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ARTICLES

REPRODUCTIVE TECHNOLOGY AND INTENT-BASED PARENTHOOD: AN OPPORTUNITY FOR GENDER NEUTRALITY

MARJORIE MAGUIRE SHULTZ*

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INTRODUCTION

The New York Times recently described the New Jersey Supreme Court's "right to die" decisions as creating a legal regime of "negotiated death." In one of those decisions the court observed that medical and

technological change were turning what once were “questions of fate” into “matters of choice.”

The point also applies to legal issues raised by other medical developments. Yet while the New Jersey Supreme Court legitimated the increasing role that human decision plays in the definition and eventuation of death, that same court failed to recognize similar developments at the beginning of life. In deciding the notorious Baby M case, the New Jersey Supreme Court showed considerable sensitivity to certain human issues. Yet, conceptually, it treated the surrogacy arrangement as an aberration, isolated from more general developments in reproductive technology. By so doing, the court failed to appreciate in this setting what it has so richly illumined regarding death: technological change requires new choices and responsibilities.

Nowhere are the demands and opportunities engendered by technology more importantly debated than within the domain of the law.

Modern reproductive techniques subdivide what was previously unitary. Various stages of the biological process can now be severed, allowing specific impaired aspects of the procreative process to be replaced by workable substitutes. As a result, more than two persons can now be biologically involved in a given instance of reproduction. Furthermore, because processes that previously were bundled can now


3. Because they directly implicate fundamental personal, religious and philosophical issues, decisions involving death and reproduction are especially important nexus for human choice. See infra text accompanying notes 219-27. However, recent attention to ethics, as well as to consumer control of expertise, makes apparent the extent to which choices and values also play important roles in “ordinary” medical decisions. See generally Shultz, From Informed Consent to Patient Choice: A New Protected Interest, 95 Yale L.J. 219 (1985) (analyzing the inadequacy of the informed consent doctrine and proposing alternative legal approaches for the protection of patients’ autonomy).

4. See infra note 267.


6. See In re Farrell, 108 N.J. at 340-341, 529 A.2d at 406 (“[s]ophisticated life-sustaining medical technology ... ‘obfuscat[es] the use of traditional definition of death’” (quoting In re Quinlan, 70 N.J. at 27, 355 A.2d at 656)); In re Conroy, 98 N.J. at 343, 486 A.2d 1209, 1220 (“scientific advances make it possible for us to live ... even when most of our physical and mental capacities have been irrevocably lost”).

7. See infra text accompanying notes 37-39.
be separated, procreation can be depersonalized: biological reproduction can be separated from the social and physical context of interpersonal intimacy. Whenever subdivision occurs, choices emerge. Developments in reproductive technology have created new biological and social options that in turn challenge old assumptions and pose new dilemmas for legal doctrine and policy.

One particularly significant theme emerges from this array of developments: the choices generated by modern reproductive technology have made personal intention a far more significant factor in procreation and parenthood. Such broad generalizations are, of course, never strictly true; continuity always coexists with change. Thus, although the New Jersey Supreme Court accurately identified a growing individual responsibility for negotiating death, suicide has always provided an avenue of chosen death. So, too, abstinence, a change of sexual partners, or resort to comparatively crude methods of inducing miscarriage have long provided some semblance of individual control over procreation and parenthood. But the increasing ease and accessibility, the public visibility, and the social permissibility of individual control over decisions about death distinguish modern circumstances from prior realities. Similarly, individual intention has become a far more central ingredient in parenthood. At the beginning of the life cycle, as at the end, there is a growing need and an emerging opportunity to make choices about things that used to be largely beyond our control.

Greater individual choice ordinarily implies a welcome potential for greater personal fulfillment. However, these particular choices are highly controversial. The issues of procreation, marriage, sexuality and child rearing are profoundly bound up with individual and societal beliefs and values. Some object strenuously to changes wrought by technology in the basic procreative process. Others fear the more flex-


ible, pluralist and non-conventional family arrangements that are a likely result of the expansion of choice.\textsuperscript{10} Whatever the doubts, the trend toward conscious choice about and management of reproduction seems certain to continue and expand. Both the evolving techniques and the issues they raise are fundamental; reconsideration of the legal context and consequences is therefore essential. The critical, overarching question for legal policy is not \textit{whether} but \textit{how} to accommodate the new developments. Among the most difficult specific issues is how to resolve competing claims to parenthood of children born through artificial reproductive techniques.

When new legal and social questions arise, various legal perspectives "claim" the issue as their own. Reproductive technology in general, and surrogacy in particular, illustrate this phenomenon.\textsuperscript{11} Property


For a fuller treatment of these objections, see infra text accompanying notes 87-94, 104-21.


11. Fields as diverse as constitutional law, property, procedure, family law, and gender discrimination, as well as contracts, offer important insights about these social innovations. Each field's conceptual "lens" for examining the issues brings a different dimension of the problem into focus. As a result, the most interesting comments about surrogacy, for example, are not those that survey all the possible issues. Rather, they are those that bring to bear the depth and resonance of some distinct perspective. Thus, for example, Herma Hill Kay contrasts the Baby M situation with other instances in which family law adjudicates the custody of a child using a "best interests" test. Kay, \textit{Child Custody Litigation Arising from Surrogate Parenting Agreements: A Family Law Perspective on the Baby M Case}, 20 Boalt Hall Transcript 2 (1987). Others in family law propose to govern the surrogacy problem on the basis of analogies to custody, adoption, divorce, unwed parents' rights, abandonment and neglect, etc. Martha Field, for example, urging an adoption analogy, proposes that a surrogacy contract be voidable by the surrogate, allowing her to change her mind about giving up the child after it is born. M. Field, \textit{Surrogate Motherhood} (1988).

Margaret Radin's perspective is shaped by her concerns as a property scholar, jurispru-
lawyers debate the issues in terms of alienability, family lawyers by analogy to adoption, feminist lawyers in terms of gender. As a student of contracts and of medical-legal problems, I see medical progress as expanding the potential for expression and effectuation of personal intentions. Accordingly, I propose that legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and

that prohibiting paid surrogacy recapitulates the traditional gender inequity whereby women's work is kept out of the public sphere) with G. Corea, supra note 9, at 2 (paid surrogacy markets parts of women's bodies for reproductive purposes, thereby "reducing women to Matter").

Those concerned about poverty and welfare law fear that market surrogacy inevitably involves exploitation of the underclass in general and women in particular. Compare Note, "M" is for Money: Baby M and the Surrogate Motherhood Controversy, 37 AM. U.L. REV. 1013 (1988) (arguing enforcing contracts which could lead to the economic exploitation of lower-class women as baby-carriers for upper class women) with Comment, Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee, 18 GONZ. L. REV. 539 (1982-1983) (arguing that women deserve reasonable remuneration for their labor).

Lesbian and gay rights advocates examine the medical, social and legal consequences of these new reproductive possibilities for the homosexual community. See, e.g., O'Rourke, Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination, 1 BERK. WOMEN'S L.J. 140 (1985).

Constitutional scholars dissect the scope of privacy rights and attempt to predict whether principles governing procreative liberty will extend to protection of surrogacy arrangements. See, e.g., Robertson, supra note 5 (arguing that reproductive freedom is so central to individual autonomy that it deserves full constitutional protection); Stark, Constitutional Analysis of the Baby M Decision, 11 HARV. WOMEN'S L.J. 19 (1988) (concluding, after painstaking dissection of all parties' rights, that the Constitution only protects contracts for the voluntary surrender of the child after birth). See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW 1306-07, 1329-61 (2d ed. 1988).

Others with constitutional orientations speculate about connections between surrogacy and slavery. See, e.g., Williams, On Being the Object of Property, 14 SIGNS 5, 13-16 (1988) (analogizing the law's blind imposition of passivity on family relations in slavery and surrogacy); O'Brien, Commercial Conceptions: A Breeding Ground For Surrogacy, 65 N.C.L. REV. 127 (1986) (arguing that commercialized surrogacy poses an impermissibly greater risk of commodifying the child). But see Radin, supra, at 1926-27 (arguing that the analogy to slavery is inaccurate because parents who buy babies want not to exploit them but to love them).

For a particularly interesting example of conceptual "lenses" at work, see the three-way debate between Landes & Posner, The Economics of the Baby Shortage, 7 J. LEGAL STUD. 323 (1978) (arguing that a free rather than the current regulated market for babies would maximize utility for all parties), Prichard, A Market for Babies?, 34 U. TORONTO L.J. 341 (1984) (countering that economic model fails to account for our moral repugnance to baby-selling), and Morgan, supra note 5, (arguing that both the pro- and anti-baby selling positions work to mask the fact that childbirth and child rearing are already a form of "reproductive slavery" for women).

Those examining the interface between law and medicine focus on the recurrent problems of adapting legal policy to scientific and technological advance. See Robertson, supra note 5, at 952 (pointing out that society and the law are still searching for a normative framework within which to analyze new reproductive developments); Capron, supra note 5, (discussing the law's lag behind reproductive science).
expectations, as is the case in technologically-assisted reproductive arrangements, they should be honored. If these propositions are accepted, contractual perspectives, doctrines and concepts could become important tools for solution of the legal issues raised by modern reproductive technologies.

By embracing the emerging opportunities provided by advancing technology, the law would enhance individual freedom, fulfillment and responsibility. Important additional gains would also accrue. Rules that would determine legal parenthood on the basis of individual intentions about procreation and parenting—at least in the context of reproductive technology—would recognize, encourage and reinforce men’s choices to nurture children. By adopting a sex-neutral criterion such as intention, the law would partially offset the biological disadvantages men experience in accessing child-nurturing opportunities. The result would parallel recent legal efforts to offset the burdens that childbearing imposes on women who seek equal access to market employment.

Before proceeding with the analysis, I offer one additional comment. Whatever the opportunities provided by modern technology, we are at best ambivalent about increasing control over our destiny. For the most part our society eagerly embraces the ideology of autonomy. Welcoming control, most are frustrated mainly by our inability to perfect it: delays persist; success rates are partial; “bad outcomes” are more easily prevented, but disability and realized risks still impede the search for error-free results. Others might choose to avoid greater control over procreation. Many would admit that although we are liberated and energized by options, we also draw stability and comfort from boundaries. Choice brings moral responsibility, and with it the possibility of blame or inadequacy. Perhaps some different balance between fate and choice would seem optimal. Ironically, however, the availability of choice is not something we control; our decisions are about how fully to recognize and exercise it.

Part I briefly describes the role of intention in procreation prior to the development of modern reproductive techniques and then traces

12. See generally A. MacIntyre, After Virtue: A Study in Moral Theory 103-04 (1981) (asserting the importance to individuals of being able to make plans and to project intentions into the future); Jones, The Jurisprudence of Contracts, 44 U. CIN. L. REV. 43 (1975) (discussing the centrality of contractual and promise-keeping ideas in western intellectual and political history).

13. See infra text accompanying notes 295-338.

how procreational technology has brought individual intention to the fore. It identifies options that have emerged, and describes who might use them and why. It also examines how the law has traditionally assigned legal parenthood. Part II proposes a new legal policy regarding parenthood and examines concerns that might militate against its acceptance. It analyzes objections to modern reproductive techniques themselves, to the projected social consequences of their use, and to the adoption of private contracting as the legal device for governing these arrangements and for determining legal parenthood. Part III discusses the Baby M case as an illustration of the analysis presented in this Article. It argues that the New Jersey Supreme Court's decision is seriously flawed because it failed to come to terms with the emergence of intentional decision-making in artificially assisted reproduction. Moreover, the decision missed an important opportunity by choosing to amplify and reinforce rather than to soften and offset gender imbalances that presently permeate the arena of procreation and parenting.

I. PARENTHOOD: FATE, INTENTION, GENDER AND LAW

A. The Traditional Version

Through most of history, biological procreation was more a matter of fate than of intention. Until fairly recently, pregnancy and the birthing of children was experienced as largely outside the control of individuals. Insofar as individual intention could play a role in biological parenthood, it did so through means that were often indirect, ineffective or multi-consequential.\(^1\) Those attempting to be purposeful about biological parenthood could manipulate timing of or positions for intercourse, or use medical or surgical interventions (or, earlier, “magical” ones) aimed at increasing fertility or barring conception. But these methods had severe drawbacks as means of expressing and effectuating deliberative intention. For instance, management of sexual relations according to menstrual cycle or temperature charts could turn an in-

\(^{15}\) See L. Gordon, Woman's Body, Woman's Right: A Social History of Birth Control in America (1976). Social movements (e.g., eugenics, birth control, population control) focusing on enhanced control over human reproduction became widespread only in the 1890s.

