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GENES, GESTATION, AND SOCIAL NORMS

(Accepted 8 June 2011)

ABSTRACT. The case law surrounding surrogacy, in vitro fertilization, genetic donation, and legal parenthood is notoriously confused. Yet the issues involved in these cases are of fundamental importance to our most basic rights. To make matters worse, ongoing developments in technology continue to push the conceptual limits of both our legal and moral schemes. In this paper I argue that the concept of ‘parenthood’ is deeply ambiguous and attempt to carefully untangle the notion into two distinct concepts – one biological and largely descriptive, and the other social and profoundly normative. I argue that the social notion of parenthood is a complex function of intentions, actions, and emotional states. It is a concept both defined and constrained by social norms. The biological notion of parenthood, for its part, cannot be understood in strictly genetic terms. I offer, instead, a more fleshed out view that treats biological parenthood as a family resemblance concept. Finally, I discuss the role of gestation in the context of a powerful feminist critique and argue that although gestation is a biological phenomenon, it is a mistake to think that its relevance is limited to biology. In fact, what is special about gestation, in the context of parenthood and obligation, is its distinctly social role. By shifting the discussion of gestation away from biology and toward the realm of the social, we can make better sense of the disputes that manifest themselves in the literature and in the law.

I. INTRODUCTION

Courts are tasked with safeguarding the fundamental liberty interests related to family and procreation. To the extent it is unclear who is and who is not a parent, it is unclear whose liberty interests and rights deserve protection in any particular case. The problem is

* I would like to thank Michael Dorf for constructive comments on an earlier version of this paper, and Andrew Adams for helpful discussion. Special thanks to an anonymous reviewer for many insightful comments and suggestions.

compounded – often in dramatic ways – by new developments in technology and the constant evolution of social norms.

In what follows, I argue that the concept of ‘parenthood’ is deeply ambiguous. I attempt to carefully untangle the notion in order to get a clearer view of what is at stake in discussions of surrogacy, cloning, adoption, in vitro fertilization, and a host of other issues connected to procreative rights. In part II, I set the stage for discussion by defining some key terms, disambiguating ‘parenthood’ into two distinct concepts, and outlining an example that I will return to throughout the paper. In part III, I discuss a conception of parenthood which is purely social in nature. I argue that this social notion of parenthood is a complex function of intentions, actions, and emotional states. In part IV, I turn to a biological conception of parenthood. After attempting to explicate it in strictly genetic terms, I argue that such an approach is too reductive and offer, instead, a more fleshed out view that treats biological parenthood as a family resemblance concept. Finally, in part V, I discuss the role of gestation and argue that although it is a biological phenomenon, it is a mistake to think that its relevance is limited to biology. In fact, what is special about gestation, in the context of parenthood and obligation, is its distinctly social role. By shifting the discussion of gestation away from biology and toward the realm of the social, we can make better sense of the disputes that manifest themselves in the literature and in the law.

II. THE BASIC DISTINCTION

Broadly speaking, there are at least two distinct notions captured by the term ‘parenthood’. Call them ‘social parenthood’ and ‘biological parenthood’.

The difference between these two notions depends on whether we think of ‘parenthood’ as a functional concept, like gardener or mentor, or as a concept that picks out some natural property, like having green eyes or being 6 feet tall. On the one hand we have the idea that a child’s parents are those individuals who play a particular role in her life. They love her, care for her basic needs, and have various responsibilities related to her welfare. The nature and extent of these responsibilities, it should be said, are not uniform, but typically vary across cultures. But, whatever the culture, the overarching idea is of