The Facts of Fatherhood

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This essay puts forward a labor theory of parenthood in which emotional work counts. I want to say at the onset, however, that it is not intended as a nuanced, balanced academic account of fatherhood or its vicissitudes. I write it in a grumpy, polemical mood.

In the first place I am annoyed that we lack a history of fatherhood, a silence which I regard as a sign of a more systemic pathology in our understanding of what being a man and being a father entail. There has unfortunately been no movement comparable to modern feminism to spur the study of men. Or conversely, history has been written almost exclusively as the history of men and therefore man-as-father has been subsumed under the history of a pervasive patriarchy—the history of inheritance and legitimate descent, the history of public authority and its transmission over generations. Fatherhood, insofar as it has been subsumed under the history of inheritance and legitimate descent, the history of public authority and its transmission over generations. Fatherhood, insofar as it has been subsumed under the history of a pervasive patriarchy—the history of inheritance and legitimate descent, the history of public authority and its transmission over generations. Fatherhood, insofar as it has been subsumed under the history of inheritance and legitimate descent, the history of public authority and its transmission over generations.

The rule of the patriarchy waned, but historians have not studied the cultural consequences for fathers of its recession. Instead, they have largely adopted the perspective of nineteenth-century ideologies: men belong to the public sphere of the marketplace and women to the private sphere of the family. A vast prescriptive literature explains how to be a good mother; essentially how to exercise proper moral influence and display appropriate affections in the home, duties that in earlier centuries would have fallen to the father.

The facts of fatherhood are different. The development of industrial production (incidentally, of the patriarchal kind) tended to weaken patriarchy by providing opportunities for economic and social independence for children and women. Thus, notice that patriarchy is a system of gender relations.

This view of feminism was offered by the nineteenth-century suffragists themselves: it can be found argued well in several general surveys of the women's rights movement, including Aileen Krady's Idees of the Woman Suffrage Movement (New York: Columbia University Press, 1965).
But there is little in the era of “separate spheres” on how to be the new public man in private. A rich and poignant source material on the affective relationship between fathers and children in the nineteenth century—Gladstone’s account of watching for days by the bedside of his dying daughter, for example—speaks to the power of emotional bonds, but historians have largely ignored it. They have instead taken some Victorians at their word and written the father out of the family except as a parody of the domestic autocrat or as the representative of all those forces that stood in the way of the equality of the sexes.

Second, I write in the wake of Baby M and am annoyed with the neoessentialism it has spawned. Baby M was the case of the decade in my circles, a “representative anecdote” for ancient but ageless questions in the late twentieth century. Like most people, I saw some right on both sides and had little sympathy for the marketplace in babies that brought them together. On the one hand Mary Beth Whitehead this...; on the other William Stern that... The baby broker who arranged the deal was manifestly an unsavory character, the twentieth-century avatar of the sweatshop owners who in ages past profited unconscionably from the flesh of women. It was difficult not to subscribe to the doctrine that the baby’s best interests must come first and it was by no means consistently clear where these lay. Each day brought new emotional tugs as the narrative unfolded on the front pages of every paper.

I was surprised that, for so many people, this transaction between a working-class woman and a professional man (a biochemist) became an epic prism through which the evils of capitalism and class society were refracted. It did not seem newsworthy to me that the poor sold their bodies or that the rich exploited their willingness to do so. What else would they sell? Malthus had pointed out almost two centuries ago that those who labored physically gave of their flesh and in the long run earned just enough to maintain and replenish it. So had Marx, who also identified women as the agents of social re-production.

Admittedly, the contract entered into by Whitehead and Stern was stripped of all shreds of decency and aesthetic mystification, flagrantly revealing the deal for what it was—not a womb rental but a baby sale. This is why the New Jersey Supreme Court ruled it unenforceable. Every account that one reads of the surrogate baby broker’s operations, with its well-dressed couples sitting in little cubicles interviewing long lines of well-dressed but hopeful, spiffed-up women seeking work as surrogates, conjures up distasteful reminders of depression labor exchanges, starlet casting couches, or academic hiring fairs. But there surely are no new horrors in this case. Basically the Baby M narratives are modern versions of the industrial novel and allied genres in which factory labor is portrayed as wage slavery; in which children’s tiny thin fingers are metamorphosed into the pin wire they hour after hour produce; in which paupers, whose labor is worthless on the open market, are depicted pounding bones into meal so that they might remain just this side of starvation.

In short, I remain cynical when some commentators discover Mary Beth Whitehead as the anticapitalist Everywoman. If “surrogate” mothers were as well organized as the doctors who perform the much more expensive in vitro fertilization or as unionized baseball players they would earn a decent wage—say $100,000 instead of the ludicrously low $10,000—and opposition to surrogacy as emblematic of the evils of a free market in labor might be considered muted. (Though of course then the story might shift to emphasize the power of money to dissolve the very fabric of social decency, another nineteenth-century trope.)