A growing tradition in feminist theoretical writing attempts to criticize liberalism’s account of the autonomous self without jettisoning its core project of continual critical self-realization. See, for example, essays collected in Feminism as Critique (S. Benhabib & D. Cornell eds. 1987), especially Butler, Variations on Sex and Gender: Beauvoir, Wittig & Foucault (posing the cultural construction of gender as a project in which individual women and men can participate in potentially liberating ways). I see intent-based determinations of parenthood as a concrete proposal with aims that parallel these theoretical ideals.
tensely personal form of communication into a purely instrumental activity. Other methods involved serious physical risks. Many had only questionable effectiveness.

Other ways of being purposeful about procreation involved multiple consequences that extended far beyond any particular choice about parenthood. For instance, individuals might engage in sexual relations not otherwise desired, together with whatever responsibilities or entanglements such relations might entail, in order to beget a child. Typically, persons wanting to have children would marry, thereby accessing a “legitimate” sexual partner, in order to have children. Or, an individual might change relationship partners, including marriage partners after divorce became common, where the partner rather than oneself was thought to be “at fault” for an inability to conceive. Or, individuals might abstain from all sexual relations to avoid parenthood. Indeed, chastity and virginity constraints buttressed by legal, religious and family norms functioned as a powerful form of social-psychological birth control. However, in these and other examples, the necessity of undertaking or avoiding complex relationships and diverse obligations in order to effectuate a specific intent regarding procreation cannot be viewed as meaningful “choice” because such decisions are neither optimal nor particularly “free.” Thus, intentionality about biological parenthood has been distinctly limited both for men and for women.

Although both sexes are essential to conception, both can try to persuade or coerce the other’s procreational behavior, and both share disabilities in effectuating reproductive intentions, major sex differences in access to procreation and parenthood remain. Thus, women bear all the physical risks and burdens of pregnancy and childbirth—a considerable fact given the realities of maternal death, illness and complications from childbirth as well as the accompanying disruptions of work and lifestyle. However, if the genders are compared from the

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16. But see K. Luker, supra note 10, at 166-68, 210-13 (discussing how a need to communicate about such intimacies as stage of menstrual cycle, as well as the constancy of being “at risk,” may increase interpersonal closeness for couples using a “rhythm” method of birth control).


18. The rhythm method, for example, was found to produce three times as many unwanted pregnancies as the use of condoms. P. Whelpton, A. Campbell & J. Patterson, Fertility and Family Planning in the United States 296-98 (1966). Anti-miscarriage drugs like DES were also widely used. A study shows at least six million people have been exposed to the drug—in spite of convincing studies done during the 1950s showing that the drug did not prevent miscarriages. R. Meyers, DES: The Bitter Pill 64-70 (1983).

19. In 1986, 247 women died from causes related to or aggravated by pregnancy or
vantage point of an affirmative desire to be a parent, nature gives important advantages to women.

Because men are biologically uninvolved in gestation and birth, they are more dependent on women than women are on them in achieving parenthood. Men do have the advantage of being fertile for more years of the life cycle than women. However, the physiology of procreation gives the mother opportunities to frustrate a father’s knowledge and choices about procreation. A woman may hide a pregnancy, physically escaping the man’s observation or knowledge during the gestation and birth. She may obscure the timing of conception or assert that other men are more likely the father. Moreover, since the pregnancy occurs within her body, she may try to preserve a pregnancy or to induce a miscarriage.

Despite these natural advantages, women have not generally been inclined to use their procreational dominance to frustrate a man’s knowledge about or claim to parenthood. Women may desire emotional intimacy with the father of the child. More importantly, women have historically needed an economically and socially present father for the child. Discrimination in education, employment and domestic roles and responsibilities have kept women’s comparatively more immediate access to procreation and parenthood from being an unmitigated benefit. Indeed, the principal historical effect of the natural asymmetry in biological roles has been the greater ability of men to escape the financial and personal burdens of parenthood.

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20. Psychiatrists Bruno Bettelheim and Edith Jacobson argue that throughout the world at various points in history men have designed institutions and practices intended to appropriate for themselves the procreative potential they feared and admired in women: practices such as voluntary castration in Rome, subincision (with simulated menstrual bleeding) among the aboriginal Australians, couvade, and African initiation ceremonies centering on a symbolic rebirthing by a male mother. See B. BETTELHEIM, SYMBOLIC WOUNDS: PUBERTY RITES AND THE ENVIOUS MALE (1962), cited in G. COREA, supra note 9, at 283-289. Feminists such as Corea see the development of new reproductive technology as the logical next step in the historical male effort to gain control over women’s reproductive capacities. Id. at 304-17.

21. One vivid example was reported in the news media recently. A woman travelling from New York to California gave birth to her third child on board the plane. Apparently the father did not know his wife was pregnant, although they were together on the airplane where the mother gave birth and hid the child in the plane’s restroom. Drury, Custody Hearing Over Jet-Born Baby, Newsday, July 22, 1988, at 2.

Women’s advantage in procreation is manifested not only in heterosexual relations, but in homosexual relations as well. A lesbian couple would have a comparatively easier time having a child than a gay male couple, simply because of the relevant physiological roles played by men and women. See discussion infra, in text accompanying notes 51-52.

22. See H. KAY, SEX-BASED DISCRIMINATION (3d ed. 1988) (regarding education, 813-87; regarding employment and pay, 485-812; regarding domestic roles and responsibilities, 186-484).

23. See, e.g., Caban v. Mohammed, 441 U.S. 380, 399 (1979) (Stewart, J., dissenting)
However, recent developments suggest some important changes. The increasing economic, social and legal independence of at least some women gives them greater freedom to exploit their natural procreational advantages. Reciprocally, as some men become more actively interested in parenting, their sex-based disadvantages become more visible and distressing.

B. The Emerging Version

Modern reproductive technology has greatly enhanced the potential for intention in procreative behavior. Intention conveys the directness, specificity and lack of ambiguity with which voluntary behavior is linked by purpose. A further element is the presence of options or alternatives; intention connotes choice, or selection among available courses of action. Where behavior is not purposeful or where for one reason or another an individual "has no choice," moral accountability is generally lessened. While the criminal law separates these two elements into threshold criteria defining

(“Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested”) (citation omitted). Even in recent times, relatively few fathers seek or get custody of children after divorce. See Weitzman & Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce, 12 U.C. DAVIS L. REV. 473, 502-03 (1979). The non-payment of child support by fathers provides another index of fathers’ apparent willingness and ability to detach from their children and their children’s needs. See L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 262 (1985) (detailing empirical evidence of non-payment of child support as a “national disgrace”); Bruch & Wikler, The Economic Consequences, 36 Juv. & Fam. CT. J. 5 (1985) (discussing the disparate economic impact of divorce on formerly married women and the children in their custody).

24. Intention is defined in Webster’s Dictionary as “determination to do a specified thing or act in a specified manner.” WEBSTER’S NEW WORLD DICTIONARY 733 (college ed. 1980). My usage here is somewhat parallel to the tort/criminal law notion of specific intent (having the particular outcome of an action as a goal) as opposed to general intent (merely having reason to know that a given outcome is substantially certain to result from an action). See, e.g., RESTATEMENT (SECOND) OF TORTS § 8A (1965) (defining intent as “desire to cause”).

The concept as used here envisions conscious decision-making. While pre- or sub-conscious forces may influence decision-making and behavior, they are, by definition, unknown and therefore difficult to take account of. See infra text accompanying notes 156-69 for discussion of whether surrogacy involves decisions that are inherently less capable of purposeful cognition than most other types of transactions.

25. See infra text accompanying note 170-76.

26. The doctrine of justification in criminal and tort law reflects this judgment. See W. LaFave & A. Scott, CRIMINAL LAW § 5 (2d ed. 1986) (detailing various justificatory defenses such as duress, necessity and self-defense that might colloquially be described as situations where the actor had “no choice” but to do as she did.) Compare the centrality of the concept of meaningful choice in contract law. See RESTATEMENT (SECOND) OF CONTRACTS § 208 comment d (1979) (“gross inequality of bargaining power . . . may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent . . . to the unfair terms.”)
responsibility on the one hand and bases for claiming justification or excuse on the other, my purpose here is best served by combining the two dimensions into a single framework. Rather than grading behavior for societal sanction, I seek to describe when purposeful affirmative commitments are deserving of societal respect and deference. Intention for this purpose combines the concern about personal responsibility in criminal or tort law with the concern about meaningfulness of choice that is emphasized in contract law. In the following discussion, then, behavior that meets criteria both of purposefulness and of choice among available alternatives is the product neither of necessity nor of accident; it is both voluntary and willed, that is, intentional. New reproductive techniques increase procreative intentionality in both these senses.

1. TECHNOLOGY ALLOWS SPECIFICITY OF PROCREATIVE PURPOSE

Procreation by ordinary coital means necessarily includes a degree of ambiguity regarding purpose. On the one hand, sexual relations have been the sole means to procreate. On the other, sexual relations are often either an end in themselves or a means to some end other than procreation. Thus, procreation may be a goal or a by-product, or anything in between. Although individuals may know and may state their intentions regarding procreation when engaging in sex, they often do not. Certainly from an outsider's vantage point, ambiguity about intentions suffuses acts of sexual intercourse and reproduction by ordinary coital means.

The invention and legitimation of birth control (including voluntary sterilization) and abortion generated a wide array of social changes, most of which I make no attempt to identify or discuss. For this analysis, the special significance of those developments is their role in allowing comparatively direct expression of intentions regarding procreation and parenthood. Use of birth control gives unambiguous evidence of at least one partner's intention to have sex without procreation. Voluntary sterilization as a form of birth control is even more definitive: it signals a choice never (again) to be a biological parent. Abortion is more ambiguous. Abortion may follow nonconsensual sex, as in instances of rape, or unconscious sexual relations. But where intercourse was voluntary, abortion indicates either an intent to have

27. See K. Luker, supra note 10, at 111-18 (discussing social changes induced by the availability of birth control and abortion).

28. Intentions of the two individuals involved may, of course, differ. Clarity of intention may only be attributable to whichever partner uses the birth control or chooses the abortion.

29. In instances where sterilization is chosen for health reasons rather than as a form of reproductive control, it is usually called involuntary sterilization.
had sex without reproduction,\textsuperscript{30} or a change of mind since the time of the sexual relations that led to pregnancy.\textsuperscript{31} In any case, for those both willing and able to use them, birth control and abortion signal a clear, present intent not to procreate. These techniques make it possible to prevent unwanted pregnancy and/or childbirth while still enjoying sexual activity. Lack of knowledge or money\textsuperscript{32} may prevent, and religious belief or personal psychology render problematic, some individuals' use of these mechanisms, but the very existence of the techniques marks at least the opportunity for a fundamental change in procreative opportunity.

However, these techniques of procreative control, while important, remain limited means for expression of personal intention. They are essentially reactive, offering only the ability to forestall parenthood. More recent developments in the field of reproductive technology, by contrast, dramatically extend affirmative intentionality. Intention about parenthood can now be expressed by means other than preventing the birth of a child. Steps can be taken to bring into being a child who would not otherwise have existed. Moreover, those means themselves represent a significant change: while contraception and abortion allow sex without procreation, modern reproductive technologies allow procreation without sex.\textsuperscript{33}

Because procreation and sex are now severable, these techniques eliminate uncertainty regarding procreative intention. The purpose of

\textsuperscript{30} Pregnancy may ensue without intent to reproduce either because birth control failed, or because it was not used. Non-use of birth control does not establish a clear intention to reproduce. For instance, some abstain from birth control for health, religious or aesthetic reasons, or because of differences of opinion with a partner. Moreover, some individuals see abortion as an acceptable method of after-the-fact birth control, and may use abortion to effectuate a before-the-fact intent to not procreate.

