



Sexualidad, Salud y Sociedad (Rio de Janeiro)

ISSN: 1984-6487

Centro Latino-Americano em Sexualidade e Direitos Humanos (CLAM/IMS/UERJ)

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Sexualidad, Salud y Sociedad (Rio de Janeiro), no. 32, 2019, May-August, pp. 4-19

Centro Latino-Americano em Sexualidade e Direitos Humanos (CLAM/IMS/UERJ)

DOI: 10.1590/1984-6487.sess.2019.32.02.a

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DNA and the displacement of certainties in brazilian family law

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Abstract: Inquiring into the impact of DNA technology on Brazilian family law,¹ through the consultation of legislation, jurisprudence and specific legal briefs concerning paternity disputes, we map out trends over the past thirty years. We show how, after a moment of original skepticism, genetic evidence appears to dominate the legal scene, rendering personal testimony irrelevant. However, with growing concern about men who use a negative test result to disclaim their paternal status, this testimony is once again needed to clarify whether or not the man originally believed the child was his blood-related offspring. Finally, we look at a recent period, showing how reactions against the “real biological truth” have spawned a new juridical category—*socio-affective paternity*—that, spreading well beyond paternity tests, is altering some basic tenets of family law.

Key-words: Paternity investigations; Socio-affective paternity; DNA; Family law

DNA e o deslocamento de certezas no direito de família brasileiro

Resumo: Enfocando o impacto da tecnologia do DNA no direito de família brasileiro, pela análise de leis, jurisprudência e processos particulares lidando com disputas de paternidade, mapeamos tendências de mudança ao longo dos últimos trinta anos. Mostramos como, após um momento de ceticismo inicial, a evidência genética parece dominar o cenário legal, tornando os depoimentos pessoais irrelevantes. Entretanto, com a atenção crescente dirigida para homens que usam um resultado negativo para refutar seu status paterno, a importância de depoimentos volta para esclarecer se o pai registral originalmente acreditava ou não que tinha um vínculo consanguíneo com seu filho. Finalmente, olhamos para um período recente, rastreando como reações contra a “verdade real” da biologia geram uma nova categoria jurídica – paternidade socioafetiva – que, estendendo-se muito além dos testes de paternidade, está alterando alguns princípios básicos do direito da família.

Palavras-chave: Investigação de paternidade; paternidade socioafetiva; DNA; direito de família

ADN y el desplazamiento de verdades en la ley de la familia brasileña

Resumen: Centrándonos en el impacto de la tecnología del ADN en el derecho de familia brasileño, analizando las leyes, la jurisprudencia y las demandas particulares relacionadas con disputas de paternidad, trazando tendencias cambiantes en los últimos treinta años. Mostramos como, después de un momento de escepticismo inicial, la evidencia genética parece dominar el panorama legal, haciendo irrelevantes los testimonios personales. Sin embargo, con la atención cada vez mayor dirigida a los hombres que usan un resultado negativo para refutar su paternidad, la importancia de los testimonios vuelve a aclarar si el padre de registro originalmente creía o no, tener un vínculo consanguíneo con su hijo. Finalmente, observamos un período reciente, rastreando como las reacciones contra la “verdad real” de la biología, generan una nueva categoría legal, paternidad socioafectiva, que, más allá de las pruebas de paternidad, está alterando algunos principios básicos del derecho de familia.

Palabras clave: Prueba de paternidad; paternidad socioafectiva; ADN; derecho de familia.

DNA and the displacement of certainties in brazilian family law¹

In early 1999, a young man in a small city on the Brazilian-Argentine border decided to open a paternity suit against the town mayor he claimed was his father. The purported father was outraged: how could he possibly be held accountable for long-ago adventures he could hardly remember? Admittedly, in his youth, he had engaged in weekend hunting parties with his cronies—events to which a number of women, normally of dubious reputation, might be invited. But it was preposterous to think that, now, 22 years later, this young fellow could be so sure about his father's identity. Why hadn't he come forward earlier? The son answered these doubts, explaining that, given his father's social prominence, he had not been able to find witnesses willing to testify in court. It was thanks to the "absolute certainty" now provided by the DNA paternity test that he had finally found courage to press claims.

