citizenship by descent (emphasis in original).[29]

---

25 This rationale was articulated by the director of legal services to the secretary of state, as the government was considering amendments to the *Citizenship Act* in 1976. Cited in *Taylor v Canada (Citizenship and Immigration)* 2007, para 70.

26 See *Citizenship Act* RSC 1985, c C-29 s 3. Regarding the significance of extending citizenship to the "children" of veterans (now themselves senior citizens), Chris Alexander, Minister of Citizenship and Immigration, stated that the extension of Canadian citizenship to the pre-1947 category ensured that "we take the final steps to make sure that… the children of those who fought in World War II, those who were among the most committed to the defence and service of this country, enjoy all the benefits of Canadians, not just in the first generation but also in succeeding generations, as governed by the provisions of this law." Canada, *Debates* 27 Feb 2014, 41st Parliament, 2nd Session, http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=53&Parl=41&Ses=2&Language=E&Mode=1.

27 *MAO v Canada (Citizenship and Immigration)*, 2002 CanLII 47118 (IRB) – 2002-01-18. This was a case involving the determination of parentage for a naturalized Canadian father seeking to sponsor his son.

28 Birth certificates and other documentation are generally all that is required, unless there is some suspicion about the likely parentage of a child. See, for example, *Azziz v Canada (Citizenship and Immigration)* 2010 FC 663 (CanLII) in which the advanced age of the mother led consular officials to question the parentage of the child. In this case, the birth certificate and notice of birth signed by the midwife were not regarded as conclusive, and DNA evidence was requested.

29 Citizenship and Immigration Canada, "Operational Bulletin 381—Assessing Who is a Parent for Citizenship Purposes Where Assisted Human Reproduction (AHR) and/or Surrogacy Arrangements Are Involved," 8 March 2012, http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob381.asp.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

Intriguingly, this categorical statement is preceded by a description of the current status of Canadian parentage law, which notes that "the determination of whether a person is a 'parent' is not merely dependent on a genetic link between the biological parent and the child, but also based on evidence of intention to parent and demonstration of parentage as displayed by the existence of a legal parent/child relationship."[30] At least in the context of this operational bulletin, parentage is understood as "biology plus." This assertion is intriguing because of what it demonstrates about the effects of citizenship on parentage. First, "biology plus" is not, in fact, an accurate rendering of Canadian parentage laws and Vital Statistics recordings of parental relationships, which, as we have already seen, are considerably more circumspect about the necessity of a biological relationship. In fact, people can be deemed parents without a genetic link to a child (e.g., a married heterosexual couple who used donated gametes, with the wife as the gestational mother). Sometimes parentage is only about the "plus." Furthermore, as noted above, gestational mothers, regardless of whether they are biologically related to the child they bear, have first call on motherhood, even when they have initially expressed an intention NOT to parent, by participating in a pre-conception agreement to relinquish the child and their parental status. And of course, in the Canadian domestic context, children derive their citizenship from birth in the territory. In the absence of Canadian soil, and in the transnational operation of Canadian sovereignty, basic principles of domestic family law are disregarded, and it is the genetic relationship (or the visual appearance of genetic relationship) that matters. Again, even if the gestational mother is Canadian, if the child is born abroad and is *genetically* unrelated to his intentional parents, he is, at least according to the Operational Bulletin, unable to acquire Canadian citizenship from his mother. Ironically, in the quest for certain determinations of legitimate citizenship claims, committed parents are cast by the wayside, and it is only Canadian flag-waving sperm that is required to make members of the Canadian polity.[31]

This biological essentialism in the determination of parentage has recently been upheld in a Federal Court of Appeal ruling in *Canada (Citizenship and Immigration) v Kandola* (2014).[32] The case involves a child born in India to her gestational Indian mother and her Canadian father, whom the court refers to as her guardian. The father sought Canadian citizenship for his child, but his application was rejected on the grounds that he was not genetically related to his daughter. The ruling was then appealed to the Federal Court, where the father prevailed, and subsequently to the Federal Court of Appeal, where he lost. In fact, the child is not genetically related to either of her parents, but her mother gave birth to her and her parents are married. In Indian law then (as in the law of every Canadian

30 Ibid.

31 Canadian citizenship is only granted to children born abroad if the child's Canadian parent was born in Canada, acquired Canadian citizenship through naturalization, or was employed overseas as a member of Canada's armed services or an employee of a federal or provincial government. *Citizenship Act* RSC 1985 c C-29, ss 3.3, 3.5. Technically, this provision could be read as a residency requirement, except that there is no stipulation on how long a person has to remain in Canada.