\textsuperscript{31} Thus, abortion does not so clearly as does birth control establish that there was no intent to procreate. Rather, it establishes that at the time of the abortion, there is no intent to procreate.

\textsuperscript{32} While technological and legal availability of techniques such as abortion are crucial developments, women in economically exigent circumstances may have no access to these techniques. The current line of Supreme Court cases on access to abortion makes this problem all too real. See Maher v. Roe, 432 U.S. 464 (1977) (equal protection clause does not require state to pay medically unnecessary abortion expenses for indigent women, nor does regulation impinge upon fundamental privacy rights); Harris v. McRae, 448 U.S. 297 (1980) (Hyde Amendment prohibiting federal reimbursement for all abortion expenses upheld); Webster v. Reproductive Health Servs., 109 S.Ct. 3040 (1989) (upholding statute allowing inter alia for prohibition on use of public employees or facilities to perform abortions). \textit{But see} Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (state constitution prohibits discriminatory Medi-Cal funding scheme that would cause poor women to surrender their right to privacy in abortion decisions).

\textsuperscript{33} Not all the techniques are recent, although new uses emerge. Artificial insemination has been around since the 1930s. See Guttmacher, \textit{Practical Experience with Artificial Insemination}, 3(4) \textit{JOURNAL OF CONTRACEPTION} 75 (1938), cited in Clarke, \textit{The Industrialization of Human Reproduction} 22 (1987) (unpublished manuscript on file with author).
those who invoke new reproductive procedures is clear, specifically targeted and unambiguous. Procreation does not occur by accident or as a byproduct; purposeful effort is directed to achievement of a specific outcome. When one undergoes sperm collection procedures or removal of eggs for in vitro fertilization (IVF); when one is artificially inseminated, or has an embryo implanted; when one directs that an embryo (or egg or sperm) be frozen for later use, one acts directly and unambiguously to achieve procreation.

Technological barriers may, of course, intervene between behavior and a desired outcome. As with ordinary coital means, efforts to procreate through reproductive technologies may not be successful, but unlike coital means, the uncertainties of reproductive methods are introduced by technological barriers, rather than by ambiguities of meaning or purpose.

2. TECHNOLOGY EXPANDS AVAILABLE OPTIONS

The second element that defines intention is the availability of alternatives. The existence of options allows a given outcome to be a meaningful expression of personal will rather than a product of fate, coercion or necessity.

Subdivision of a whole into parts allows new combinations and applications. Reproductive technology’s ability to subdivide biolog-

34. The success rates of infertility treatment techniques vary, and with some techniques are still extremely low. The American Fertility Society gives a figure of 11 live births per one hundred surgical procedures for IVF and 17% for gamete intra-fallopian transfer. Fleming, In the Search for Baby, A Last Resort, N.Y. Times, Feb. 1, 1989, at C10, col. 3. More generally, the Office of Technology Assessment estimates that even appropriate therapy will assist only 50% of infertile couples to achieve pregnancy. INFERTILITY, supra note 5, at 131, 146 (discussing the difficulties of accurately evaluating effectiveness). The effectiveness of some but not all techniques can be expected to improve as experience grows.

The less-than-optimal success rates, the “clinicalness” of the methods, and the involvement of experts and strangers may make the psychological experience of these techniques something less than “free” or “intentional.” Nonetheless, intention in the sense of purposefully directed, voluntary behavior, remains an appropriate description; intentionality should not, however, be confused with ease.

Moreover, while it is true that new techniques bring greater individual choice, modern techniques also impose dependency on expensive high-tech, professionalized methods. See Clarke, supra note 33 (discussing trend toward professional and technological, and therefore male rather than female, control of reproduction); Wikler, supra note 9, at 1046-47 (discussing feminist disillusionment with the male orientation of the medical profession).

35. Individuals attempting artificial reproduction may also, of course, be in psychological conflict about what they are attempting, but their behavior itself is directed to a clearcut end: reproduction.

36. One of the best known instances of this phenomenon occurred in physics. At one stage of knowledge, scientists thought the atom was the smallest unit of matter. Indeed the word “atom” comes from the Greek “atomos” which means indivisible. AMERICAN HERITAGE DICTIONARY OF SCIENCE 49 (1986). Only later was it discovered that smaller subparts, electrons, protons, etc., existed. Once the smaller components became known, new
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ical procreation both multiplies the options and makes them available to individuals whose choices were previously limited. One aspect of this partition has already been noted: procreation can be separated from sexual intimacy. Other types of biological “unbundling” have also developed: for example, gestation can be separated from egg-contribution; fertilization can occur apart from gestation both in location and in time.37

The creation of new biological possibilities also generates new personal and social options. Apart from the thirst for scientific understanding for its own sake, reproductive technological development was initially driven by the desire to assist those who were biologically unable to reproduce.38 However, once techniques are developed, their use need not be restricted to the infertile. Individuals having varying motives may seek to use different techniques. The reasons for using new techniques, and the personal options that could result from such use, may be loosely grouped into three categories; (1) options used to overcome biological infertility; (2) options desired for particularized personal reasons; and (3) options employed to accommodate systematic but socially rather than physically rooted infertility.39 Particular techniques themselves are more or less controversial.40 Moreover, different reasons for using a given technique invest it with different meanings; some reasons for using a particular technique, and some users, will be more controversial than others.41

a. Options for the biologically infertile

As various forms of assisted reproduction develop, those who are in some way biologically impaired (cannot produce eggs, cannot suf-
ficiently concentrate semen, have blocked fallopian tubes, are unable
to gestate, etc.) can often find a process or person to replace whatever
aspect of their reproductive capacity is dysfunctional. Some reproduc-
tive techniques (e.g., in vitro fertilization for a couple whose female
partner's fallopian tubes are blocked) involve only a conventional
couple assisted by medical personnel. Here, the subdivision of bio-
logical procreation expands choice simply by providing a technically
assisted opportunity to procreate for people who were previously unable
do so.

However, other techniques involve having another person substi-
tute for some impaired function in one or both of the partners wishing
to procreate. Egg donation or artificial insemination are such tech-
niques, as is surrogate gestation, whether or not accompanied by egg
donation. The very existence of a third party who may or may not
have any personal intimacy with those seeking to procreate and parent,
raises difficult personal, social and legal questions concerning what re-
lationship the individuals involved will have to each other and to any
child conceived in this fashion. Because of the implied disruption of
the nuclear family unit, the use of third parties has been far more
controversial than technically assisted reproduction per se. Moreover,
third party replacement of female roles has been far more controversial
than third party substitution for male functions. In part, this dis-
tinction results from differences in the underlying biological roles, with
their differences in temporal and physical involvement. But in part, it
likely reflects sexist mores that assume and insist that women not only
are but should be more intrinsically and irreversibly connected to chil-
dren than men are.

These techniques provide important new life choices: Individuals
previously unable to do so now have an opportunity to procreate. If
individuals attempt assisted reproduction, further decisions confront

42. About 85% of all couples seeking treatment receive conventional medical and
surgical therapy not involving a third party. See Fast Spread of Test-Tube Baby Clinic Spurs
Growing Concern, L.A. Times, July 14, 1988, at 3, col. 1. Many infertility centers will only
serve couples, refusing treatment to homosexuals or individuals without partners in an effort
to be as noncontroversial as possible. INFERTILITY, supra note 5, at 157.
43. Anna Kaminski performs a careful comparison of societal reactions to two
(somewhat) analogous processes: the donation of sperm by a man and the donation of an
ovum by a woman. She found that commercial sperm banks and paid "donation" of sperm
entered into social practice without significant controversy, in contrast to the social conflict
regarding use of a woman as third party replacement. See Kaminski, supra note 11, at 12-
15, 21-26. But see G. Corea, supra note 9, at 34-46 (arguing that artificial insemination was
energetically resisted when first introduced because it posed a threat to male control over
paternity.)
44. As one activist put it: "men seldom bond to their ejaculate," cited in Kaminski,
supra note 11, at 22. But neither do women bond to their ova; they bond to the product of
the reproductive process, the child. It would seem that in men sperm is sperm, whereas in
women an ovum is socially perceived as a potential child.
them. They need to choose appropriate methods of reproductive assistance. For example, they might choose actual individuals to play the relevant roles. They might make choices regarding the type of relationships, rights and responsibilities they desire for the people who are and will be involved, including any child born of the arrangement. Similarly, individuals who assist others in reproduction have choices not only regarding whether to participate, but also regarding whom to assist, and what kinds of relationships and responsibilities they want to have with those persons and with any resulting children.

b. Options desired for particularized personal reasons

Individuals who are biologically capable of reproducing in the "ordinary" fashion might nevertheless choose to use reproductive techniques. Thus, individuals could use assisted reproductive techniques for reasons of timing, personal convenience, selection of characteristics of offspring,\textsuperscript{45} avoidance of genetic defects, protection against changed circumstances (e.g., death, divorce), etc.\textsuperscript{46} Technologically, there would be no barrier to doing so.

Some non-biological reasons for using reproductive technologies might seem socially or ethically "good," for example, a happily married couple who very much want children might freeze semen, eggs or even an embryo before one partner undergoes a medical procedure which might result in sterility. Similarly, an individual whose life or health would be threatened by pregnancy, or who is at high risk for passing on genetic disease, might choose such techniques for reasons which many would sympathize with and support. Other reasons might seem "frivolous," for example, a couple might conceive through artificial insemination because busy travel schedules make it difficult for them to engage in sexual relations during fertile times of the woman's menstrual cycle.\textsuperscript{47} Still other reasons might be seen as "evil," or "wrong," for example, a couple might choose in vitro fertilization and embryo transplant in order to eliminate any female embryos because they do

\textsuperscript{45} See infra text accompanying notes 198-204.

\textsuperscript{46} For example, in a 1984 French case, a young widow wished to use the sperm of her then-dead husband to conceive a child. The husband had donated the sperm to a research center for experimental purposes. The center refused and the widow sued. Rubellin-Devichi, \textit{France: The Reform Wagon Rolls Again}, 25 J. Fam. L. 127, 131-32 (1986-87).

\textsuperscript{47} This variability in approval depending on reasons for use is illustrated in a public opinion poll regarding the \textit{Baby M} case. The number approving surrogacy varied from 63% where a wife was unable to bear a child, to 54% where the wife's health was at significant risk, to only 14% where the wife was afraid to bear the child. Kantrowitz, McKillop, Joseph, Gordon & Turque, \textit{Who Keeps 'Baby M'?}, Newsweek, Jan. 19, 1987, at 44, 48. Kristin Luker has discovered a similar tendency in public opinion about abortion to vary strongly with the reasons for the abortion. K. LUKER, supra note 10, 228-45.
not want to raise girls; another couple might choose surrogacy because the woman does not wish to interrupt her career by undergoing pregnancy.

Such personal choices have now become technologically possible. Certainly they expand the reach of individual freedom. Apart from cost, the principal questions are those of morality and policy that will be addressed in Part II. At this juncture, what is important is that such possibilities are becoming available and likely will be desired by at least some individuals.

c. Options for the "socially infertile"

A third set of individuals who could gain new options are the "socially infertile." The ability to separate procreation from sex also provides new choices to those who want to reproduce but are unwilling or unable to change important and stable aspects of their intimate lives in order to accomplish that goal. Of course, it has always been possible

48. Sex selection implemented through reproductive technology is one of the more controversial issues surrounding these technologies. Some object to sex selection simply as an instance of their underlying objections to abortion or reproductive technology generally. These concerns may be addressed by changes in the techniques. For instance, because amniocentesis does not allow abortion until fairly late in the second trimester, those who object to late but not early abortion may be more accepting if sex selection is based on chorionic villus testing available much earlier in pregnancy. Alternatively, if the objection is to abortion per se, IVF could be used to select for sex although currently high costs and low success rates of IVF are sufficient to make widespread use unlikely.

Many believe sex selection per se is morally objectionable and should be outlawed. In many cultures, girl children are less desired than boys; abortions for sex selection might well perpetuate stereotypes that devalue women. Morgan, Foetal Sex Identification, Abortion and the Law, 18 Fam. L. 355 (1988). See also, Wikler, supra note 9, 1044-46 (discussing various feminist concerns about sex selection). Note, however, that current law requires no justification for early abortions. As a result, sex selection can be regulated only by controlling methods of gaining the information regarding the fetus' sex.