I am, however, primarily interested in this case as the occasion for a return to naturalism. Feminism has been the most powerful denaturalizing theoretical force in my intellectual firmament and, more generally, a major influence in the academic and cultural affairs that concern me. I regard it as both true and liberating that “the idea that men and women are two mutually exclusive categories must arise out of something other than a nonexistent ‘natural’ opposition,” and that “gender is a socially imposed division of the sexes.” A major strand of commentary on Baby M, however, rejects this tradition and instead insists that the category “mother” is natural, a given of the world outside culture. Phyllis Chesler, for example, in the major article of a special “Mothers” issue of Ms. (May 1988) argues that motherhood is a “fact,” an ontologically different category than “fatherhood,” which is an “idea.” Thus, “in order for the idea [my emphasis] of fatherhood to triumph over the fact of motherhood,” she says, “we had to see Bill as the ‘birth father’ and Mary Beth as the surrogate uterus.” (Actually Chesler misstates the claims. Mary Beth has been, rightly or wrongly, called the “surrogate mother,” not the...
“surrogate uterus.” But since the point of the article seems to be that mother and uterus are more or less the same thing, this may be an intentional prevarication.)

I resist this view for obvious emotional reasons: it assumes that being the “factual” parent entails a stronger connection to the child that being the “ideational” parent. (This assumption is widespread. During my daughter Hannah’s five-week stay in the preemie nursery, her caretakers, in the “social comments” column of her chart, routinely recorded my wife’s visits to her incubator as “mother in to bond,” whereas my appearances were usually noted with the affectively neutral “father visited.”) While I do not want to argue against the primacy of material connection directly, I do want to point out that it is not irrational to hold the opposite view and that, “in fact,” the incorporeal quality of fatherhood has been the foundation of patriarchy’s ideological edifice since the Greeks. In other words, simply stating that mothers have a greater material connection with the child is not to make an argument but to state a premise that historically has worked against Chesler’s would-be conclusion. The Western philosophical tradition has generally valued idea over matter; manual labor for millennia was the great horizontal social divide. In other words, precisely because the mother’s claim was “only” corporeal, because it was a matter of “fact,” it was valued less.

I will recount some of the history of this discourse, but I also want to argue against its basic operating assumption: the unproblematic nature of fact especially in relation to such deeply cultural designations as mother or father and to the rights, emotions, or duties that are associated with them. The “facts” of motherhood—and of fatherhood for that matter—are not “given” but come into being as science progresses and as the adversaries in political struggles select what they need from the vast, ever-growing storehouses of knowledge. The idea that a child is of one’s flesh and blood is very old, while its biological correlates and their cultural importance depend on the available supplies of fact and on their interpretation.

But the reason that the facts of motherhood and fatherhood are not “given” has less to do with what is known or not known than with the fundamental gap, recognized by David Hume, between facts and their meaning. Is does not imply ought, and more generally no fact or set of facts taken together entails or excludes a moral right or commitment. Laws, customs, and precepts, sentiments, emotion, and the power of the imagination make biological facts assume cultural significance. An Algonquin chief, confronted by a Jesuit in the seventeenth century with the standard European argument against women’s promiscuity (how else would you know that a child is yours?), replied that he found it puzzling that whites could apparently only love “their” children, that is, that only individual ownership entailed caring and affection.

Before proceeding I want to again warn my readers that some of my evidence and most of my passion arise from personal circumstance. I write as the father of a daughter to whom I am bound by the “facts” of a visceral love, not the molecular biology of reproduction. The fact of the matter is that from the instant the five-minute-old Hannah—a premature baby of 1,430 grams who was born by Caesarean section—grasped my finger (I know this was due to reflex and not affection) I felt immensely powerful, and before the event, inconceivably strong bonds with her. Perhaps if practitioners of the various subspecialties of endocrinology had been present they might have measured surges of neurotransmitters and other hormones as strong as those that accompany parturition. But then what difference would that make—with what is one to feel if not with the body?

I also write as the would-be father, some sixteen months before Hannah came along, of a boy weighing something less than 800 grams who was aborted late one night—an induced stillbirth really—after twenty-four weeks of gestation because of a burst amniotic sac and the ensuing infection. I can recapture my sadness at his demise vividly and still regard the whole episode as one of the gloomiest of my life. Gail, my wife, was ambivalent about having the child—she was, she says, unprepared at age 40 for becoming pregnant the very first month at risk—and regards the abortion as a painful but not especially fraught episode that cleared the emotional ground to allow her to welcome Hannah’s birth unequivocally.

Finally, I write as the male member of a family in which gender roles are topsy-turvy. Hannah early on announced that she would prefer being a daddy to being a mommy because mummies had to go to work—hers is a lawyer—while daddies only had to go to their study. (As she has grown older and observed my not silent suffering as I finished a book begun the year she was born, her views have been somewhat revised.) I am far guiltier of the stereotypical vices of motherhood—neurotic worry about Hannah’s physical and mental...
well-being, unfounded premonitions of danger, excessive emotional demands, and general nudginess—than is Gail. In short, my experiences—ignoring for the moment a vast ethnographic and somewhat smaller historical literature—make me suspect of the naturalness of “mother” or “father” in any culturally meaningful sense.