This story serves as an apt introduction into our object of inquiry: the impact of DNA paternity tests on decisions and policies in Brazilian family law. There exist different sorts of DNA technologies for personal identification in Brazil. On the one hand, we find research on the FBI's DNA data-banks for criminal prosecution (Machado, 2012; Socchiet and Garrido, 2018). On the other hand, we encounter multidisciplinary teams that, taking inspiration in the Argentine *Madres*, have put genetic technology to the service of human rights (Fonseca et al., 2015). But nowhere, we would argue, have technologies of genetic identification drawn more attention in the media, or had more far-reaching consequences for Brazilian citizens, than in the area of paternity tests.

By the turn of the millennium, the "DNA mystique" was riding high in Brazil. At the time, the flirtation among judges with what Helena Machado (2005) calls an "acritical use of science" was patent. As a social scientist, I myself was inclined to think that the growingly precise scientific techniques of paternity identification would bring a dramatic change in family relations. By allowing public access to what had heretofore been a woman's secret, DNA technology was becoming an Achilles' heel in the conjugal relations of contemporary couples, driving a wrench into the automatic presumption of a married man's paternity that had pertained throughout most of modern history. Heralding in an era of "biologization" of kinship, the fixation on genetic truth – I pondered – would inevitably produce "more kin, fewer relations" (Fonseca, 2009; Finkler, 2000).

¹ This paper owes much to commentaries of colleagues offered during the International Conference of "Genetic identities and identification: Social issues surrounding non-medical DNA testing", held 11th-12th October 2018, EHESS, Paris.

Over the past years, given time to observe the unfolding of events, I have come to see that things are not so simple as I had originally imagined. My position today is something like what Vailly (2013) suggests in the introduction of *Birth of a Genetics Policy*: in the long run, DNA technology in paternity investigations has brought neither the total perdition nor the triumphant daybreak people were predicting at the end of the 1990s. Nonetheless, inspired in the reflections of M. Strathern (1995), I argue that, in the judicial realm, DNA has “displaced” certain set ideas about family ties—and not always in an expected way. I follow here in the tradition of STS scholars such as Sheila Jasanoff (1995, 2002) seeking to understand far-reaching changes in the social order brought on in the wake of new sorts of knowledge and technological possibilities. In the discussion that follows, DNA as “genetic witness” is made to behave as a Latourian mediator, in which “causes do not allow effects to be deduced ... [and as] ...a result, lots of surprising aliens may pop up in between” (Latour, 2005, p.58).

In an attempt to give shape to this “displacement”, I examine the last three decades’ evolution of decisions in Brazilian courts concerning paternity disputes. In a first moment, we will see how, after initial skepticism, DNA commands the scene, rendering a man’s personal denial irrelevant in the face of a positive test result. In a second moment, we find more and more attention directed toward cases in which men use a negative test to disclaim the paternal status they had previously assumed. The pivot of these disputes is whether or not the man was misled by his spouse into thinking the child was his blood-related offspring. Framed in crisscrossing legal principles, these cases of “paternity fraud” render personal testimony once again highly relevant to court decisions. Finally, we look at a recent period, in which reactions against the “real biological truth” have spawned a new juridical category—*socio-affective paternity*—that, spreading well beyond paternity tests, is altering some basic tenets of family law².

The early years: DNA Wars in Brazil

Coming back to the small-town politician... The mayor avoided submitting to the test as long as possible, but he was finally forced by circumstances to show up at the Judicial Medical Service where a team of university-based geneticists, contracted specifically for paternity investigations, took a sample of his blood. When

² Our observations are based on fieldwork in the 8th Family Court of Rio Grande do Sul during 2002 (accessed with permission from the state’s judicial directorate) as well as on-line research of legislation and jurisprudence.

the test proved positive, he called in the state's best lawyers to find holes in the new supposedly fail proof genetic technology.

The defense lawyers consulted articles published in recent Brazilian legal journals, which in turn had been inspired in the latest debates from overseas on the use of DNA in criminal cases. The attacks against DNA technology fell into categories that scholars are now familiar with (Lynch et al., 2008; Machado, 2012): the possible corruption of the material itself (bloodstains, saliva, sweat, semen); errors committed by police or lab workers in the so-called "chain of custody"; ambiguous results in the visual portrayal of chromosomal bands; the use of possibly outdated technology; the use of an insufficient number of markers; and a lack of standardized guideposts for these new technologies in Brazil (with insinuations of a notable lag in relation to the procedures used by the FBI in the USA). They also pointed out loopholes in the calculations of probability using as reference a North American databank made up of "alien populations unrelated to the mixture of races that formed Brazil." And, beyond everything else, they spent considerable space attacking the "cold, mathematical logic" of probability itself.