49. Cf. S. Firestone, supra note 38, at 233 (praising freedom women would gain by being liberated from pregnancy and childbirth).

This possibility could eventually raise difficult problems for employed women. If it became fairly safe for women to have someone else gestate children, would that possibility become normative? Would employers, for example, be able to resist demands for maternity leave on the grounds that bearing one's own child was optional? While this is theoretically possible, it seems likely that in the foreseeable future enough women will want to bear their own children, and that society will be sufficiently approving of that choice, that no such analysis could prevail. Cf. M. Atwood, supra note 9.

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to separate sex and intimacy, not only in commercial contexts like prostitution, but also in the behavioral realities of either marital or nonmarital, heterosexual or homosexual relations. However, in modern culture, many people prefer to connect sex and interpersonal commitment. Therefore, when procreation required sexual relations, it was also associated with interpersonal intimacy and long-term commitment. Moreover, if sexual relations were to lead to procreation, the relationship had to be between a man and a woman.

Today's technology allows individuals to choose procreative roles independent of their decisions about sexual and, by extension, interpersonal intimacy. A woman may donate an egg, be artificially inseminated, or receive a fertilized egg or an embryo implant or transplant; a man could provide semen to a surrogate, or for in vitro fertilization—in all instances without having any intimate physical or social relationship with the other biological parent(s). Because procreation and sexual-interpersonal intimacy are no longer tied together, greater opportunities for varied familial arrangements arise. Single persons of either gender could procreate without compromising their single status. Individuals in homosexual relationships, just as individuals in committed heterosexual relationships where one partner cannot or chooses not to reproduce, could decide to procreate, without either betraying or abandoning the partner.

Furthermore, where procreation can be comparatively impersonal for the adults involved, the link between biological procreation and the socio-legal parenting of a child both becomes and seems less necessitous. The interpersonal involvement that frequently correlates with sexual intimacy also typically provides the social context in which adults plan to raise their children. If biological procreation can legitimately, that is non-sexually, occur apart from this personal context, then procreation can also more readily be seen as severable from the rearing of children: an individual could plan to rear a child biologically produced outside a particular intimate relationship. Conversely, because an individual could participate in reproduction without having either sexual intimacy or social ties with the other party(ies) to the procreation, an individual might more likely plan to procreate without intending to rear the child. Societal concerns about the desirability of these methods remain to be discussed, but technological developments


Note that an individual might be both biologically and socially infertile. Even if society restricted use of reproductive technologies only to those who were biologically infertile, issues regarding access by those with socially controversial family lives would remain.

51. See supra note 37.
that subdivide the reproductive process make such individual choices far more "thinkable" than they have previously been.

C. The Law of Parenthood

1. ASSIGNMENT OF PARENTAL STATUS

In the main, the law's assignment of parental status has followed nature. Biology provided definitive identification of the mother of a particular child. Bearing and birthing a child were physically apparent; motherhood was simply a fact. With nature giving authoritative guidance, legal norms had only to reflect and codify the physiologically obvious. The legal status of motherhood, and thus the maternal rights and responsibilities of rearing a child, were readily assigned.1

More remote in physical time and space from the gestation and birth of a child, fathers have always been more difficult to identify than mothers. In theory, fathers could be traced through the fact and timing of sexual intercourse with the mother. However, until modern methods of paternity testing were developed,3 as a practical matter, biological fatherhood has been a matter of inference rather than certainty.

The uncertainty attendant on natural fatherhood has made social values more critical and more obvious in determinations of legal paternity than in the law of maternity. For instance, primogeniture rules in Europe,54 welfare budgets in contemporary America,55 and the preferences of putative fathers or other family members56 as well as a

52. Unif. Parentage Act § 3, 9B U.L.A. 298 (1973) (providing natural mother is woman who gave birth). The comment to section 21 of the Act states that the drafters anticipated that any issue regarding who was the mother of a child would arise so infrequently, and would be so easily settled by a judge, that they left out of the statute the details of a declaratory action to determine the mother-child relationship. Id. § 21 comment.

53. Serologic blood typing tests have long been used to determine that a particular man cannot be the father of a given child. Recently, human leukocyte antigen testing (HLA) and even more accurate DNA tests have led to admission of evidence showing a high probability that a certain man is the father. For a discussion of validity and admissibility of such tests, see Kaye & Kanwischer, Admissibility of Genetic Testing in Paternity Litigation: A Survey of State Statutes, 22 Fam. L.Q. 109 (1988). See also Comment, DNA Fingerprinting and Paternity Testing, 22 U.C. Davis L. Rev. 609 (1989).


55. For instance, Aid to Families with Dependent Children is generally reduced or denied if the genetic father of the child is available to provide support. In 1988, welfare legislation was amended to force biological fathers to provide child support by automatically deducting payments from the father's paycheck. Eaton, House Approves Welfare Overhaul Bill but Other Social Measures Stall in Senate, L.A. Times, Oct. 1, 1988, § I, at 18, col. 1.

56. Michael H. v. Gerald D., 109 S. Ct. 2333 (1989) (despite both strong biological evidence of paternity and established relationship with child, where child born into established marital family, putative natural father denied right to challenge statutory presumption that husband of child's mother was legal father of child).
societal preference that children be legitimate have affected whether and how fatherhood was determined. Under some circumstances, men have been able to attain legal fatherhood by acknowledging paternity of a given child. Often, fatherhood has been presumed derivatively on the basis of a man's relationship to a child's mother, particularly where the pair are married.

Paternity-by-preservation rules reflect various societal concerns, but one presumptive purpose has been the codification of empirical inference—the best available method of determining factual biological paternity. Who is the biological father? The most likely candidate is the man having sexual intercourse with the mother. Who is most likely having sexual intercourse with the mother? Her husband. However, what purports to be an inference about biological fact may actually grow out of a normative aspiration and may readily be transformed into a prescriptive command about marriage and family, often without acknowledgement that such a transformation has taken place. The important issue becomes not who is, but who should be having sex with the mother: her husband. Thus, the social construct, in fact normative and mutable, draws substantial but disguised legitimacy from the representation that it simply expresses "givens" of nature.

Until recently, the difficulty of proving biological paternity allowed the normative and biological bases of legal presumptions about fatherhood to blur together. And if they did not precisely correlate, in circumstances of uncertainty about biology a preference for legitimacy seemed prudent and permissible. However, modern methods can prove biological paternity to a near certainty. As a result, the law today must

57. See M. Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 196-202 (1985) (describing the historical preference for legitimacy as both a protection for innocent children, and a way of preventing bastards from becoming wards of the state).
60. One can infer that the presumption is empirically rather than normatively based because it applies except where the husband is impotent or sterile. See, e.g., Cal. Evid. Code § 621(a) (West Supp. 1990). Such an exception would be relevant to the empirical inference but not to the normative judgment. Moreover, such presumptions may sometimes be rebutted by evidence of sexual intercourse between the mother and the alleged father, by blood tests, and by opinions based on the duration of pregnancy. See, e.g., Unif. Parentage Act § 4, 9B U.L.A. 287 (1973). All of these bases for rebuttal speak to the biological facticity of fatherhood.
61. American society may have special tendencies to present social and normative judgments as scientifically or biologically driven. See D. Schneider, American Kinship: A Cultural Account 24 (2d ed. 1980). As Schneider points out: "So much of kinship and family in American culture is defined as being nature itself, required by nature, or directly determined by nature that it is quite difficult, often impossible, in fact, for Americans to see this as a set of cultural constructs and not the biological facts themselves." Id. at 116.
choose whether to assign legal fatherhood on the basis of biological fact or social values, such as conventional family norms.

In recent years, the Supreme Court has established its preference for conventional nuclear families over biological connection in certain circumstances. In Lehr v. Robertson, where a biological father contested rights to a child against a now-married mother’s husband, the Court protected the new intact family. Such unwed father cases pointed strongly to socially defined fatherhood but were somewhat indirect in that they involved paternal rights to prevent an adoption rather than the fact of paternity per se. However, in its most recent decision, the Court faced a direct conflict between the biological and normative premises of paternity itself. In Michael H. v. Gerald D., the Court gave resounding priority to the normative judgment over the biological fact, holding constitutional a California statute that it described as making biology “irrelevant” to legal paternity. Although these decisions did not involve artificial reproductive techniques, they are critical because they irretrievably expose the socially constructed character of legal fatherhood.

While it is biological certainty that has highlighted policy choices regarding fatherhood, it is biological uncertainty that demands judgment regarding motherhood. As noted earlier, the status of motherhood used to be self-evident, but new reproductive methods that can split genetic from gestational components render the legal determination newly problematic. Arguments about appropriate resolution of this problem will be discussed in Part II. For now, the point is simply that both for mothers and fathers, biological givens and empirical facts can no longer be assumed to drive the legal assignment of parental status. Once biological justification is undermined, choices must be made. The prudence of particular normative judgments becomes debatable, and new alternatives such as the one proposed in this Article can be more openly considered.

62. Lehr v. Robertson, 463 U.S. 248 (1983), in which the Court held that despite his having neither notice nor a hearing, an unwed biological father’s rights to object to termination of his parental rights through adoption of his child by its mother’s new husband had been sufficiently protected by New York law. The father had not lived with or supported the child but had recently filed an affiliation action and sought visitation. The Court approved the outcome because it saw mere biological connection as insufficient to guarantee paternal rights. The Court rested its holding in part on the fact that “state laws almost universally express an appropriate preference for the formal family.” Id. at 257. See infra text accompanying notes 320-31.

63. See, e.g., Lehr, 463 U.S. 248; Quillioin v. Walcott, 434 U.S. 246 (1978). Although the two issues are always interconnected, the best interests of the child are the focal point in adoptions, while paternity actions address parental rights.

64. 109 S. Ct. at 2340 (1989) (holding constitutional a statute preventing biological father or child from challenging presumptive fatherhood of mother’s husband).
2. ATTEMPTS AT PRIVATE ORDERING

Given the law's traditional approach to parental status, it is no surprise that efforts to arrange parental rights and responsibilities through private ordering have received little credence in the courts. A few recent cases have considered how representations or promises made by procreative partners should affect their parental rights or responsibilities. For example, one partner in ordinary coital reproduction may have promised not to reproduce, or have misrepresented an inability to do so; or a party may have agreed not to claim or exercise parental status despite biological participation in the procreation. Thus far, courts have held that such promises are not enforceable through private law actions in tort or contract because under standard analysis, the child is deemed to have a right to support that cannot be foreclosed by the parents' agreement or statements. Granting this point, representations or promises about parental intentions might alternatively be enforced by one parent suing the other for damages flowing from breach of a duty or an agreement between them without directly impinging on the child's right to support. However, in the few such suits filed, courts have generally been unreceptive to these actions as well.

3. THE ADOPTION EXCEPTION

While legal assignment of parental status has, typically drawn legitimacy from its reflection of and alignment with biological givens,

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65. The issue is usually raised as a defense to a paternity suit. See, e.g., L. Pamela P. v. Frank S., 88 A.D.2d 865, 451 N.Y.S.2d 766 (N.Y. App. Div. 1982) (mother deliberately misrepresented to defendant father that she was using contraception; father argued he should not have to support the resulting child because of deceitful interference with his constitutional right to choose not to procreate. The New York court held that the mother's representation was not relevant to a child support proceeding), aff'd, 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983); accord Hughes v. Hutt, 500 Pa. 209, 455 A.2d 623 (1983). See also Linda D. v. Fritz C., 38 Wash. App. 288, 687 P.2d 223 (1984) (father's counterclaim for breach of contract and misrepresentation regarding use of birth control not actionable in a paternity proceeding).

In addition, litigation regarding private agreements about parental rights has occurred in a few cases involving artificial reproduction. Cases involving artificial insemination are discussed infra text accompanying note 134. Disputes about surrogacy also fit within this category. See infra text accompanying notes 235-340.

adoption has long constituted an important, albeit partial, exception. Adoption provides an avenue to parenthood through legally recognized intention rather than through biological connection. Individual intentions, socially recognized and legitimated, are the trigger both for surrendering a child and for adopting one. However, the legal system of adoption has traditionally mimicked, insofar as possible, the conventional nuclear family and its presumed reflection of biological parenthood.