The association of fatherhood with ideas and motherhood with facts is ancient; only its moral valences have been recently reversed by some feminists. The Marquis de Sade suggests that the “idea” of fatherhood—the notion that a child is “born of the father’s blood” and only incidentally of a mother’s body—means that it “owes filial tenderness to him alone, an assertion not without its appealing qualities.” Sade is the most rabid of antimaternalists, and his argument is made to induce a girl to sexually defile and humiliate her mother; but his relative valuation of fact and idea is standard. The “idea” of fatherhood gave, and displayed, the power of patriarchy much of Western history since the Greeks.

Bolingbrooke in Richard II (1.3.69) addresses his father as

“Oh thou, the earthly author of my blood,
Whose youthful spirit, in me regenerate.”

He is author and authority because, like the poet who has in his mind the design for the verses that subsequently appear, he has the conceit for the child in him. The physical act of writing, or of producing the child, matters little. Conceiving a child in this model is a man’s sparking of an idea in the uterus, which contains, like a block of marble, a form waiting to be liberated. It is like writing on a piece of paper awaiting inscription. The “generation of things in Nature and the generation of things in Art take place in the same way,” argued the great seventeenth-century physician William Harvey, who discovered the circulation of the blood. “Now the brain is the instrument of conception of the one . . . and of the other the uterus or egg.” And being the instrument is less elevated than being the author: “He,” speaking of God, “was the author, thou the instrument,” says King Henry in offering pardon to Warwick (3 Henry VI, 4.6.18).

But the idea of “father” as bound to his child in the way a poet is to verse, that is, its genitor, is much older than Shakespeare. It is, argues Freud, one of the cornerstones of culture; believing in fathers, like believing in the Hebrew God, reflects the power of abstract thought and hence of civilization itself.

The “Moses religion’s” insistence that God cannot be seen—the graven image proscription—“means that a sensory perception was given second place to what may be called an abstract idea.” This God represents “a triumph of intellectuality over sensuality [Triumph der Geistigkeit über de Sinnslichkeit], or strictly speaking, an instinctual renunciation.” Freud briefs precisely the same case for fathers as for God in his analysis of Aeschylus’ Eumenides, which follows immediately his discussion of the Second Commandment. Orestes denies that he has killed his mother by denying that being born of her entails special bonds or obligation. Apollo makes the defense’s case: appearances notwithstanding, no man has a mother. “The mother is no parent of that which is called her child, but only nurse of the new-planted seed that grows.” She is but “a stranger.” The only true parent is “he who mounts.”

Here is the founding myth of the Father. “Paternity” [Vaterschaft], Freud concludes, “is a supposition,” and like belief in the Jewish God it is “based on an inference, a premise,” while “maternity” [Mutterchaft], like the old gods, is based on evidence of the senses alone. The invention of paternity, like that of a transcendent God, was thus also “a momentous step”; it likewise—Freud repeats the phrase but with a more decisive military emphasis—was “a conquest [einen Sieg] of intellectuality over sensuality.” It too represented a victory of the more elevated, the more refined, the more spiritual over the less refined, the sensory, the material. It too is a world-historical “Kulturfortschritt,” a great cultural stride forward.

Similarly, the great medieval encyclopedist Isidore of Seville could, without embarrassment, make three different claims about the nature of seed—that only men had sperma, that only women had sperma, and that both had sperma—which would be mutually contradictory if they were about the body but perfectly compatible if they were instead corporeal illustrations of cultural truths purer and more fundamental than biological “fact.” Isidore’s entire work is predicated on the belief that the origin of words informs one about the pristine, uncorrupted, essential nature of their referents, of a reality beyond the corrupt senses, beyond facts.

In the first case Isidore is explaining consanguinity and, as one would expect in a society in which inheritance and legitimacy pass through the father, he is at pains to emphasize the exclusive origins of the seed in the father’s blood, in the purest, frothiest, white part of that blood shaken from the body as the foam is beaten from the sea.
as it crashes on the rocks. For a child to have a father means that it is “from one blood,” the father’s; and conversely to be a father is to produce the substance, semen, through which blood is passed on to one’s successors. Generation seems to happen without woman at all and there is no hint that blood—“that by which man is animated, and is sustained, and lives,” as Isidore tells us elsewhere—could in any fashion be transmitted other than through the male. Now case two, illegitimate descent. This presents a quite different biology: the child under these circumstances is from the body of the mother alone; it is “spurious,” he explains, because “the ancients called the female genitalia the spuriun.” So, while the legitimate child is from the froth of the father, the illegitimate child seems to come solely from factual flesh, from the seed of the mother’s genitals, as if the father did not exist. And finally, when Isidore is explaining why children resemble their progenitors and is not interested in motherhood or fatherhood he remarks pragmatically that “newborns resemble fathers, if the semen of the father is potent, and resemble mothers if the mothers’ semen is potent.” Both parents, in this account, have seeds, which engage in repeated combat for domination every time, and in each generation, a child is conceived.