What we find interesting here is how this case marks the brief passing on the Brazilian scene of the "DNA Wars" that so occupied the attention of criminal justice experts in British and US courts during the late 1980s and early 1990s (Lynch et al., 2008). Notwithstanding the many evident differences in the case under study here (civil rather than criminal law, within an inquisitional rather than adversarial philosophy of law), the Brazilian lawyers cite a long list of objections to DNA evidence raised by expert witnesses in the U.S., such as Harvard's Richard Lewontin, and MIT's Eric Lander³. And, similar to early discussions in the Northern hemisphere, the Brazilian magistrate's belief in the 99.99% reliability of the DNA test appears undented by the defense lawyers' criticisms. In his 2002 sentence, the judge pronounces the politician father of the plaintiff without ever addressing the potential fallibility of the test. Reaching his decision in closed chambers—as is usual in these cases—and in the absence of any "expert witnesses", he completely ignores the nuances of scientific technique, simply repeating recent jurisprudence and juridical doctrine:

³ What the Brazilian lawyers fail to mention is that, in the U.S., most objections to the use of DNA in criminal law petered out by the late 1980s. Thanks in part to more sophisticated technologies, by the mid-1990s even the most vociferous critics agreed that DNA findings were generally valid and "the controversy was over" (Lynch et al. 2008).

“The scientific examination of DNA is evidence that attests to paternity “with absolute certainty.” (1998)⁴

“Other evidence becomes useless and obsolete, (for) no one and absolutely nothing is able to deny the genetic reality that science has discovered how to manipulate.” (*apud* Madaleno 1999)

This is the only case we came across in over a hundred paternity investigations opened in 8th Family Court of Rio Grande do Sul between 1999 and 2002 that ventured to question the scientific validity of the proof provided by the new genetic technology. The judge’s written sentence reaffirmed the trend of the times towards what certain juridical analysts would come to call the “sanctification of DNA” and the “biologization of kinship” (Caulfield & Stern, 2017).

The trend toward biologically-based paternity (the “genetic witness” takes over)

The case cited above takes place when DNA paternity tests were in their hey-day. Reinforcing a 1992 “Paternity Law” designed to promote the identification of fathers for children born out-of-wedlock, a number of court decisions had progressively enhanced the centrality of the DNA test. In 1994, arguing that thanks to the test’s near-absolute accuracy, and the fact that “fictive truth” could now be replaced with “real truth”, the Superior Tribunal of Justice decreed that men who refused to undergo a paternity test would automatically be declared fathers (*apud* Caulfield and Stern, 2017). Traditional proofs were losing ground. Tales about the callous irresponsibility of men and loose morals of women were becoming briefer, if not absent altogether. And visual resemblances between father and son that had occupied paternity investigations fifty years back was entirely left by the wayside (Finamori, 2012).

In public debate, it was understood that holding men responsible for the children they had engendered would bring an end to a good number of social problems concerning violence and poverty. In Brazil, married men are automatically the legal fathers of children born to their wives. However, civil-law marriage was on the decline, meaning that more and more men would have to make a concerted effort in order to be officially recognized as fathers⁵. Citing the high percentage of

⁴ Ac. 487398 DF, 3^a Turma Civil, Rel. Maria Beatriz Parrilha em 28/9/98.

⁵ The last demographic census, in 2010, showed that, in the society’s lower-income echelons,

female-headed households to justify the need for paternity tests, first state legislatures, then—at the end of 2001—the national congress passed laws guaranteeing public-funded DNA paternity tests for all fatherless children. At the same time, judicial offices all over the country began forming multidisciplinary teams to promote “responsible paternity”, that is, to persuade mothers of fatherless children to avail themselves of the (now free) technology in order to press suit against their ex-mates.