32 *Canada (Citizenship and Immigration) v Kandola* 2014 FCA 85 (CanLII).

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

province and territory), the child was born in the context of a marriage, her gestational mother is regarded as her "natural" mother, and her father is the husband of her mother. The parents were forthright with Canadian officials about the circumstances of their child's birth, and the consular official followed the explicit instructions of the operational bulletin, finding that the child was not a Canadian because she was not genetically related to her Canadian parent.[33] The family received advice to consider adoption, an option that was not, in fact, open to them since the adults were already legally recognized as the child's parents in India. One cannot adopt one's own child. Alternatively, officials suggested applying for a temporary resident permit in order to gain access to Canada and then seek a permanent resident permit on humanitarian and compassionate grounds or a discretionary grant of citizenship.[34]

In Federal Court, Blanchard J. rejected the Ministry of Citizenship and Immigration's (CIC) narrow reading of the definitions of child and parent. Although he too repeated the fiction of biological relationship that attends *jus sanguinis* definitions of citizenship, and thus determined that the child could not make her claim on that basis, he felt that the child's right of citizenship was, in fact, conferred by the *Citizenship Act* because her birth was legitimated. In his reasons, Blanchard J. cited section 2 of the *Act,* which provides that, for its purposes, the definition of child "includes a child adopted or legitimized in accordance with the law of the place where the adoption or legitimating took place."[35] And further, section 3 (1)(b) of the *Citizenship Act* declares that a person is a citizen if the person was born outside of Canada after February 14, 1977 and at the time of his birth one of his parents was a citizen.[36] Justice Blanchard's reasoning thus returns us to the role of law rather than biology in defining parentage. Ironically, by drawing attention to the provisions surrounding legitimation in establishing definitions of parent and child—a concept that is regarded as archaic in Canada's domestic parentage law—the court was able to reinvigorate a social definition of familial relationships.

This judgment was subsequently appealed and overturned, in a split decision, at the Federal Court of Appeal. Concerning the issue of legitimation, Noël J.A., writing on behalf of his colleague Webb J.A., held that the term "legitimized" required a prior state of illegitimacy in order to acquire meaning. Because the child was born to married parents, this prior state did not exist.[37] Turning, then, to the definition of "child," the Court held that the French wording of the act should apply. The English word "parent," in Noël J.A.'s assessment, carried a latent ambiguity.[38] The French phrases "née d'un père" or "née d'une mere" were preferable, since in his view (and that of CIC), the words "née d'un père" could mean

33 *Kandola v Canada (Minister of Citizenship and Immigration)* 2013 FCJ No 374 (Quicklaw) at para 8.
34 Ibid.
35 Ibid. at para 32.
36 Ibid. at para 24.
37 *Canada (Citizenship and Immigration) v Kandola* 2014 FCA 85 (CanLII) at para 54. It seems unlikely that the judge considered the implications of this claim very carefully. In effect, if a child can become a Canadian citizen through legitimation, unmarried single-parent foreigners should be marrying Canadians as quickly as they can to ensure a fast track to citizenship.
38 Ibid. at para 22.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

only that the father contributed to the child's genes.[39] Of course, prior to the advent of genetic testing, when a birth in the context of marriage turned husbands into fathers, "née d'un père" would, indeed, have meant something other than genetic contribution, an argument that was elaborated by Mainville J.A. in dissent.[40]

The terrain got a bit rougher when considering the meaning of "née d'une mere" (although this was not an issue in the case, since the child's mother was not Canadian). Since both genetic and gestational mothers could claim to have begotten a child, the French text was less instructive. And worryingly, Noël J.A. noted in *obiter,* in a context of assisted reproduction, neither the genetic nor the gestational mother may confer derivative citizenship if, as the federal government insisted, a "parent" is restricted "to a person who has begotten (father) or borne (mother) a child and who is genetically related to the child."[41] While the parties did not raise a Charter issue in their arguments before the court, Noël J.A. noted that there may well be a section 15 (equality) argument here, in the unequal treatment of children of Canadian citizens, depending on the manner of their conception.[42] Presumably, there would also be a gender equality argument regarding the unequal capacity of men and women to convey citizenship to their children in the context of reproductive technologies and birth abroad. Indeed, the implication of the federal government's argument would seem to be that Canadian women who use certain forms of reproductive technologies and have, or hire a surrogate to have, a child abroad, may lack the ability to pass on their citizenship altogether.