These three distinct and mutually exclusive arguments are a dramatic illustration that much of the debate about the nature of the seed and of the bodies that produce it was in fact not about bodies at all but rather about power, legitimacy, and the politics of fatherhood. They are in principle not resolvable by recourse to the senses. One might of course argue that “just so” stories like Isidore’s or Aeschylus’s are simply no longer tenable given what has been known since the nineteenth century about conception. Modern biology makes utterly cultural claims unlikely to be acceptable, and we may persist in reading their cultural claims as based in a false biology. But the “fact” of women bearing children has never been in dispute and has nonetheless counted for relatively little historically in establishing their claims to recognition or authority over children or property.

As I suggested earlier, are but shifting sands for the construction of motherhood or fatherhood. They come and go and are ludicrously open to interpretation. Regnier de Graaf’s discovery of the ovum in 1672 seemed to relegate the male/father to an unaccustomed and distinctly secondary role in reproduction. (Actually de Graaf discovered the follicle that bears his name but which he and others mistakenly took to be the egg. Karl Ernst von Baer in 1827 was the first to observe a mammalian egg, and an unfertilized human egg was not seen until 1930.) The female after de Graaf could be imagined to provide the matter for the fetus in a preformed if not immediately recognized form, while the male “only serv’d to Actuate it.” This, one contemporary observed, “derogates much from the dignity of the Male-Sex,” which he thought was restored when “Mons. Leeuwenhoek by the Help of his Exquisite Microscope . . . detected Innumerable small Animals in the Masculine sperm, and by his Noble Discovery, at once removed that Difficulty.”

I hope by this egregious example to suggest that the form of the argument, and not just its factual premises, are flawed; both conclusions are silly. And the discovery, still accepted, that neither egg nor sperm contains a preformed human but that the fetus develops epigenetically according to plans acquired from both parents does not settle the question of the comparative claims of mother or father, just as the mistaken notions of the past did not entail judgments of their comparative dignities.

Interpretations, not facts, are at issue. The archbishop of Hartford announced in the New York Times on 26 August 1988 that he had quit the Democratic party because it supported abortion: “it is officially in favor of executing unborn babies whose only crime is that they temporarily occupy their mother’s womb.” No one would dispute that the “thing” in the mother’s womb is, under some construction, an unborn baby. “Baby” is a common term for fetus as well as for a very young child, and the phrase “the baby is kicking again” to refer to an intrauterine action is generally acceptable; baby-as-fetus is indisputably only a temporary occupant. The archbishop’s interpretation is objectionable because he elides the difference between “baby-in-the womb” and “baby-in-the-world,” between the womb and any other space an infant might occupy, and therefore between abortion and execution. At issue here is meaning, not nature.

David Hume makes manifest the chasm between the two. A beautiful fish, a wild animal, a spectacular landscape, or indeed “anything that neither belongs, nor is related to us,” he says, inspires in us no
pride or vanity or sense of obligation. We might with perfect reason fear a minor injury to ourselves and care almost nothing about the deaths of millions of distant strangers. The fault is not with the objects themselves but with their relationship to us. They are too detached and distant to arouse passion. Only, Hume argues, when these “external objects acquire any particular relation to ourselves, and are associated or connected with us,” do they engage the emotions.\(^1\) Owning the “external object” seems for Hume to be the most obvious way for this to happen, although ownership itself is, of course, an immensely elastic notion. A biological parent, uncle, clan, “family” can “own” a child in such a fashion as to love and cherish it. But more generally Hume is suggesting that moral concern and action are engendered not by the logic of the relationship between human beings but by the degree to which the emotional and imaginative connections that entail love or obligation have been forged.

The “fact” of motherhood is precisely the psychic labor that goes into making these connections, into appropriating the fetus and then child into a mother’s moral and emotional economy. The “fact” of fatherhood is of a like order. If a labor theory of value gives parents rights to a child, that labor is of the heart, not the hand. (The heart, of course, does its work through the hand; we feel through the body, but I will let the point stand in its polemical nakedness.)

While I was working as a volunteer in an old people’s home I was attracted to, and ultimately became rather good friends with, a gay woman who was its director of activities. At lunch one day—she had alerted me that she wanted to discuss “something” and not just, as we usually did, schmooz—she asked whether I would consider donating sperm should she and her longtime lover decide, as they were on the verge of doing, to have a child. I was for her a generally appropriate donor—Jewish, fit, with no history of genetic disorders in my family. She was asking me also, she said, because she liked me. It was the first, and remains the only, time I had been asked by anyone, much less someone I liked, so I was flattered and pleased.