Standard adoption procedures substitute the adoptive for the biological parents. The biological parents are to “disappear” from the child’s life and vice versa. All records of the parties and the circumstances are buried in secret files of a “go-between,” never to be revealed to any of the parties. No ties of knowledge, name or personal contact are to remain after the initial redefinition takes place. This approach has been understood and justified as being for the welfare of all concerned. But it may also be analyzed as a limitation unnecessarily imposed by concepts too readily assumed to be mandatory. If the primary pattern is biological parenthood crystallized in the legal framework of the conventional nuclear family, anything else seems aberrant. Therefore, facts must be altered and suppressed in order to make what began as intention mirror as closely as possible the standard model of socially legitimated biology. The approach to adoption is essentially one of assimilation rather than one of acknowledged variation.

In recent years, the efforts of adopted children to find their “real” parents, the resistance of some mothers who are giving up their babies to being utterly eliminated from the lives of their children, the conflict

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67. Adoption involves the consent of all the parties. For example, California requires consent of both the adopting parents, CAL. CIV. CODE § 223 (West 1982), and stipulates consent of the birth parents except in cases of relinquishment or desertion, which requires an intent to desert, id. § 224.

68. Traditional adoption statutes provided for sealed records, See, e.g., CAL. CIV. CODE § 227 (West Supp. 1990). In the face of growing demands by both adoptees and birth mothers, several states have revised their statutes to provide identifying information as long as all parties consent. New York, for instance, has set up a central register for both identifying and non-identifying information and a system for adoptees and birth parents to search the register. N.Y. PUB. HEALTH LAW § 4138-b, 4138c (McKinney 1985).

69. See Churchman, The Debate Over Open Adoption, 44(2) PUB. WELFARE 11 (1986) (discussing organizations and arguments for and against open adoption). See also Note, Open Adoption Records Movement, 26 J. FAM. L. 395, 397-98 (1987-88) (secrecy was thought to promote an integrated family free of a birth parent’s interference and protect the adoptee from the stigma of illegitimacy).

70. See Note, supra note 69, at 395-97 (recounting moves to open up the adoption process). “Adopted child syndrome” was used as a defense in a recent murder case where an adopted child set his adoptive family’s home on fire so that he could seem to disappear, and thus be free to search for his birth mother. Lifton, How the Adoption System Ignites a Fire, N.Y. Times, Mar. 1, 1986, at 27, col. 2.

71. Several organizations of birthparents exist to push for an end to closed adoptions. Churchman, supra note 69, at 11-12.
between rights of birth parents and those of adoptive parents, as well as an increase in private adoptions that do not necessarily honor the norms of mainstream adoption all suggest that the model used by conventional agencies does not reflect preferences and needs of many parties to the adoption transaction. Intention, rather than biology, is the basis for giving up or adopting a child, but an imagery of biology locked into conventional family forms has shaped the transaction. Neither surrendering biological parents nor adoptive legal parents have had more than one choice about how to structure their relationship to each other or to the child. After the initial choices that triggered adoption, social and legal convention have smothered the element of intention in structuring the parental relationship. Thus, while adoption is a partial exception to the generalization that legal parenthood has traditionally tracked biological fate and fact, the exception is much attenuated.

II. PROPOSAL AND CONSIDERATIONS OF POLICY

A. A New Legal Basis for Determining Parental Status

Part I showed that modern reproductive techniques significantly expand the role of individual intention (purpose and choice). While legal designations of parental status have been legitimated by their presumed reflection of biological fact, modern reproductive developments both expose and intensify the influence of social norms. Given the socially constructed aspects of legal parenthood, increases in procreative intentionality present pressing social and legal issues. How ought the law to react?

Should the law facilitate or inhibit use of the various artificial techniques? How should it respond to the new social and personal alternatives these techniques generate? To what extent ought the law

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to leave the relevant decisions and arrangements to private ordering? How much and what regulation ought to be imposed? Running through these specific questions is a recurrent meta-question: What are the implications for the law of heightened intentionality in procreative behavior? Ought the law to embrace and institutionalize such intentions, or ought it to ignore or suppress them?  

1. INTENTION SHOULD BE THE DETERMINING FACTOR

Parenting relationships are among the most significant in life, both to the individuals involved and to the society whose future depends upon its children. While conception may occur quickly and without much deliberation, parenthood competently performed is an unusually important, substantial and long-term activity. Parenting involves such large amounts of time, energy and money that deep commitment to

74. Intention has growing legal and ethical significance in other areas of procreative policy as well, particularly in the context of abortion. Differences in parental intention could justify allowing one woman an unrestricted right to abort a first trimester fetus, while making another liable for negligent behavior that injured a first trimester fetus that she brought to term. See Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 437-50 (1983).

Similarly, removal of a late term fetus from the womb may alternatively be characterized as “induced labor” or as “abortion” depending on the intentions of the mother and/or the doctor performing the procedure. As techniques for transplanting or artificially gestating fetuses emerge, a major dispute is likely to arise regarding whether a mother who does not wish to continue a pregnancy can effectuate her intention not only that the aborted fetus be removed from her body, but also that it not be brought to term through any alternative gestational process. The litigated issue of whether individuals or the state should control the methods of abortion is fundamentally a dispute over whose intentions regarding the future of the fetus should prevail. See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986) (striking down as posing too great a threat to woman’s health a statutory requirement that doctors performing abortions after viability use techniques most likely to result in fetal survival). See Robertson, *Gestational Burdens and Fetal Status Justifying Roe v. Wade*, 13 AM. J.L. & MED. 189, 203-09 (1987) (discussing method and timing of abortion, and of duty to rescue live-born abortus in light of competing interests of woman and fetus). In addition, where one or several fetuses have a better potential to survive if others are removed, it is parental intention that differentiates the fetuses, investing them with different futures. G. SHER & V. MARRIAGE, FROM INFERTILITY TO IN VITRO FERTILIZATION: A PERSONAL AND PRACTICAL GUIDE TO MAKING THE DECISION THAT COULD CHANGE YOUR LIFE 61-63 (1988) (discussing selective “pregnancy reduction”).

Intention could also distinguish what might otherwise be similarly situated embryos where, of a number fertilized in vitro, some are implanted and others are discarded. See Robertson, *supra* note 11, 971-81 (1986) (discussing the legal and ethical status of embryos, including issues of discard). Alternatively, discard of embryos could be justified on the ground that such embryos are the property of the mother or parents or fertility center. Use of intention as a source of norms, however, avoids the implications of “thing-hood” that make the property characterization disturbing. See also the dispute between a divorcing couple over future of seven frozen embryos, where failure to express intentions for possible eventualities has produced a difficult dilemma. Davis v. Davis, No. E-14496 (Tenn. Cir. Sept. 21, 1989) (Westlaw, TN-CS database). Smothers, *Embryos in a Divorce Case: Joint Property or Offspring*, N.Y. Times, Apr. 22, 1989, at 1.
the task seems highly desirable. The needs and dependency of a child are no doubt powerful motivators. Nevertheless, people perform major and responsible tasks better when they feel a desire, exercise a choice, and make a commitment. It is thus preferable for people to be more rather than less purposeful about their procreational and parenting intentions.

Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood. As with most arenas in which private ordering is encouraged, that rule ought not to be absolute. Rather, it should be a default rule, an enabling rule that allows intention to govern unless and until policy restrictions on particular types of private arrangements are articulated, justified and adopted. A number of such restrictions have been suggested regarding the use of artificial reproductive techniques in general, and regarding surrogacy—the illustrative example analyzed in this Article—in particular. Some of those proposed regulatory restrictions are extensively discussed in this Article (e.g. commercial vs. altruistic surrogacy; mandatory provision for revocation by surrogate after birth; use of techniques restricted to conventional families; selection of particular traits). Some receive more limited consideration (e.g. contracting regarding abortion; screening of prospective parents). Still others are not specifically analyzed here at all. My purpose is not to debate the wisdom or lack thereof of all possible restrictions but rather to propose a new cognitive map. I argue for a new meta-rule that makes bargained-for intentions determinative of legal parenthood. Such intentions may, of course, be motivated by or aligned with biology or conventional social morality. But whether those factors converge or diverge, intentions should govern the legal assignment of parental rights and responsibilities.

2. THE SCOPE OF AN INTENT-BASED POLICY

An important question concerns what universe of parental determinations should be embraced within this proposal. While I am fa-

75. See infra note 141 regarding the influence of control on quality of performance. This proposition is also deeply rooted in our historical, political and philosophical belief system. It is a fundamental tenet of our system of government that when people participate and have a stake in decisions, they have a greater sense of commitment to and collaboration with the resulting arrangements. With reference to the evolution of nineteenth century family law, an historian of the family recently concluded that a “new conviction was being woven into American family law: voluntarily assumed domestic relations provided the most secure foundation for family success.” M. Grossberg, supra note 57, at 218.

76. Presumptive, because as with any other regime for determining parental status, circumstances might arise in which that status would be shifted or terminated, as for example, where unfitness is demonstrated, or where parenthood is abandoned or surrendered. See Bartlett, supra note 50.
vorably disposed toward more general adoption of intent as a determinant of legal parenthood, I restrict this current proposal to instances where children are brought into being through "artificial or assisted reproduction." The category of artificially or assisted reproduction differs from ordinary reproduction in ways that are directly relevant to this proposal.

First, there are major differences in feasibility. The law recognizes bargained-for intentions in order to enable important present decisions to be projected into the future, creating enforceable obligations that allow individuals to control or reduce the uncertainty to which they are otherwise subject. Where artificial or assisted reproductive techniques are used, the need to reduce uncertainty, to project decisions into the future, and to protect reciprocal expectations and reliance is especially significant. In these settings, the necessity of planning; the time, effort, emotion and money expended; and the involvement of non-intimates, both professionals and reproductive participants, mean that the intentions of those involved are more likely to be deliberative, explicit and bargained-for than is in the case in most situations of ordinary coital reproduction. Moreover, non-intimates who have serious expectations and reliance invested in arrangements with one another are far more likely both to need and to seek formal dispute resolution than are conventional sexual partners. By contrast, where ordinary reproduction occurs within ongoing relationships, severing intention about procreation and parenthood from other motivations would, as a practical matter, be substantially more difficult than where non-intimates contract.

Second, there are differences in moral and factual legitimacy. The fairness of imposing a status-based parental regime is far weaker in instances of artificial or assisted reproductive techniques. The justification for such outcomes in ongoing relationships between coital partners derives, at least in part, from presumed intention. In artificial or assisted reproduction the factual base for such presumptions about intention is often lacking.

Finally, there are different prudential concerns. The newness of the issues presented by scientific changes virtually demands consideration of new legal approaches and rules. The much smaller numbers

77. Conventional married couples using artificial reproductive techniques that do not involve third party assistance may be least likely to fit these assumptions. For example, the divorcing couple currently disputing over the fate of frozen embryos made no agreement regarding the eventuality of divorce. See Davis, No. E-14496. However, the involvement of professionals, whether doctors or infertility entrepreneurs, increases the likelihood that an agreement covering such obvious eventualities will be made. Indeed, one positive role that entrepreneurs/middlepersons could offer is to require that couples consider future eventualities. Cf. B. Rothman, Recreating Motherhood 25 (1989) (one thing all feminists agreed on was discomfort over the role of brokers in surrogacy).
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involved in assisted reproduction would make it a less risky zone for preliminary experimentation.

The boundaries of the category within which I would determine parental status on the basis of intention are difficult to establish. Artificial reproduction cannot be defined with precision; its perimeter can, however, be suggested. The proposed category would encompass all procreation other than "ordinary procreation." Although "ordinariness" could be tested in biological or social ways, emphasis should be on departure from the biological norm. Thus, artificial or assisted reproduction would encompass all non-coital methods of conception, such as artificial insemination, or in vitro fertilization. It would also include instances where genetic or gestational assistance by third parties is employed before or after conception, for example egg donation or embryo transplant.