While the federal government found a sympathetic ear in the Federal Court of Appeal for its arguments regarding the narrow genetic definition of fatherhood in the citizenship determination of children born abroad, they were rather less successful in their efforts to insist that the law required "biology plus." In Noël J.A.'s view, the Operational Bulletin had no legal foundation, leaving him to conclude that paragraph 3(1)(b) of the *Citizenship Act* only provided for the acquisition of derivative citizenship by a child with a genetic relationship to a Canadian.[43] Justice Noël regarded the automatic grant of derivative citizenship—of *jus sanguinis*—as exactly parallel to the operation of *jus soli*. Thus, a child born abroad with an X or Y chromosome from a Canadian is a Canadian, full stop, just as a child born on Canadian territory is a Canadian, full stop. His reasoning ran as follows:

---

39 Ibid. at para 59.

40 Mainville J.A. dismissed the relevance of the distinctions drawn between the French and English texts, regarding them as a function of administrative re-drafting rather than legislative amendment, and finding that such changes were not intended to change the law (ibid. at paras 89, 91). From there, he offered an analysis of the meaning of "parent" in the law, including an extensive analysis of the paternal presumption (indeed, it forms the primary focus of his dissent). Parliament, in his estimation, would have been well aware of the paternal presumption when it drafted the derivative citizenship provisions of the *Citizenship Act*. Since those provisions did not explicitly exclude non-genetic fathers as they did adoptive parents, the federal government's argument for a rigidly genetic definition of "parent" in the case at bar was, in his view, unpersuasive (at para 108).

41 Ibid. at 72.

42 Ibid. at 75. As well, a marital status argument could be advanced by same-sex couples with regard to the recognition of their parentage.

43 The derivative citizenship clause of the *Citizenship Act* reads: "Subject to this Act, a person is a citizen if the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen."

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

> A mother who comes to Canada with the strategic view of giving birth and conveying citizenship on her child achieves this goal the same way as a mother who gives birth in Canada in the normal course. Similarly, a Canadian parent who conceives a child with no intention to parent confers citizenship upon the child at birth in the same way as a parent who assumes his or her parental responsibilities. In short, paragraph 3(1)(*b*)… is totally divorced from family law considerations.[44]

This is an extraordinary claim. There is, after all, no gene for Canadianness. One is a Canadian by virtue of the criteria of birth articulated through the law. Paragraph 3(1)(b) describes the acquisition of derivative citizenship as a function of the citizenship of one's parent; and parentage, as this discussion has been at pains to point out, is fundamentally the purview of family law considerations.

In any event, as Noël J.A. noted, this rigid adherence to genetic relationship in the interpretation of the *Citizenship Act*'s definition of "parent"—to the "begetting"—in the context of men, means that "a Canadian donor conveys that right like any other Canadian procreator."[45] (This finding, one might note, is directly at odds with several provincial parentage statutes that state, explicitly, that a donor "cannot be declared a parent by virtue of the donation, even though there is a genetic link between the child and the donor."[46]) Thus, the Federal Court of Appeal offers the federal government a cautionary warning—Canadian sperm does wave a flag, and, in the citizenship context, genetics is proof enough to establish fatherhood and Canadian nationality. And while the federal government had an opportunity to address this issue in timely fashion, given that revisions to the *Citizenship Act* were before Parliament at the time of the judgment, they chose not to do so.[47]

What are the implications of insisting on genetic relationship as the basis of national belonging? In the first instance, it tells us that genetic relationship to a Canadian parent gives you Canadian blood. And the implication of shared blood is a nation of people who are "of the same stock"; people whose blood ties them together with the common fate of the political society. This language of blood invokes a racial logic at the heart of birthright citizenship.[48] It is a discourse of national purity, or at least coherency, that echoes other familiar and diabolical instances of insisting on blood as the basis of belonging. Of course, an insistence on genetic relationship to a Canadian as the basis of derivative citizenship does not create an ethnically or racially homogenous population (whatever that would be), but the insistence on genetic relationship as a claim to national membership does signal a certain cleaving to identity that can, at least according to Canadian officials, be known in the blood.