I was also hesitant. My wife the lawyer raised serious legal difficulties with donating “owned” sperm, that is, sperm that is not given or sold for anonymous distribution. I would remain legally liable for child support for at least twenty-one years, not to speak of being generally entangled with the lives of a couple I liked but did not know well. (Anonymous sperm is alienated from its producer and loses its connection with him as if it were the jetsam and flotsam of the sea or an artisan’s product in the marketplace. Semen, in other words, counts as one of these products of the body that can be alienated, like plasma and blood cells, and not like kidneys or eyes, whose marketing is forbidden.)

Legal issues however, did not weigh heavily with me. The attractive part of the proposition—that I was being asked because of who I was and therefore that I was to be a father and not just a donor—also weighed mightily against it. A thought experiment with unpleasant results presented itself. I immediately imagined this would-be child as a version of Hannah, imagined that I could see her only occasionally and for short periods of time, imagined that her parents would take her back to their native Israel and that I would never see her again. Potential conflicts with my friend about this baby were almost palatable on the beautiful sunny afternoon of our lunch. In short, I was much too caught up with this imaginary child to ever give up the sperm to produce her.

I recognize now, and did at the time, that my response was excessive. My reveries of fatherhood sprang from a fetishistic attachment to one among millions of rapidly replenished microscopic organisms—men make on the order of 400 billion sperm in a lifetime—swimming in an abundant, nondescript saline fluid. All that I was really being asked to do was to “produce” some semen—a not unpleasant process—and to give it to my friend so that a very, very tiny sperm—actually only its 4 to 5 micrometers long and 2.5 to 3.5 micrometers wide (c. 1/10,000 to 1/20,000 of an inch) head—might contribute the strands of DNA waiting about in it to her egg. Since we humans apparently share 95 percent of our genetic material with chimpanzees, the sperm in question must share a still higher percentage of base pairs with those of my fellow humans. In short, my unique contribution to the proposed engagement, that which I did not share with billions of other men and monkeys, was infinitesimally small. I was making a mountain out of much, much, much less than a molehill and not very much more than a molecule.

But this is as it should be. For much of history the problem has been to make men take responsibility for their children. Prince and pauper as circumstances required could easily deny the paternity that nature did so little to make evident. The double standard of sexual morality served to insure that however widely they sowed their wild
oats the fruits of their wives' wombs would be unambiguously theirs. In fact, until very recently paternity was impossible to prove and much effort went into developing histo-immunological assays that could establish the biological link between a specific man and child. The state, of course, has an interest in making some male, generally the "biological father," responsible for supporting "his" children. In short, a great deal of cultural work has gone into giving meaning to a small bit of matter. Ironically, now that tests make it possible to identify the father with about 100 percent accuracy, women—those who want children without a father—have considerable difficulty obtaining sperm free of filiation. History, social policy, imagination, and culture continue to encumber this cell with its haploid of chromosomes.

In 1978 Mary K., a gay woman living in Sonoma County, California, decided that she wanted to have a child, which she would "co-parent" with a close gay woman friend living nearby. Mary wanted to find a sperm donor herself rather than use anonymous sperm for several reasons, which she later more or less clearly articulated. She did not want to make the repeated trips to Berkeley, the location of the nearest sperm bank; she did not want to use a physician in her community who might be able to acquire sperm anonymously because she felt that as a nurse she could not be assured of confidentiality; and—this would come to haunt her—she wanted some vestige of an individual human being to be associated with the sperm and with the hoped-for baby. She wanted a "father" of some ill-defined sort, and after a month or so of looking around and after interviewing three potential donors, she was introduced one January evening to a young gay man, Jhordan C., who seemed to fit her needs. He did not want to make the repeated trips to Berkeley, the location of the nearest sperm bank; she did not want to use a physician in her community who might be able to acquire sperm anonymously because she felt that as a nurse she could not be assured of confidentiality; and—this would come to haunt her—she wanted some vestige of an individual human being to be associated with the sperm and with the hoped-for baby. She wanted a "father" of some ill-defined sort, and after a month or so of looking around and after interviewing three potential donors, she was introduced one January evening to a young gay man, Jhordan C., who seemed to fit her needs. He would become the "father" of her child, even though he did not have the red hair that she had originally sought in a donor.

Neither Jhordan nor Mary thought very rigorously about what they expected from their relationship or just what their paternal rights and obligations would be. Neither sought legal counsel; they signed no contract or other written understanding and resolved only the most basic practical details of the matter: Jhordan, upon being notified that Mary was ovulating, would journey to her house, and "produce" sperm, which she would introduce into herself. It took six months before Mary conceived and each of his visits was apparently attended by commonplace social intercourse—some chitchat, tea, and other pleasantries.