Even stating the concept as a biological one, our notions of ordinariness are so entangled with conventional morality that the lines I suggest seem sometimes counter-intuitive, and, in any case, debatable. Some instances of procreation would be included that seem comparatively "ordinary" in that they involve only conventional married couples who need technical assistance (e.g. artificial insemination used to concentrate the husband's sperm). Excluded would be some instances of procreation that may not seem fully "ordinary" because they occur in socially unconventional circumstances (e.g. a single woman who becomes pregnant through coitus with a man who has no continuing relationship with the woman or with the child, perhaps lacking even knowledge of the child's existence.) While some of the necessary classificatory decisions would be clear, this definition, as others, would involve disputes at the margin. Indeed, perhaps more than most, this category would be contested; the indeterminacy of future scientific developments and their consequences is greater than those assessed by most categorizations.

B. Considerations of Policy Regarding Intent-Based Legal Parenthood

If intention were to play the role proposed, contracts as a means of private ordering would become important in arranging certain instances of procreative behavior and parental status. Before one could conclude that contract would be a possible or desirable mechanism for structuring the decisions and expectations that are involved in the use of reproductive techniques, a number of more specific questions of policy and prudence require consideration. These questions may be clustered around two central issues:

1) To what extent is private decision-making about procreation and parental status a desirable thing? This question implicates objec-
tions to the procreative methods themselves as well as concerns about the social consequences of privately, as opposed to publicly, dictated ways of ordering legal parenthood and ultimately, "family-ness" itself.

2) If a substantial degree of such private ordering were acceptable, would legal enforcement of such privately structured decisions be both feasible and desirable?

Before discussing these issues in the specific context of agreements about artificial or assisted reproduction, several points regarding family policy in general are relevant. Part I noted that the law's traditional status approach to family life entailed rejection of private ordering of parental rights and obligations. The state's marital and parental status regimes preempt normative control over the family; private ordering would threaten that control. Resistance to private ordering also reflects classic objections to state intervention in the intimate sphere of the family.

These traditional rationales for regulating families through a status regime rather than through private ordering have substantially eroded. First, the two assertions embody an important inconsistency. The state claims normative control for publicly imposed values but simultaneously rejects efforts to enforce private expectations on the ground that state "interference" in the intimate sphere is inappropriate and disruptive. Second, the arguments are independently unpersuasive. Variations in family substance and style have received greater recognition and tolerance; norms about intimacy have become more pluralist and relative. Moreover, a host of considerations—including demands to vindicate criminal and tort policies, the need to protect expectations and reliance, and a growing skepticism about the so-called "private" realm—have significantly increased courts' willingness to intervene in relations both between adult intimates and between parents and chil-

78. The arguments summarized here are made in detail in Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 204 (1982).

79. On a variety of grounds, including preservation of domestic harmony, prevention of fraudulent or collusive suits, and lack of institutional competence, courts were historically reluctant to redress tortious injuries between members of the same family, particularly intimate partners. However, that reluctance has substantially diminished, as, for example, with recent suits against sexual partners for transmitting diseases such as herpes. See, e.g., Maharam v. Maharam, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986) (cause of action stated for wrongful transmission of genital herpes by husband to wife). Such cases involve only adults, thereby making the issues simpler than where a child's welfare is also at stake. However, they do indicate some willingness to provide legal redress for even those injuries between intimate partners that would previously have been considered too "intimate" or too "private" for adjudication.

Contract as well as tort actions between intimates have traditionally been viewed with suspicion. See Restatement (Second) of Contracts § 190 (1979) (holding that contracts that alter an essential incident of the marital relation are unenforceable as against public policy). However, here, too, the reluctance to enforce agreements between intimates has been under considerable attack. As policy concerns such as the deterrence of tortious conduct and
These broad changes in family policy combine to create a receptive background for the proposal made in this Article.

1. IS PRIVATE ORDERING DESIRABLE?

Our society generally favors the fulfillment of individual purposes and the amplification of individual choice. Developments that expand the arena of voluntary purposeful decision and action are strongly favored. Our political and cultural traditions emphasize individual liberty, particularly in central arenas of personal life, such as reproduction. In particular, we constrain the government from intruding on the punishment of criminal violence have overcome the traditional reluctance to intrude the law into intimate relations, so, too, the enforcement of expectations has been urged as an important concern in such relationships. See, e.g., Shultz, supra note 78, at 274-91 (tracing courts' growing acceptance of actions between intimates and arguing for extension of that trend).

80. Even under the traditional status-based regime, conflicts over parental rights and responsibilities have been regularly adjudicated by courts, as for example, when parental status is determined, transferred or terminated, or when custody or visitation are settled. Moreover, with the decline of the view that children are property and subject to virtually unrestrained authority of their parents, with the growing concern about children's rights in general and child abuse in particular, additional barriers to legal intervention in parent-child relations are eroding. With the demise of intra-family tort immunity, more suits for tortious injury of children by parents have been successful. See Note, The Child's Right to 'Life, Liberty, and the Pursuit of Happiness': Suits by Children Against Parents for Abuse, Neglect and Abandonment, 34 Rutgers L. Rev. 154 (1981) (tracing history of parental immunity, urging broader liability of parents to children and proposing model statute). But see J. Goldstein, A Freud, & A. Solnit, Beyond the Best Interests of the Child (2d ed. 1979) [hereinafter BEYOND THE BEST INTERESTS] (vigorous and sweeping argument that parental authority and discretion should be sustained in all but clearcut cases of physical abuse). Courts have generally refused to entertain actions by children against parents for intangible injuries inflicted, for example, by causing a child to be born illegitimate. See, e.g., Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (child may not recover in action against natural father for burdening child with stigma of illegitimacy, cert. denied, 379 U.S. 945 (1964). A particularly controversial aspect of this area of law involves potential maternal liability for prenatal injuries. In the latter regard, see, e.g., Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980) (child could sue mother on theory that taking antibiotic during pregnancy was negligent and caused tooth discoloration); see also discussion in Robertson, supra note 74, at 438-42 (arguing that mothers should be accountable for avoidable behavior that injures a fetus later born).

Moreover, private intentions already govern parental rights and responsibilities in some circumstances. See Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce 88 Yale L. J. 950 (1979) (private agreements governing not only child support but also custody and visitation are routinely approved). Granted that support, custody and visitation are less weighty than parental status per se, doing what is best for the child is central in both settings. However comforting the idea of "the best interests of the child" as an abstract standard of decision, a child's best interests will, in many an ordinary case, be best served by effectuating the deliberate intentions of his parents. See sources cited infra notes 140-41.

81. One recent work that includes both theory and empirical observation comments on the centrality of individualism in American life and culture: "It seems to us that it is individualism, and not equality, as Tocqueville thought, that has marched inexorably through our history." Habits of the Heart, supra note 14, at vii.
personal freedom and privacy to any extent greater than is essential to fairness and societal survival. Respect for persons, and for their autonomous life choices, is a fundamental tenet of our philosophical heritage. Influential, too, is the utilitarian principle that achieving the greatest good is the appropriate goal of human action. In general, individuals can best determine what will maximize their happiness, and should make their own choices accordingly unless in so doing they would injure others. Absent compelling reasons to the contrary, then, our society's predisposition would be to support developments that extend and enhance individual purpose and choice.

However, arrayed against these general principles stand a number of interrelated claims about harms that might flow from comparatively unrestricted private control over the uses and legal consequences of reproductive techniques. Some objections to reproductive technologies emphasize characteristics thought to be intrinsic to the methods themselves. Others see various consequences flowing from private governance of the techniques and of the resulting social and legal arrangements as the essence of what is objectionable. While these concerns overlap and interconnect, certain themes stand out.

82. Constitutional protection for a "zone of privacy" into which the government may intrude only for compelling reasons has been grounded in the first, third, fourth, fifth, ninth and fourteenth amendments. See generally L. Tribe, supra note 11. The value upon which this privacy right rests may be characterized as the value of "autonomy or control over the intimacies of personal identity." Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233, 236 (1977). See, e.g., Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (sterilization of repeat felons violates "the basic civil rights of man" to reproduce); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (statute prohibiting distribution of contraceptives to married couples is "repulsive to notions of privacy surrounding the marriage relationship"); Roe v. Wade, 410 U.S. 113 (1973) (statute criminalizing abortion violates a woman's right to decide whether to end her pregnancy).

There is a developed tradition in feminist theory critiquing the notion of privacy as it functions to maintain gender inequality. See generally essays collected in S. Benhabib & D. Cornell, supra note 14. The most radical feminist rereading of the notion of a constitutionally protected right to privacy has come from Catharine MacKinnon. See, C. MacKinnon, Feminism Unmodified: Discourses on Life and Law 93-102 (1987) ("the right to privacy is a right of men 'to be let alone' to oppress women one at a time" quoting Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 190, 205 (1890)).

83. While many have advocated respect for persons as a central premise, among those most fundamentally associated with this value is Immanuel Kant. See, e.g., I. Kant, Groundwork of the Metaphysic of Morals 105-06 (H. Patton trans. 1964).

84. Perhaps the best known advocate of this view is John Mill. J. Mill, On Liberty 6 (1873) ("The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself; his independence is, of right, absolute.") But see Dworkin, Is More Choice Better than Less?, 7 Midwest Stud. Phil. 47 (1982) ( canvassing reasons why the widespread presumption that more choice is always better may not be correct); Shapiro, On Not Watering All the Flowers: Regulatory Theory and the Funding of Heart Transplantation, 28 Jurimetrics J. 21 (1987) (arguing that on some occasions reinforcement of transcendent social values such as the value of life might justify limiting autonomy).
a. Hubris?

(1) Human "meddling?"

The Catholic Church recently reaffirmed its view that no artificial techniques should be employed in reproduction. This prohibition extends even to comparatively uncontroversial contexts (e.g. biologically infertile married couples using only their own gametes, but requiring some technological assistance to procreate). Church opposition to birth control and abortion rests heavily on perceptions about taking innocent life. The Church’s recent stand on reproductive technology, however, makes clear its conviction that comparatively direct and intentional control over procreation is per se morally wrong. For some, procreation should be God’s will; too much human control amounts to hubris.

A secular version of this objection may be somewhat irreverently shorthanded as, “It’s not smart to mess with Mother Nature!” These views range from generic “know-nothingism” that categorically resists all scientific progress to sophisticated theological, ethical and scientific arguments questioning our ability to predict and our capacity to manage the outcomes of scientific discovery. At bottom, these doubts, religious and secular, concern the wisdom and capability of human intention, individual or collective, when contrasted with nature, fate, ontology or God as sources for ordering life.

To some extent such claims are not answerable; they are matters of faith or belief more than of reason. However, any objection based on “unnaturalness” per se would sweep away numerous medical procedures already routinely used and perceived as valuable. Furthermore, as with redefinition of death in the wake of mechanical maintenance of respiration and heartbeat, we will have to make decisions about some of the reproductive issues that are upon us. Only by totally

85. See generally Instruction, supra note 9.
86. See, e.g., Humanae Vitae (1965) (stating the church’s opposition to non-natural forms of birth control).
87. See Instruction, supra note 9 (artificial insemination, in vitro fertilization and surrogate motherhood are morally wrong because they occur outside the traditional procreative process). See, e.g., McCormick, How Brave a New World 311-12 (1981), for discussion of the traditional Catholic viewpoint.
88. Perhaps the best known of this school of critics is Jeremy Rifkin, President of the Foundation on Economic Trends. Rifkin has led opposition to commercial use of biotechnology. See, e.g., Ethics in Embryo, supra note 9. Philosophers and theologians have long discussed the relationship between man and nature. See, e.g., McCormick, Theology and Bioethics, Hastings Center Rep., Mar.-Apr. 1989, at 5 (discussing various models of this relationship, e.g. the “power-plasticity” model in which nature is perceived as alien to humans, to be used, shaped and dominated by them vs. the “sacro-symbiotic” model in which humans are part of nature, not its masters but its stewards).
89. See Caplan, supra note 38, at 74-75.
barring any technological assistance to reproduction could additional human decision be wholly avoided. Although some segment of the population would endorse that view, society at large seems unlikely to adopt such a categorical bar. Significant restraints on scientific research and medical practice seem improbable given the social power of doctors and scientists and the generally positive attitude of Americans toward science and technology.\textsuperscript{90} Moreover, both individuals and the law have placed great priority on procreative interests.\textsuperscript{91} Protection and latitude for at least some technological assistance in actualizing these interests seems predictable. In particular, the social cost of denying desired outcomes that are technologically attainable to those who fit conventional definitions of family but are biologically ill-fated seems so high as to be unacceptable. Artificial insemination, for example, is already socially and legally accepted at least for use in conventional marriage,\textsuperscript{92} and reversal of that policy seems unlikely. Instead, artificial insemination will probably serve as a persuasive wedge opening the way for other developments.