---

44 Ibid. at 66.

45 Ibid. at 76.

46 British Columbia, Minister of Justice, "Family Law Act Explained, Part 3—Parentage," http://www.ag.gov.bc.ca/legislation/shareddocs/family-law/part3.pdf.

47 The Federal Court of Appeal's decision was handed down on March 31, 2014. Second reading and the committee stage for consideration of Bill C-24—where such an amendment might have been introduced—occurred between May 29 and June 4, 2014. No amendments to the *Act* were adopted. See Canada, Standing Committee on Citizenship and Immigration, 41st Parliament, 2nd Session, "Report 3: Bill C-24, An Act to Amend the *Canadian Citizenship Act*," http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6634456&Language=E&Mode=1&Parl=41&Ses=2.

48 Stevens, *Reproducing the State*, 173–208.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

When citizenship and family law collide, the Federal Court of Appeal tells us, there is a simple, and highly illiberal, test for belonging. It's in your veins.

Consequences for Children

The contestation over how to define parentage in the context of derivative citizenship and reproductive technologies also raises the prospect of children being deemed *filius nullius* and/or stateless. In several well-documented cases involving a range of countries, children have been born to intentional parents but rendered, at least temporarily, stateless and potentially parentless, because the parents' country of citizenship refuses to acknowledge children born of surrogacy arrangements (Australia, France, Germany, Italy, the Netherlands, Norway, Sweden); the country of citizenship of the surrogate mother will not grant citizenship to a child born of a surrogacy arrangement unless the surrogate is willing to acknowledge the child (India, Ukraine); the country of birth does not grant jus soli citizenship; or due to some other conflation of parental citizenship and national conflicts around parentage laws.[49] Countries may be willing to issue special grants of citizenship to these children, but evidently, that prospect is dependent on the rationale advanced by a state for refusing derivative citizenship in the first place. In countries such as France and Germany, for instance, where surrogacy is outlawed, the refusal to grant citizenship to these children is motivated by a desire to convey moral opprobrium and dissuade prospective ART users from contracting surrogacy services abroad.[50] Yet as many commentators have observed, the consequences of such laws most keenly affect the children, and thus children are being punished for their parents' refusal to accept prohibitions on their reproductive choices.[51]

---

[49] See Seema Mohapatra, "Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy," *Berkeley Journal of International Law* 30, no. 2(2012): 412–50; Usha Rengachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India," *Cumberland Law Review* 39 (2008–2009): 15–26; Richard Storrow, "Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory," *Hastings Law Journal* 57 (2005–2006): 295–330. The Baby Manji case, involving a conflict of laws between India and Japan, is perhaps the most famous instance of this situation. In this case, a Japanese couple contracted an Indian surrogate to have a child, using the father's sperm and the ova of an anonymous donor. The intentional parents divorced before the birth of the child, and the Japanese prospective mother no longer wanted to parent the child, while her ex-husband did. Indian law does not permit unmarried fathers to adopt children, nor would it confer citizenship on the child, since the court could not determine who should be named the child's mother. Similarly, Japan refused to recognize the parentage of the child, since the birth mother was not Japanese. For a summary of the case see Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, Kenan Institute for Ethics at Duke University, https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf.

[50] Laura Bertilotti, "The Prohibition of Surrogate Motherhood in France," *New York University Journal of International Law and Politics Online Forum*, 31 January 2012, http://nyujilp.org/the-prohibition-of-surrogate-motherhood-in-france-2/.

[51] Ibid.; Titshaw, "Sorry Ma'am, Your Baby is an Alien," 52–53. In April 2011, France's Cour de Cassation confirmed an earlier decision, first rendered in 2008, annulling the birth certificates and thus denying French citizenship to two children who had been born in California under a surrogacy arrangement. While the children do have American citizenship, France does not recognize them as the legal children of their French parents, nor is their surrogate mother a parent. The parents subsequently appealed the decision to the European Court of Human Rights and received a positive outcome in June 2014. See "Judgments Mennesson v. France and Labassee v. France—Legal Recognition for Children Born Following Surrogacy Arrangements Abroad," http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4804617-5854908#{%22itemid%22:[%22003-4804617-5854908%22]}.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