After Mary conceived, she and Jhordan saw each other occasionally. She accepted his invitation to a small New Year's party at the home of one of his close friends. She testifies that he "reiterated" to her that "he wanted to be known as the father—and I told him I would let the child know who the biological father was—and that he wanted to travel with the child when the child was older.” In all other respects she believed that they had an implicit understanding that she would be the child’s guardian and primary parent; that Victoria T., Mary’s friend, would be coparent; and that Jhordan would play effectively no role in the life of her child.

On the basis of Jhordan’s own testimony, he did not know precisely what he meant by wanting “to be known as the father.” The court-appointed psychologist described him as a young man of unsettled plans and interests. But Jhordan knew that he wanted somehow to be acknowledged. He was upset when Mary informed him, some months before the birth, that his name would not be on the birth certificate, and he became increasingly uneasy as he came to realize that he was being increasingly written out of the family drama that he had helped launch.

Mary admits that she too had been vague about what Jhordan’s being her child’s father meant to her and that he did have some grounds for his expectation that he would play some sort of paternal role. Language failed her when she tried to describe it:

I had thought about and I was considering whether or not I would tell Sean [not his real name] who the father was, but I didn’t know if I would tell him as a father. Like he would know that Jhordan helped donate the sperm, but I did not know if he would ever know Jhordan—How do I say this? I didn’t plan on Sean relating as a father. No.

The confusion of names and collapse of grammar here suggests precisely the underlying ambiguities of this case.

When Sean was born Mary felt increasingly threatened by Jhordan’s insistence on seeing him, on displaying him to his family, on taking pictures to show friends and relatives, and in general on acting like a parent, a role that Mary had thought was reserved for herself and Victoria. Jhordan, on the other hand, told the psychologist who interviewed him to determine his fitness as a parent that when "he looked into Sean’s eyes, he ‘saw his whole family there.’” Whatever
uncertainties he might have felt before vanished in the face of his imagined flesh and blood.

Mary finally refused to allow Jhordan to see the baby at all, and he eventually gave up trying. There matters might have rested had not, a year later, Mary applied for welfare. The state sued Jhordan for child support (it was after all his sperm) and he, of course, eagerly agreed to pay. Two years and two lawyers later he won visiting rights with Sean at the home of Mary's friend and coparent, Victoria. These privileges were subsequently expanded. From here on the story is like that of countless divorced couples: quarrels about visitation hours and pickup times, about where Sean would spend holidays and birthdays, about whether Jhordan allowed him to eat too much sugar, and about other of the many controversial niceties of child raising that divide parents in even the tightest of families. A court promulgated guidelines and issued orders; an uneasy peace settled over all the parties.

The trial judge in this case was a rather old-fashioned sort who did not seem terribly interested in the subtleties of law regarding the rights of sperm donors but believed that “blood is thicker than water” and that Sean both needed, and had “a right to,” a father. Jhordan was the father and therefore ought, in the judge’s view, to be given commensurate visitation rights.

Mary appealed. The central question before the high court was how to interpret sections 7005(a) and (b) of the California Civil Code. These provide that if, under the supervision of a doctor, a married woman is inseminated by semen from a man who is not her husband, that man under certain circumstances is treated as if he were not the natural father while the husband is treated as if he were. Mary’s lawyers argued that while their client’s case did not quite fit under this statute, it was close enough, and that the only possible distinction was one of sexual orientation, which ought not to matter. Other California statutes provide that the law must not discriminate against unconventional parenting arrangements in adoption and other reproductive rights issues. If Mary had been married to someone and had acquired Jhordan’s sperm in precisely the same circumstances—admittedly not meeting all the conditions of the statute—it would be ludicrous to suppose that the state would give him rights that infringed upon those of a husband. (A German court has held that a man has no claims on a child of a married woman even if he is acknowledged to be the “biological father.” Today, as has been generally true for centuries, children born in wedlock are presumed to belong to the husband of the woman who bore them.)

Moreover, Mary’s lawyers argued, section 7005(a)’s reference to semen given “to a licensed physician” was not intended to limit the law’s application only to such cases but reflected simply a legislative directive to ensure proper health standards by recourse to a physician. Mary, because of her training as a nurse, was able to comply with this standard on her own. Her lawyers also cited another court case, which held—admittedly in different circumstances—that

A child conceived through heterologous artificial insemination [i.e., with semen from a man other than the woman’s husband] does not have a “natural father.” . . . The anonymous donor of sperm can not be considered the “natural father,” as he is no more responsible for the use made of his sperm than is a donor of blood or a kidney.

Echoes of Isidore of Seville. Jhordan might not have been anonymous but he was certainly a stranger to Mary.

His lawyers naturally argued for a stricter construal of section 7005 (a–b), and the appeals court sided with them. By not employing a physician, the court agreed, Mary had excluded herself from the law’s protection. Moreover, the court viewed the case before it as being more like those in which artificial insemination occurred within the context of an established relationship and in which the sperm donor retained paternal rights than it was like cases of anonymous donation. Jhordan’s lawyer cited a New Jersey Supreme Court case, for example, in which a man and a woman were dating and intended to marry. She wanted to bear his child but did not want to have premarital intercourse, so they resorted to artificial insemination. Three months into the pregnancy they broke up and she declared that she wanted nothing more to do with him and that she certainly would not allow him to visit their child. He sued for paternity and won.