(2) Choice is essential: the case of two mothers

Given acceptance of some artificial techniques, decisions about specific issues will simply have to be made. Social policy demands that someone be committed to rearing any child brought into the world. In recognizing or designating a legal “parent,” the law assigns responsibility for a given child to particular adult(s).

In the recent Michael H. case, discussed above, biological paternity was rejected in favor of conventional nuclear family values in determining who should exercise the rights and privileges of legal fatherhood. The case dramatizes the necessity of a choice by the law between two claims to fatherhood. Similarly, assigning the status of “mother” where genetic and gestational functions are split requires the exercise of social

\textsuperscript{90} See generally P. Starr, The Social Transformation of American Medicine (1982) (documenting the extraordinary rise in power of the American medical profession, a rise tied to American faith in science). Starr states: “The medical profession has had an especially persuasive claim to authority. . . . It enjoys close bonds with modern science, and at least for most of the last century, scientific knowledge has held a privileged status in the hierarchy of belief.” Id. at 4.

\textsuperscript{91} Most of the constitutional procreative interest cases, are aspects of the right to privacy. See supra note 84.

judgment.93 Two axes of policy decision are involved: (1) What, substan-
tively, should be the answer to the question: Who should be rec-
ognized as a child’s parent? and (2) Who should determine the answer?

With regard to the substantive issue, either gestation or genetics
could be chosen as the legally determinative role. To choose between
competing biological claimants, one might compare the gestational and
genetic roles to determine which is more important. Both genetics and
gestation affect the child’s long term future. The genetic parent deci-
\[94\] sively influences both the physical and psychological makeup of the
individual.94 However, events during pregnancy can also have life-long
impact.95 Moreover, the gestational mother has “done the work” of
nine months of pregnancy, suffering its attendant physical invasion,
the curtailment of behavioral freedom, and the physical pain, risk and
economic costs of childbirth.96

Because both mothers have a significant “flesh and blood” rela-
tionship to the child, both would presumably have the felt connection
to the child that we associate with biological ties. While some may feel
the connections forged by months of gestation are stronger,97 others
would likely emphasize the vital role of genetics.98 Both women would

93. For example, in vitro fertilization may use a donated egg from one woman (the
genetic mother) which is then implanted in the womb of a second woman who carries the
child to term (the gestational mother). A transplanted embryo may produce the same outcome.
See L. ANDREWS, MEDICAL GENETICS: A LEGAL FRONTIER 162-63 (1987). See also Njeri,
Test Tube Mother: It’s Not Just a Job, L.A. Times, July 30, 1987, § v, at 1, col. 1 (describing
gestational surrogate carrying a fetus conceived through IVF with the egg of the intending
mother).

Thus far men’s biological role remains unitary, although I was told recently of an
instance of testicular implant in Europe. If the story is true, there may be a new twist to male
roles as well: the man who ejaculates, whether during intercourse or not, may not be the
same man whose genes join with the egg.

94. Genes are responsible for physical traits and influence susceptibility to some
cancers, as well as a host of inherited diseases. They are at least partially responsible for an
individual’s propensity to schizophrenia, alcoholism and depression. See generally J. JENKINS,
HUMAN GENETICS 371 (1983); H. SUTTON, AN INTRODUCTION TO HUMAN GENETICS (1988).

95. This is clearly true in the physical domain (e.g., where the gestational mother
has German measles during the first trimester, or ingests a drug like thalidomide, or abuses
drugs, alcohol or even caffeine, the baby may be deformed or impaired). Some argue that
this is true of psychological effects as well. See, e.g., J. PRINCE & M. ADAMS, MINDS, MOTHERS
AND MIDWIVES: THE PSYCHOLOGY OF CHILDBIRTH 105-06 (1978) (discusses evidence that
psycho-social factors experienced by a pregnant woman affect fetal development).

96. See Bartlett, supra note 50, at 330 (describing and critiquing rights-based or
exchange-oriented claims by women grounded on pregnancy).

97. See, e.g., Schuler, Baby M and the Politics of Gender, 74 TELOS 126, 130 (1987-
88) (arguing the gestational bond should always be determinative); B. ROTHMAN, supra note
77, at 238-39 (“the legislation we need to develop as national policy . . . would recognize that
the gestational mother is the mother. Any pregnant woman is the mother of the child she
bears, regardless of the source of the egg or the sperm.”). See also UNIF. PARENTAGE ACT §
3, 9B U.L.A. 287 (1973) (natural motherhood may be established by proof of having given
birth).

have an equitable claim based on "contribution," in the sense that each
would have had a genuine role in the child's future. I would argue that
there is no persuasive basis for a categorical preference for either a
gestational or a genetic contributor to receive exclusive recognition as
"mother."

Perhaps, then, the child in question should have two biological
mothers. Such an approach is unconventional, and therefore unlikely
to be imposed. Moreover, the practical fact that both women would
have to be willing to cooperate in a plan of access to the child means
that such an arrangement would be difficult if imposed rather than
chosen.

Shifting from the substantive axis to the procedural one regarding
who should decide, the choice between competing biological mothers
could be dictated by public policy (either choosing one role as primary
or imposing a shared mothering arrangement). Or the state could defer
to private choices regarding who should be the mother. Choices and
attitudes about procreation and parenting are deeply embedded in per-
sonal religious, philosophical and psycho-social values. Standardized
answers to new questions about parental status seem difficult to discern
and imprudent to impose. Moreover, because parenting involves long-
term and multi-faceted commitment, personal intention seems a de-
sirable basis for selecting between two biological claimants who are
arguably equally situated.

Whatever the substantive decision, and whatever the locus of
choice, some choice must be made. From the standpoint of social pol-
cy, subdivisions of biological motherhood are a dramatic development,

the married gamete donors the legal parents of a fetus conceived through *in vitro* fertilization
and carried by a surrogate).

announced that "California law, like nature itself, makes no provision for dual fatherhood."
*Id.* at 2339. While the characterization of California law is surely correct, such assumptions
about nature are, as this Article suggests, overly facile, particularly as regards mothers.

100. Analogously, courts' imposition of joint custody where divorcing parents do not
want it has been vigorously criticized. See Scott & Derdeyn, *Rethinking Joint Custody*, 45
*Ohio St. L.J.* 455 (1984) (joint custody preference unfairly strengthens father's bargaining
position relative to mothers who have been primary caretakers; when involuntary joint cus-
tody is not voluntary a conflict-filled environment for children has negative effects). See also
may be disruptive and may increase pain of divorce for children).

The court in the New Jersey *Baby M* case created a situation in which Melissa de facto
has two mothers, the surrogate and the biological father's wife. *See infra* text accompanying
note 339.

101. However, this phrasing begs the question, sending us in an obsolete direction,
in search of a determinate answer to a question whose premise is now faulty. If we truly
deferred to private ordering, the adults who decided to create this child would decide who
among them—one or more—should mother this child.
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in some ways akin to the invention of respirators that altered the determination of death. Where biology no longer dictates self-evident results, even doubts about our wisdom cannot insulate us from the need to decide.

b. Depersonalization?

The objection to human control over elements of life that are viewed as transcendent—the charge of hubris—might be characterized as a resistance to over-personalization of procreation. Interestingly, another major objection is to the depersonalization of procreation that some view as inhering in reproductive technology.

(1) Inappropriate severance of roles?

As noted in Part I, advances in reproductive technology are outgrowths of the subdivision of procreative processes. Procreation can be severed from sexual relations and also, therefore, from socio-personal intimacy. Thus, some of the increase in choice that flows from modern reproductive techniques arises precisely because procreation can now be carried out impersonally. Some object, believing that such developments separate things that, at a fundamental level, should not be separated. In part, this is a fear about consequences—for marriage, for male/female role allocation, for the well-being of children—that will be more fully explored below. But the concern rises beyond any particular implication, to the level of meta-issue. The phrase, "What God has joined together let no man put asunder" comes to mind, albeit in a new context. At work here is a conviction that sex and the potential to procreate should be intrinsically connected, and often, too, that both are rightly embedded within formal marriage. From this vantage point, the marriage bond is the only setting appropriate to the procreation and rearing of children, and thus the only context appropriate for sexual relations, which ought always to carry the potential to procreate. The potential to create life sacralizes both sex and marriage, binding the parties to one another and to any offspring in a deeper way than would be possible were any of the trio (sex, marriage and procreation) to be wholly severed from one another.

The counter-viewpoint, described by Professor Kristin Luker, holds that sex is an activity of intrinsic value apart from its procreative potential. To that end, it should be capable of being freed from the risk of reproduction. Conversely, procreation should be planned. Individual

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102. Objections at this level stem from what Kristin Luker has called a world view. K. Luker, supra note 10, 158-92.
103. Id. at 159-75.
freedom, particularly for women, depends on individuals' ability to exercise control and choice regarding sex, procreation and marriage. This requires picking and choosing both the what and the when of their involvement in all three activities.104

Catholicism and some fundamentalist Protestant groups are the leading proponents of the "don't-sever-things" viewpoint. Although American society remains bitterly divided over the morality of abortion,105 many Americans, including Catholics, have behaviorally, and sometimes theoretically as well, accepted the second viewpoint on other issues such as: individual control over procreation via birth control, women's freedom from being primarily assigned to domestic and child-rearing roles, and even perhaps, the severance of sex from marriage.106 While these views are resisted by some official church doctrines, their popular acceptance creates an environment that would likely tolerate if not eagerly embrace the depersonalized aspects of modern reproductive technologies.

(2) Commodification?

A second strand of the depersonalization objection grows from a different source: the concern that reproductive techniques treat persons as means rather than ends, thereby violating a cardinal principle of ethics.107 Under this view, the child conceived through reproductive techniques becomes a means to the end of adult happiness, vanity or obsession with genetic lineage.108 Moreover, persons who use gametes

104. Id. at 175-86.
105. Tom Smith of the National Opinion Research Center states: "Only about 10 percent of the American people are absolutely against abortion ... Only about 30 percent say it's entirely up to the woman, nothing else matters. That leaves 60 percent who have conditional (on reasons given for abortion) support." Liebert, Anti-Abortionists Expect Some Gains, San Francisco Chron., Feb. 6, 1989, §1, at 4, col. 2.
106. For example, 32.1% of American women consider themselves Catholics; 31.5% of all women who had abortions in 1987 listed their religion as Catholic. Henshaw & Silverman, The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients, 20 Fam. Plan. Persp. 158, 162 (1988). Eighty percent of never-married Catholic women aged 20-29 had experienced sexual intercourse, compared to 81.7% of all such women; 54.5% of Catholic women, compared to 53.1% of all women, described themselves to interviewers as sexually active. Catholics also use birth control, and medical birth control methods like the pill, at almost exactly the same rate as non-Catholics. Tanfer & Horn, Contraceptive Use, Pregnancy and Fertility Patterns Among Single American Women in Their 20's, 17 Fam. Plan. Persp. 10, 12-13 (1985).
107. Kant, Foundations of the Metaphysics of Morals, in PHILOSOPHICAL WRITINGS 94 (E. Behler ed. 1986) ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only"); A. MacIntyre, supra note 12, at 46 (discussing the centrality of this Kantian moral principle).
108. For example, feminists have objected to a male's preoccupation with having a child that is genetically his. As Gloria Steinem, commenting on surrogacy, put it: "What seems to come first ... is an obsession with sperm and paternity." Bumiller, Mothers for
or their bodies to assist others’ reproduction (e.g., a surrogate mother) are also arguably being treated as means. Special concern over the exploitation of women arises, and forebodings about slavery are invoked. These issues are escalated if money is involved in the arrangement. The fear is that impersonal reproduction, involving technological assistance, arms-length arrangements between strangers, and transfers of reproductive entities and services, results in the commodification, and thus the devaluation, of human life.