By the time the politician’s lawyers went into action, Brazilian researchers, working in collaboration with their overseas counterparts, were adding new sophistication to the DNA paternity test and marketing it on a grand scale (Fonseca, 2011). Costing at the time, up to US\$700 dollars per family, the tests were not cheap, thus providing opportunity for an ample margin of profit. In 1999, soon after the state of Sao Paulo allocated around three million dollars per annum for DNA tests, private labs began vying with the government-run Institute of Social Medicine and Criminology (IMESC), answering to a demand of over 20.000 tests a year in that state alone.

Elsewhere, we have cited material from our research with litigants in legal paternity disputes to suggest that the DNA tests did not cause any large-scale change in the way fathers behave toward their children (Fonseca, 2016). Hence, not surprisingly, after peaking in 2002, the demand for paternity tests in Brazil went into slight decline⁶. And, despite repeated campaigns to promote responsible paternity, still it would seem that many—if not most—mothers of “fatherless children” do not avail themselves of the court’s services to identify the biological father for their children⁷.

Although genetic technology for paternal identification may not have attained its originally-proposed target, we suggest that—as a result of unforeseen uses—it has had some interesting consequences for courthouse procedures.

nearly 49% of the couples are living in common-law unions (IBGE 2012). Although, in Brazil, the number of legally-married couples has been historically low, the proportion appears to have declined somewhat in the years leading up to the 2010 census.

⁶ Although the public laboratory in São Paulo published data up to 2006, showing a slight decline in demand for tests after the 2000-2003 peak, no official statistics have been published since. In informal interviews, owners of private labs have told me that demand went down to the extent that they either had to redirect their business toward other genetic exams or shut down altogether. Nonetheless, judicial medical services run by each state appear to maintain to this day a hefty rhythm of paternity exams.

⁷ See the Rio Grande do Sul State Public Attorney Office’s Project “Father? Present!”, 10/08/2016, <<http://www.defensoria.rs.def.br/projeto-pai-presente-da-defensoria-publica-tera-divulgacao-especial-em-mutirao-no-largo-glenio-peres-na-capital-nesta-quin>> [Accessed 1/8/2019].

Unforeseen complications in family law (traditional witnesses are reinstated)

Although ostensibly designed to compel unmarried men to register their “fatherless children”, DNA technology also unleashed a trend going in the opposite direction: broadening the right of legally-declared fathers to *refute* their paternal status. According to the 1916 Brazilian Civil Code, a child’s birth certificate, whether established by marriage or by formal declaration, was definitive proof of a man’s paternity: “No one can disclaim the status registered on a child’s birth certificate” (art.348)⁸. The only way for a married man to legally deny paternity was to provide proof of total sexual impotence or of prolonged conjugal separation—and even in such cases, he had a two-month limit after the child’s birth to press suit (article 340). In 1943, an addendum further extended the exceptions: a man could now refute the paternity of his wife’s children if he could prove “*error or false registry*”. Fifty years later, at the end of the 1990s, citing the “notably secure methods” of science to verify the existence of filial ties”, Brazil’s Supreme Court lifted virtually all restrictions on men seeking to negate their paternal status.⁹ And, in 2002, a reedited version of the country’s Civil Code inscribed a man’s “right to know” in law. Married men gained the right to contest their paternal status without having to demonstrate impotence or worry about date limits. Today, a married man may press suit to deny paternal status of children that are full-grown: his right to do so does not expire, ever.

Elsewhere, we have described in length how, in Brazil, the availability of DNA paternity tests set off a wave of suits filed by divorced and separated men who—before paying child support—were demanding tests in order to “clear up a certain doubt” (Fonseca, 2009). Although cases of “paternity fraud” are not unknown in other countries (Machado and Silva, 2012), Brazil’s particular history of government administration has made this phenomenon all the more likely. Until at least the 1970s, the most elementary documents—birth certificates, identity cards, and so on—were still not a routine part of most Brazilians’ lives (Cunha, 2005; Fonseca, 2016; Caulfield & Stern, 2017). The majority of the population was to be found in rural areas, where couples lived in consensual unions and children were born at home. Many people had never been to school and there were, otherwise, few incentives that would lead a person to submit to the state bureaucracy of individual identification. A birth certificate established years, if not decades, after a child’s

⁸ A man was automatically the father of his wife’s children if they were born in the 180 days following their marriage or within 300 days of their legal separation. A child born earlier was presumably the husband’s child if he was aware of his wife’s pregnancy when they married or if he voluntarily registered the child in his name.