Mary and Jhordan were obviously not as intimately involved as this couple, but, the court felt, neither were they the anonymous strangers envisaged by statute. Enough humanity remained in Jhordan’s transaction with Mary to allow him to believe that his sperm, however introduced into Mary’s body, retained some of him.
As this case and others like it suggest, the legal status of a sperm donor remains deeply problematic, and, advises a National Lawyers Guild Handbook, those “consulted by a lesbian considering artificial insemination must be extremely careful to explain the ramifications of the various choices available to their clients.” Usually a medically supervised sperm bank where the identity of the donor is unknown of the recipient is the most certain way to guarantee that the donor will not at some time in the future be construed as the father. Other possibilities include having a friend secure semen but keeping the source secret; using semen from multiple donors (not recommended because of possible immune reactions); using a known donor but having a physician as intermediary. Some lawyers recommend having the recipient pay the donor for his sperm and describing the transaction in an ordinary commercial contract of the sort with which the courts are familiar. And even if agreements between sperm donors and recipients are not predictably enforceable, lawyers suggest that the parties set down their understanding of their relationship as clearly as possible.

Any or all of these strategies might have stripped Jhordan’s sperm of paternity, not just in the eyes of the law but more importantly in his heart, and might thus have saved Mary and her coparent their struggles with the parental claims of a near stranger. Mary was wrong to eschew a doctor’s mediation or at least underestimated the hold that a very small bit of matter can, in the right circumstances, have on a man’s imagination.

In designating a physician as middleman the legislature did not blindly medicalize an essentially social transaction but sought rather to appropriate one of modern medicine’s least attractive features—its lack of humanity—for a socially useful end. Everyone knows, even politicians, that artificial insemination does not require a physician. Depaternalizing sperm might. A strange doctor in a lab coat working amidst white Formica furniture, high-tech instruments, officious nurses, and harried receptionists in a boxy office in a nondescript glass and steel building set in a parking lot may offer cold comfort to the sick and needy; he or she might, however, be perfect at taking the sparkle off sperm.

Had Jhordan donated sperm not at Mary’s house, where he was offered tea and conversation, but at a clinic; had he never spoken to her after the inseminations began but only to the doctor’s nurse, who would have whisked away the vial of fresh semen; had he never seen Mary pregnant or celebrated New Year’s Eve with her, the fetish of the sperm might have been broken. The doctor as broker would have performed his or her priestly function, deblessed the sperm, and gotten rid of its “paternity.” (This I imagine as the inversion of normal priestly work, providing extra emotional glue between the participants in weddings, funerals, and the like.) Similarly, selling sperm at a price fixed by contract—the lawyer or sperm bank owner as deblessing agent—would take off some of its paternal blush. Without such rites, a father’s material claim in his child is small, but his imaginative claims can be as endless as a mother’s. Great care must be taken to protect and not to squash them.

Because fatherhood is an “idea,” it is not limited to men. In a recent case litigated in Alameda County, California (Lofton v. Flouroy), a woman was, rightly in my view, declared to be a child’s father, if not its male parent. Ms. Lofton and Ms. Flouroy lived together and decided to have a child. Lofton’s brother, Larry, donated the required sperm but expressed no interest in having any further role in the matter. Ms. Lofton introduced her brother’s semen into Flouroy with a turkey baster, Flouroy became pregnant, and in due course a baby was born. The “birth mother” was listed on its birth certificate as “mother,” and L. Lofton—Linda, not Larry, but who was to know?—was listed as “father.”

Everything went well and the women treated the child as theirs, until, two years later, they split up. The mother kept the child, and there matters might have rested had not, as in the case of Mary and Jhordan, the state intervened. Flouroy applied for welfare benefits, that is, aid to dependent children, and when asked by the Family Support Bureau to identify the father she produced, in a moment of unabashed concreteness, the turkey baster. The bureau, not amused, did what it was meant to do and went after the “father” on the birth certificate—Linda, it was surprised to learn, not Larry. Like Jhordan she welcomed the opportunity to claim paternity, did not dispute the claim, and eagerly paid the judgment entered against her: child support, current and retroactive. She also demanded paternal visitation rights, which Ms. Flouroy resisted. Lofton then asked the court to compel mediation. It held that she was indeed a “psychological parent” and thus had standing to have her rights meditated. The other L. Lofton, Larry, makes no appearance in this drama.
Linda's claim is manifestly not biological or even material. That she borrowed her brother's sperm or owned the turkey baster is irrelevant. What matters is that, in the emotional economy of her relationship with her lover and their child, she was the father, whatever that means, and enjoyed the rights and bore the obligations of that status. She invested the required emotional and imaginative capital in the impregnation, gestation, and subsequent life to make the child hers.