Of course, there are compelling reasons for national governments to be concerned about the consequences of the growing international fertility market. Countries that are signatories to the UN *Convention on the Rights of the Child* have assumed international obligations to protect children from abduction, sale, or trafficking.[52] Given the demand for reproductive services and significant numbers of poor women in both developed and developing countries, it is not surprising that keen-eyed entrepreneurs would see a lucrative opportunity to establish "baby factories." For example, in one high-profile case recounted by Seema Mohapatra, two American attorneys, well respected for their work in reproductive law, established a fake, multinational surrogacy business. Exploiting the legal opportunities created by Ukraine and California law, the entrepreneurs recruited American and Canadian women and sent them to Ukraine, a country known for its high-quality reproductive health services and its lax regulations around proof of surrogacy arrangements, where they were impregnated with Ukrainian gametes.[53] The prospective babies, who were deemed especially desirable because they were "Caucasian," were advertised to potential adoptive parents as infants with high expenses due to surrogacy arrangements that had collapsed.[54] The babies were then born in California, a jurisdiction that allows intentional, biologically-unrelated parents to be registered immediately on the child's birth certificate without having to undertake a legal adoption proceeding.[55] As Mohapatra explains, the slipperiness in this arrangement around adoption and surrogacy was necessary in order for its masterminds to be able to charge for and profit handsomely from the arrangement. Under California law, it is legal to pay a surrogate as long as the agreement is established in advance of the pregnancy. If a pregnant woman decides to give a child up for adoption, it is illegal to pay her anything other than her medical expenses. This is because adopting a baby for a price after its conception is considered human trafficking.[56] By claiming that these children were the result of abandoned surrogacy contracts, the attorneys were able to charge surrogacy rates, despite the fact that the children emerged from a purely profit-driven, speculative baby-making venture.

As this elaborate example demonstrates, the ready availability of documentation certifying parentage for a genetically unrelated child conceived with the assistance of ARTs does raise concerns about the prospects for a flourishing traffic in children. Additionally, national governments are justifiably concerned that their citizens have access to high standards of medical care; that donors and surrogates have legal and employment protections or, at least, are aware of the risks they are assuming; and that any reproductive materials and procedures—and the children they might produce—are as safe and healthy as possible. Ensuring that there are clear international standards for establishing the legitimacy of any "parental project" and standards for medical care would seem to be a basic condition for the

52 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, vol. 157, at 3, Article 35.
53 Mohapatra, "Stateless Babies and Adoption Scams."
54 Ibid. at 416.
55 Ibid. at 417.
56 Ibid.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

regulation of an international fertility market. To confront this brave new world with unequivocal refusals of surrogacy arrangements and narrow-minded insistences on genetic relationship is a head-in-the-sand response of demonstrable and shameful inadequacy.

Birth, Citizenship, and the State

In the early decades of the twenty-first century, we find ourselves in a social context in which the married, heterosexual nuclear family is on the wane as a lived experience, even if its normative force remains fully operative. And we are ensconced in a genetic revolution that seriously challenges the presumptions and fictions that have underpinned the biological relatedness of families. Of course, even when the power to constitute families was limited to husbands and wives, biological relationship was neither assured nor required. But in the midst of conditions in which states must sort out parental presumptions for families headed by same-sex partners, determine whether the child of a sole parent/caregiver must have two parents on a birth certificate, and apportion legal status among intentional, genetic, and gestational parents, one might think we could finally crack open the biological fiction of familial relatedness and begin to articulate new ways of ordering our intimate lives based on care and interdependency rather than blood. Moreover, given all of the parentage and citizenship complications arising from transnational fertility markets, so-called birth tourism, and anchor/passport babies, one might think that the prospect of delinking birth and citizenship would begin to appear on political agendas in ways other than simply denying *jus soli* citizenship to the children of non-citizens. Yet the conflation of national political membership with birth is both so taken-for-granted and so hidden, or perhaps, so insurmountable, that the prospect of devising alternatives does not even merit a mention.

How can we account for this perplexing silence? Part of the answer seems to reside in the powerful grip that the liberal consent-based model of political authority continues to exercise on our contemporary imaginations. The story of liberal democracy is the story of the separation of the state from the family, of the separation of the political from the familial.[57] Families matter in this context because of the financial and genetic inheritance they might possibly convey, but they appear to be effects of the state rather than the basis of the state itself. The mythology of liberal democracies—that there is a private sphere where the family resides, a sphere that is separate from the consent-based, rationality-infused domain of political decision-making—is well ingrained, but as we can see even from the evidence provided in this paper, the relationship between families and the state is more complicated.