⁹ Judge Eduardo Ribeiro, resp 194866/RS, 1998/0084082-6, 20/04/1999.

birth contained details (date of birth, identity of the parents) difficult to ascertain. The situation made it easy for a man, wanting to prove his fidelity to a new companion (without necessarily getting married), to simply register her “fatherless children” in his name, as though he were the biological father. Historians and jurists estimate that this particular form of step-father adoption—although technically illegal—was (and probably still is) common practice.

Nicknamed by lawyers as “Brazilian-style adoption”, this sort of “well-intentioned fraud” is still today held by many lower-income Brazilian stepfathers as a convenient way of simplifying the bureaucracy needed to assume full legal authority over the child they are raising. The procedure is not complicated. The hospital where today the vast majority of women give birth provides a Live Birth Declaration (DNV), specifying the mother’s name and ideally the father’s. This document is, in principle, required by the civil registry offices before issuing a birth certificate. However, many DNVs do not have a father’s name, thus allowing the woman to bring into the notary’s office the man she has chosen to be the father of her child (see Richter, 2016)¹⁰. In other words, while for a legal adoption, the stepparent would have to face piles of bureaucratic work and years of waiting, he can assume full parenthood in a couple of minutes, simply by establishing a (false) birth certificate¹¹.

The banality of such cases reveals not only how working-class people “bend” state bureaucracy to their own ends, it also bespeaks something of the eminently social bias that has traditionally influenced informal definitions of kin. In other words, up until recent times, people have not infrequently made unorthodox use of a child’s official birth registration more as a way of fixing social relations in perdurable form than of portraying fixed biological facts (Fonseca, 2016).

The question is what happens when this sort of declared father separates from the child’s mother and wants to renege on his paternal status? Our fieldwork in the courts convinced us that literally any case in which a man tried to undo an already established paternal status provoked profound discomfort among all concerned. Everyone working in family court had a story to tell concerning the emotional tragedy wrought by a negative result from the DNA test. We personally witnessed

¹⁰ Some couples appear without any documents from the hospital, claiming they are from the countryside and that the child was born at home. In these cases, the declarant must be accompanied by two witnesses. Nonetheless, as a certain notary public told me, “We cannot check anything. We have to accept the word of the declarants.”

¹¹ According to the so-called “Paternity Law” (8,560) of 1992, Offices of Civil Registry are supposed to notify the Public Prosecutor’s Office each time they issue a birth certificate in which the father’s name is not listed. However, in practice, paternity investigations occur—even today—only when the mother presses suit, thus explaining the campaigns geared to spurring women’s desire for action.

the case of a certain man who, although he had never lived with the child's mother, behaved for twelve years as a zealous, loving father, taking the child home on weekends and integrating it into the everyday activities of his extended family. When the fellow finally married, however, his new bride suggested the child looked nothing like anyone in his family. The worm of doubt she planted was confirmed by a DNA test, made without the mother's permission at a nearby, private laboratory (all quite legal in the Brazilian arena of unregulated technology). Moving suit to undo his paternal status, the man's plea underlined the mental anguish the mother's misrepresentation of facts had caused—not only for the child (now, practically an adolescent), but also for his own parents (supposed grandparents of the child). Afterwards, one of the judicial officials, visibly disturbed by this scene, pondered: the courts have legal authority, but do they have the moral authority to divest this pre-teen boy of the only father he's ever known?

Jurisprudence in appellate courts describing similar dramas suggests that, during the first decade of this century, although such cases were not the most frequent sort of paternity investigation, they caused the most consternation. According to a 1992 Paternity Law, if an unmarried man voluntarily assumes paternity of a child, this status would be technically irrevocable.¹² Contrary to the case of married men, there were to be no exceptions which might allow this sort of declared father to change his mind. Yet, with a negative DNA test firmly in hand, a man's defense attorneys had recourse to convincing arguments to undermine the principle of irrevocability. Jurists could invoke the “absolute priority” of a child's “best interest”, alleging that the child's basic human dignity depended on “the primary and urgent task of knowing the identity of his true, rather than his presumed, genitors” (Moraes, 1997). In other words, the same argument that had compelled reluctant fathers to submit to a paternity test could be used to insist on putting the “correct” father's name on the birth certificate.