I hasten to add that I do not regard biology in all circumstances as counting for nothing. Women have claims with respect to the baby within them simply by virtue of spatial relations and rights to bodily integrity. These are not the right to be or not to be a mother as against the right to be or not to be a father, nor the claims of a person as against those of a nonperson—the terms in which the abortion debate is usually put—but the right shared by all mentally competent adults to control and monitor corporeal boundaries, to maintain a body as theirs. Thus I would regard a court compelling a woman to bear a child against her will as a form of involuntary servitude however much its would-be father might wish for the child. And I would regard an enforced abortion as an even more egregious assault on her body. But this is not to acknowledge the “fact” of motherhood as much as the “fact” of flesh. History bears witness to the evils that ensue when the state abrogates a person’s rights in her body.

The flesh does not make a mother’s body an ahistorical font of motherhood and maternity. Anne Taylor Fleming, a writer who wants, but cannot herself have, a child and who finds surrogate motherhood morally unacceptable, “can not imagine” that “there are plenty of women now, the huge majority of surrogates who have, to hear them tell it, not suffered such a loss” as Mary Beth Whitehead’s. While her empathic instincts extend easily to Whitehead, she cannot, despite testimony to the contrary, conceive of a mother not feeling an instant and apparently unmediated bond to her child. Fleming cannot accept that feelings do not follow from flesh, so that “surrogate mothers” who feel otherwise than they supposedly should must suffer, like un-class-conscious workers, from false consciousness.

Ms.'s special “Mothers” issue, quite apart from Chesler’s article, is striking by its very cover—an airbrushed, soft-toned picture of a 1950s young Ivory Soap woman, with straight blond hair of the sort that waves in shampoo commercials, holding a blue-eyed baby to her bare bosom and looking dreamily out of the frame of the picture—which would have been denounced by feminists as perpetuating an unacceptable stereotype of women had it appeared in Family Circle a decade ago. In 1988 it unashamedly represents the Mother in America’s largest-selling feminist magazine.

What exactly are the facts of motherhood, and what of significance ought to follow from them? For advocates of Mrs. Whitehead’s, like Phyllis Chesler, her egg and its genetic contents are not especially relevant. She shares with Bill, a.k.a. Dr. Stern, the provision of chromosomes. The critical fact is therefore her nine months of incubation, which would remain a fact even if the fertilized egg she was bringing to term were not hers. Her claim, it appears, rests on labor, on her physical intimacy with the child within her, and would be just as strong if a second woman sought a stake in the child on the basis of her contribution of half its chromosomes.

I am immensely sympathetic to this view, but not because of a fact of nature. Capitalist societies, as I suggested earlier, are not usually friendly to the notion that putting labor into a product entitles one to ownership or even to much credit. It is the rare company that gives its workers shares of stock. We associate a new production of The Magic Flute with David Hockney and not with those who sawed, hammered, and painted the sets; everyone knows that Walt Disney produced Bambi, but only the cognoscenti could name even one of the artists who actually made the pictures. Having the idea or the plan is what counts, which is why Judge Sokoloff told Dr. Stern that in getting Melissa he was only getting what was already his. (The judge should, of course, have said, “half his.”)

I became so exercised by Baby M because Dr. Stern’s claims have been reduced in some circles to his ownership of his sperm, which, as I said earlier, amounts to owning very little. This puts him—all fathers—at a distinct material disadvantage to Mrs. Whitehead—all women—who contribute so much more matter. But, this essay has suggested, his claims, like hers, arise from the intense and profound bonding with a child, unborn and born, that its biological kinship might spark in the moral and affective imagination, but that it does not entail.

The problem, of course, is that emotional capital does not accumulate steadily, visibly, and predictably as in a psychic payroll deduction
plan. That is why, for example, it is unreasonable to demand of a woman specific performance on a surrogate mothering contract as if the baby were a piece of land or a work of art whose attributes would be well known to their vendor. A “surrogate mother,” like a mother who offers to give up her baby for adoption to a stranger, must be allowed a reasonable time to change her mind and, if she does, in the case of a surrogacy arrangement, be prepared to argue for her rights against those of the father.

Each parent would bring to such a battle claims to have made another person emotionally part of themselves. “Facts” like bearing the child would obviously be significant evidence but would not be unimpeachable, would not be nature speaking unproblematically to culture. While we can continue to look forward to continuing conflict over the competing claims of parents, I suggest that we abandon the notion that biology—facts—will somehow provide the resolution. Neither, of course, will ideas alone in a world in which persons exist corporeally. The way out of the facts/idea dichotomy is to recognize its irrelevance in these matters. The “facts” of such socially powerful and significant categories as mother and father come into being only as culture imbues things, actions, and flesh with meaning. This is the process that demands our continued attention.

Notes

1. For an account of these industrial narratives see Catherine Gallagher, The Industrial Reformation of English Fiction, 1832–1867 (Chicago: University of Chicago Press, 1985).