[57] See Wendy Brown, "Liberalism's Family Values," in *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995); Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); Mary Shanley, "Marriage Contract and Social Contract in Seventeenth Century English Political Thought," *Western Political Quarterly* 32, no. 1 (1979): 79–91; Jacqueline Stevens, *States Without Nations: Citizenship for Mortals* (New York: Columbia University Press, 2010).

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

While families may indeed be constituted by the state, the state is constituted by families. As Jacqueline Stevens observes, states need families, because the rules that delineate family are the rules that define political membership and provide citizens for the nation-state.[58]

In his recent work *All in the Family: On Community and Incommensurability,* Kennan Ferguson argues that the conceptions of sovereignty articulated in Western political theory, just as in contemporary electoral campaigns, rely on the organization of authority within the family as a fundamental metaphor for the operation of the state's authority. Even as liberal (and other) thinkers articulate a vision of the family as a deeply private, even pre-political arrangement, families nonetheless form a touchstone for the right ordering of political society. As Ferguson explains:

> [I]f God no longer forms the basis of political legitimacy, as in the divine right of Kings, then other legitimizations must take his place…. One pattern appears repeatedly, families are the site of natural, prepolitical authority, and the proper state is that which develops from and expands that source of power.[59]

Families (that is, patriarchal, heterosexual, monogamous families) offer a model for the operation of power and the naturalization of power differentials, but all in the service of care, concern, and a relatively shared project.[60] "Once a small-scale ideal commonality can be built (or at least bought into)," Ferguson argues, "the only obstacle to a perfectly functioning larger community is the question of scale."[61]

Ferguson's central observation is that the deployment of the familial metaphor as the basis for political authority presumes a) that families are harmonious places with a shared vision, and b) that a state, so ordered, similarly produces harmony. Ferguson wryly observes the oddity of this metaphorical association, since anyone who has actually lived in a family would be unlikely to name harmony as its prevailing characteristic.[62] In fact, it is the family's fractious inner workings that lie at the heart of Ferguson's analysis. For Ferguson, the question is what might happen to our conception of the state, or at least to our political theorizing about the state, if we took familial divisions, and modes of negotiating difference within the family, seriously. What if familial processes of mediating disputes, rather than a fantasy about the peace that results from acquiescence to the family patriarch, became the metaphor for state power?

Building from Ferguson's interest in the internal machinations of the family as a metaphor for the state, I want to suggest that we might draw a useful familial-state metaphor in the decreasing salience of biology for family formation. Obviously, states continue to trade on the legal fiction of the family's biological relatedness, but the reality is much less clear-cut. My question, or suggestion, then, is

58 Stevens, *Reproducing the State*.
59 Ferguson, *All in the Family* at 15.
60 Ibid. at 23.
61 Ibid.
62 Ibid. at 24.

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press

to shift our attention from the biological presumptions of the family's foundation—a presumption that is weirdly anachronistic in an era of non-normative families and reproductive technologies—to the bonds of love and care and a more-or-less shared project of mutual support that provide a baseline for familial association. What if that metaphor of family formation became operative for our thinking about the state? And what if absolutely none of that mattered in terms of one's capacity to be a member of a political society?

My aim in this paper has been to show how the interactions among the legal rules of parentage and citizenship track in and out of association with biological relatedness. Recent revisions to domestic family law statutes, guidance to consular officials, and court rulings evince a faith in biology, blood, and genetics as definitional criteria for parents and children, while they also define those relationships on the basis of committed relationships and intentionality. Legal definitions of the family can be used to include and exclude by naming the birth criteria required for citizenship; they can define relationships and sexual practices meriting legal status, articulate racist assumptions about "national character," and assert value judgments about the morality of surrogacy. But most importantly, by noticing how the law makes families, we can begin to conceive of relationships as conventional rather than natural, to disentangle blood and other bodily fluids from deep commitment, and to re-conceptualize obligations of care beyond the bounds of blood and nation. As the political origins of the family and the familial basis of the state grow increasingly apparent, these revelations might just offer up the prospect of non-birth-based forms of political membership.

Lois Harder
Department of Political Science
10-16 HM Tory Building
University of Alberta
Edmonton, AB T6G 2H4

https://doi.org/10.1017/cls.2014.24 Published online by Cambridge University Press