On the other hand, there was also a tendency to rehash the 1943 law looking to make the exceptions apply to unmarried declared fathers as well as married men. Jurisprudence soon established that the *salvo* permitting a man to repudiate his declared fatherhood would not apply in cases of “false registry”, that is, when a man who, “even knowing he is not the father, and fully conscious of this fact, registers the child as though it were his own” (cf. Fonseca, 2009). However, in the “hypothesis of error”, that is, when a man “erred” in good conscience, having been misled by his wife, a negative result from the DNA exam appeared to furnish a solid justification for annulling his paternal status.

¹² Article 1.609 of the 2002 Civil Code repeats this clause *ipsis literis*.

The seriousness of this complication soon became evident. Judges could no longer pretend to solve disputes through an objective, scientific truth. The splitting of hairs—between fraud and error—meant that the declared father would have to demonstrate whether or not he had actually been duped. The negative DNA result could clarify nothing about the man’s state of mind when he took out the child’s birth certificate. And so, traditional witnesses were once again called in to provide oral testimony that might convince judges of what really happened.

During some time, it appeared sufficient for a man to combine a negative test result with a convincing tale of his own ignorance for a judge to reluctantly cut the tie between father and son. However, little by little Appeals Courts, began to overturn lower-court decisions, arguing that socio-emotional ties of fatherhood overrode the lack of genetic connection (Caulfield & Stern, 2017). In 2004, members of the influential Brazilian Institute of Family Law proposed a bill in congress to prohibit step-fathers who had effectively raised their ex-mate’s children from disclaiming their previously declared paternal status (Bill n.4946 of 2004). Although the bill did not pass, we might suggest that the proposal officially marked the ebb of biologically-based “truth” in family court. The authors, at least, show they have this turning of the tide consciously in mind when they state that true father-child relations do not stem from biology, but rather from “socio-affective truth”¹³.

The rise of socio-affective paternity (just how relevant is biology?)

Significantly, talk about socio-affective paternity first appeared in judicial debates at the end of the 1990s, around the time that DNA paternity exams were becoming popular. Professionals (jurists, psychologists) from the Brazilian Institute of Family Law spearheaded concerns, gradually consolidating the new juridical notion (Teixeira e Rodrigues, 2015). Consciously used to counteract what was perceived as the growing “biologization” of kinship, socio-affective parenthood was meant to rehabilitate certain Brazilian “traditional” family forms that included informal adoption, step-parenting, and extended families. The notion, coined to convey the essentially emotional foundations of the modern family, was to be demonstrated in court through the deposition of witnesses swearing to the fact that man and child had interacted as father and son over a period of time, that they were recognized as such by members of their social network, and, in some cases, they shared the same name.

¹³ PL 4946, <http://www.ghente.org/doc_juridicos/pl4946.htm> [Accessed 1/8/2019].

The idea of socio-affective paternity became institutionally enshrined in a 2012 Superior Tribunal of Justice decision concerning a man who had registered and raised two girls, treating them as daughters even after his separation from their mother (Salomão, 2012, RE 1.059.214). The girls were both into their thirties when their father remarried and, urged on by his new wife, tried to disclaim paternity. Ruling against the claimant, despite a negative result on the DNA test, the judge presented his reasons.

DNA paternity exams, he conceded, had caused a revolution in family law: “in the past, judges would look for the tiniest clues that might convince them of biological truths”, and for years, DNA test results had “won out over more precarious forms of evidence” (Salomão, 2012). However, over time, the courts had come to recognize that the “cold laboratory analysis of chains of DNA acids is unable to translate, deny or prove...bonds established in the hidden corners of family life” (Ibid). Particularly when dealing with alleged paternity fraud, affection should pervade over genetic ties. In other words, to legally negate his paternal status, a man should demonstrate, “at one and the same time”, the lack of a biological connection with the child and also the absence of father-child social interactions. His attempted disclaimer should be ruled out if in “open conflict with socio-affective paternity”, that is, if it imperils the social and emotional ties developed over years of living together in family routine¹⁴.

Even after the 2012 decision, permitting emotional bonds to prevail over the lack of shared biological substance, a fundamental problem remained. Up until recently, most courts considered that a person could have but one set of parents on the birth certificate. To inscribe a new father on a person’s birth certificate, any previously registered father had to be erased. This “either-or” phrasing of the debate did not satisfy everyone. For one reason or another, children—especially after grown—were often anxious to retain a step-dad’s name on their birth certificate, even after another man had been proven to be their genitor. In 2016, the Supreme Court issued a ruling to settle this dilemma that would have reverberations throughout family law (Fux, 2016). Overriding a recently-named (biological) father’s objections, the judge admitted the possibility of registering both biological and socio-affective fathers on the birth certificate. Citing overseas precedence (Louisiana, USA, already during the 1980s), he thus officially introduced the notion of “pluriparentality” into Brazilian family law. Brazilian law, traditionally operating in the top-down tradition of Roman law, has thus been led to move toward a more common-law perspective, attributing growing importance to people’s everyday practices. Arguing for

¹⁴ The ruling, in effect, enacted the bill 4946 rejected by congress in 2004 (see above).

pluriparentality, Fux affirms that: “The right to the pursuit of happiness protects the human being against attempts by the State to fit his or her family reality into preconceived models, established by the State” (Fux, 2016).

The ultimate victory of socio-affective paternity came into effect on the first of January, 2018, with a decree issued by the National Council of Justice that aims at facilitating the declaration of non-biological parenthood (CNJ 2017). Now, a man wanting to assume full paternal status over his companion’s child need no longer commit perjury or fraud (as in the case of Brazilian-style adoption), nor need he submit to the judicial procedure of unilateral adoption. He has only to appear at the local notary public’s office, and, with the assent of the child’s mother, fill out the necessary forms establishing his “socio-affective fatherhood”. He will be inscribed on the child’s birth certificate as father, and held–irrevocably–to his duties. The procedure, by the way, allows for double paternity, that is, the simultaneous inscription of social and biological fathers.

Of course, it would be forcing the issue to suppose that these changes have been wrought by paternity disputes alone. The notion of socio-affective parenthood has also been raised in matters dealing with adopted children, children produced through new reproductive technologies, as well as those with homosexual parents. However, one cannot ignore the fact that most the legal landmarks have been made in connection with paternity investigations, in the wake of disputes that would never have occurred without the “absolute certainty” introduced by DNA technologies of biologically-based filial ties.

In conclusion, we suggest that the rise of awareness about “social” parenthood has not diminished the legal import of biogenetic ties. Proof of a biological relation between father and child continues to be decisive when it is the child pressing suit¹⁵. However, as Marilyn Strathern (1995) suggests in her discussion about the impact of technology on kinship, social and biological definitions of family might actually bolster each other up. Strathern reasons that, as long as biology remained an implicit premise of family belonging, it could not be readily challenged, nor could the specifically “social” aspects of family life be separated out. Today technology has rendered blood connections visible and quantifiable, and this new way of seeing the world has displaced old assumptions.

The more biogenetic kinship is made explicit, the more people have the choice of acknowledging it or not, and the more they have the option of raising something

¹⁵ In 2011, the Supreme Court allowed the unprecedented reopening of a case that had been decided (against the plaintiff) in 1989 because the alleged son had not had the benefit of a DNA test. See RE 363889 DF. <<https://stf.jusbrasil.com.br/jurisprudencia/20998282/recurso-extraordinario-re-363889-df-stf>>. [Accessed 1/8/2019].

else in its stead. In the Brazilian case reviewed here, by revealing the non-biological nature of certain family relations, DNA paternity tests have simply made explicit what everyone more or less already knew—that, for eons, men have been “giving their names” to stepchildren outside of any state supervision. Having been made visible, this practice can now be named (as socio-affective paternity), harnessed, and translated into legible terms. In the process, the law’s basic conceptions of family have been refashioned, drawing closer to the flexible dynamics of real-life practices. Altogether, we may conclude that DNA technology has yielded important effects in Brazil’s judicial system, but, thanks to “surprising aliens” such as socio-affective paternity, change has certainly not followed the predictable lines of biological determinism that observers might have originally foreseen.

Submitted: 05/18/2019

Accepted: 06/19/2019

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