Those objecting to reproductive technology on these grounds tend implicitly or explicitly to create a polarity in which the sanctity of life and persons exists at one end of the continuum and market transactions involving sales of services or products is placed at the other. Professor Margaret Radin, who concludes after a thorough and balanced evaluation, that commercial surrogacy is best avoided, has written with great insight about this cluster of issues. Her discussion of how sym-

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Others have critiqued the desire for a child “of one’s own” as a “yuppie”-like tendency to treat children as consumer goods. Some see in these trends a preoccupation with made-to-order children, an inappropriate desire for warranted, or “mistake”-free persons and relationships. See, e.g., Davis, Reproductive Technologies and Our Attitudes Toward Children, 9 Logos 51 (1988). Such objectification of children may be but one expression of a general trend wherein increased control over fate yields greater intolerance and fear about uncontrolled imperfections that persist. Thus, as affluence and scientific technology decrease objective risk, subjective anxiety about risk actually increases. See Committee on Risk and Decision Making, National Academy of Sciences, Risk and Decision Making: Perspectives and Research (1982), excerpted in Law, Science and Medicine, supra note 92, 701-05 (increased anxiety about risk seems to be related to faith in science, and conviction that risk is more subject to human control than in the past).

109. See discussion in Radin, supra note 11, 1932-33.

110. See, e.g., Williams, supra note 108, at 14-15 (discussing powerlessness and enslavement of Mary Beth Whitehead). But compare the “trading” of male bodies and their special physical capacities in professional sports. An article by Jill Lieber included a picture of a quarterback in underwear being measured, with the caption “At the Meat Market, NFL folks got a brief look at Elkins to see how he measured up.” The story quotes George Young, general manager of the New York Giants as saying: “It’s a livestock show, and its dehumanizing, but its necessary…. If we’re going to buy ’em, we ought to see what we’re buying.” Maximum Exposure, Sports Illustrated, May 1, 1989, at 38. See also sources on slavery and baby selling supra note 11.

111. Radin, supra note 11, 1928-36 (arguing that market inalienability is a better solution in a non-ideal world than incomplete commodification).

112. See id. Radin’s crucial concept of market inalienability is closely tied to non-commodification. Id. at 1855-59. She notes that “[m]arket inalienability often expresses an aspiration for noncommodification. … When something is noncommodifiable, market trading is a disallowed form of social organization and allocation.” Id. at 1855. Market inalienability however, “does not preclude—and, indeed, may seek to foster—transfer from one individual to another by gift.” Id.
bols and discourse affect behavior and values is instructive; her concern
about the extension of market language and concepts to arenas of core
personhood is eloquent. Her negative evaluation of commercial sur-
egacy gives cause for serious concern.

Yet I balance the impact of surrogacy and other reproductive ar-
rangements differently than she or others concerned about deperson-
alization do. Reverence for life and money is not a zero sum game:
the less of one, the more of the other. Many things that partake of the
monetary economy also involve aspects of life that are deeply revered.
We buy a wedding ring or a home but its personal worth is not equated
with its price. Doctors deal with the creation, sustenance and termi-
nation of life. We do not expect the fees we pay them to capture all of
their meaning and importance to us. Neither do we deny them the
capacity to get monetary recognition for their work. Similarly, we ap-
praise a couple’s ability to sustain the costs of raising a child when we
decide whether they are fit adoptive parents. We award child support
when a divorce occurs; we assess damages for the costs of raising a
child born because of a negligent diagnostic test, or for an untimely
death in a wrongful death action. We are not confused about whether
these financial representations adequately sum the value of the lives
or relationships in question. We simply say that money is one dimen-
sion of human interaction and valuing. The critical issue is not whether
something involves monetary exchange as one of its aspects, but
whether it is treated as reducible solely to its monetary features.

Efforts sharply to segregate money and values are frequently re-
gressive in effect. “Either/or” thinking rarely captures the complexity
or nuance of human reality. Nor does experience suggest that the
more we value something, the less we entangle it with money. In fact,
there is a strongly competing truism suggesting that that which we
reward with money is that which we value. In particular, the inability
to gain monetary recognition for the things they uniquely or preeminently do is one of the core causal factors in the exploitation
of women. Too often our concern with supposedly sullying and taint-

113. Id. at 1859-63, 1877-87.
114. Another thoughtful critic in this vein is Davis, supra note 108 (arguing that too
much freedom in reproduction promotes view of child as personal investment).
115. See, e.g., Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337
(1982) (costs of extraordinary care granted to parents of baby born with a hereditary hearing
loss after doctor negligently failed to diagnose condition). See also cases cited infra note 187.
116. See generally Shultz, supra note 78, at 208-10 (arguing that dichotomized thinking
about marital policy is traditional but inappropriate).
117. One manifestation of this pattern is that much of traditionally “women’s work”
in the home is not economically recognized. See id. at 231. In the marketplace, a primary
example is the issue of comparable worth: occupations rooted in “women’s work” (nursing,
child care, teaching, etc.) are paid far lower wages than traditionally male work, even where
the skills and required credentials are equal to or higher than those of traditionally masculine
ing through monetization surfaces only when women (and children) are involved. In part, the concern bespeaks an appropriate regard for the altruistic and the supererogatory. But in part, it evinces a hypocritical and damaging oversimplification and dichotomization: Men, work, public life and money are bad—but powerful. Women, home, private life, altruism and sentiment are good—and powerless.

Even if the tendency to dichotomize human flourishing and monetary activity should be resisted, however, there remains the problem that Professor Radin identifies as "the double bind:" short run realities versus long run goals.118 Should we act now on the basis of our aspirations for a right world or should we respond first to real inequities in the here and now? The risks of commodification that are posed by reproductive technology include the fear that women's present, de facto weakness in economic, political and personal terms will cause them to agree to use their bodies in ways that may serve short-term goals for empowerment but do not serve their long-term human flourishing.119 But like market discourse, the altruism/commodification dichotomy, too, has power. Together with rules and world views that reify women's presently experienced limitations, such ideas may become self-fulfilling prophecies that determine our future.

c. Disruption of family life?

Reproductive technology, particularly its separation of sexual behavior from procreative behavior, has significant social consequences. Viewed one way, these developments offer new opportunities for individual fulfillment and choice. Viewed another way, they make a host of "bad" things more likely: extra or premarital sex, new roles for women, the breakdown of the traditional family and the spread of family arrangements that differ from the conventional, religiously and politically recognized nuclear family.

(1) Effects on conventional marriage

The relation between marriage, child-rearing and "family-ness" is complex indeed. However, the following observations may be made. Adult bonds of intimacy are increasingly founded on choice rather than necessity, whether economic, traditional or familial in nature. Contem-

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118. Radin, supra note 11, 1915-17.
119. Id. at 1915-17, 1930-36.
porary adults form intimate relationships to achieve personal satisfaction and happiness rather than to conform to a social role or economic necessity.\textsuperscript{120} An evolution toward greater intentionality in parenthood would seem to parallel and complement these prevailing trends in marriage and intimate relations generally. Yet, for at least some segments of society, childbearing and rearing has itself become a major impetus to formalizing relationships through marriage.\textsuperscript{121} Furthermore, where adult commitments are fragile, parent-child ties have proven comparatively strong cement for marital bonds. Thus, children provide motivation both to enter and to remain within marriage. For those who worry about the decline of society’s major structure for organizing and solidifying adult personal relationships, anything that threatens to dilute or attenuate a tight connection between procreation and legal marriage seems frightening or even intolerable. Reproductive technology seems to some to be just such a threat.\textsuperscript{122}

In addition, although opportunities for separating marriage and procreation already exist both in childless marriages and through unmarried or extramarital sexual intercourse, some might argue that any additional development in that direction should be energetically resisted. New reproductive techniques arguably present a greater threat to the marriage-procreation link than do the more established and familiar instances of nonmarital reproduction. Nonmarital procreation is often, presumably, an unintended and undesired by-product of extra or premarital sex. To the extent that conscious intention regulates such behavior, it is likely sex rather than procreation that motivates it. Thus, procreation in those settings is both less likely to occur and, in the view of some, less culpable precisely in that it is often an “accident.”\textsuperscript{123} By contrast, nonmarital reproduction through new medical techniques is intentional, and to the extent that planning aided by modern science can be effective, it will produce the intended result.

Assessment of these various concerns about reproductive technology undermining conventional marriage depends upon one’s beliefs and on what data are considered. In weighing the impact of reproduc-

\textsuperscript{120} See Shultz, \textit{supra} note 78, at 244-53 (arguing increased emphasis on individualism, diversity and choice within modern marriage).

\textsuperscript{121} A 1983 study of American couples found that couples living together outside marriage were much less likely to have children than were married couples. \textsc{P. Blumstein & P. Schwartz}, \textsc{American Couples: Money, Work, Sex} 600 (1983).

\textsuperscript{122} \textsc{K. Luker, \textit{supra} note 10}, at 158-65.

\textsuperscript{123} A different world view might argue that doing things unintentionally is worse than doing them \textit{intentionally}. Such a view places greater priority on the process value of intentionality than on any particular substantive value. However, placing such priority on the process value probably assumes that the substantive value in question is not very important or universal and therefore, may yield. If the substantive value is deeply felt or widely shared—for instance the value of not killing—most people would probably agree that violating it intentionally is worse than violating it unintentionally.
tive technology on marriage, it should not be overlooked that the frustration, stress and sense of failure attendant on inability to procreate may itself undermine particular marriages. 124 Of course, efforts to use new technologies may also be stressful, and especially in the early development stages, low success rates combined with high costs 125 may bring further heartache to those who try to use them. However, assuming adequate disclosure regarding costs and probabilities, denial of access to techniques of such critical personal import on these grounds is overly paternalistic. Furthermore, the procreative opportunities provided to those voluntarily or involuntarily excluded from conventional marriage should also count in the evaluation.

Regarding threats posed by separating marriage and procreation, the separation that occurs in reproductive technology should be far less disruptive of marital intimacy than is procreation that results from other types of extramarital sexual involvement because this procreation occurs without interpersonal or physical intimacy. It should, therefore, hold different and less threatening meanings for the adults involved and for their marriage relationships.

To a great extent, we have lacked conceptual "maps" to track these important distinctions. If attention is paid to acts or outcomes alone, rather than to the intentions and purposes which invest them with meaning, both understanding and response will be skewed. 126 This point is illustrated by the legal and social reception originally accorded to artificial insemination. Courts initially characterized that procedure as "adultery," 127 although as originally used, such insemination was typically of a married woman, with her husband's knowledge and consent, using the sperm of an anonymous donor, and accomplished with a syringe in a doctor's office—hardly the standard image of adultery.

124. INFERTILITY, supra note 5, at 37 ("Learning to accept their infertility may put a terrible strain on partners' love for each other").

125. At present, techniques that depend wholly on biological innovation, such as in vitro fertilization, are more expensive and have lower probabilities of success than techniques which rely on the cooperation of third-party participants, such as surrogacy. If the emotional and social costs of these latter techniques—especially those flowing from their uncertain legal status and their perceived social illegitimacy—could be attenuated, they might be more desirable solutions for many people.

126. Thus, the criminal law focuses not on acts alone, but on the accompanying mental state in the establishment and gradation of culpability. See W. LaFAVE & A. SCOTT, supra note 26, at 212; see also MODEL PENAL CODE § 2.02 (1963).

Alasdair MacIntyre has called attention to the ethical importance of evaluating behavior in the context of intention. A. MACINTYRE, supra note 12, at 206-25. In his words: "There is no such thing as 'behavior', to be identified prior to and independently of intentions, beliefs and settings." Id. at 208. "We cannot, that is to say, characterize behavior independently of intentions." Id. at 206.

More recent statutory and common law has altered that characterization, accepting the intention of the participating parties, and the social and personal realities of their relationships and actions, as defining an essentially new social arrangement.128

Even in the “remapped” version, however, attitudes about artificial insemination reflect the fear that reproductive technology will undermine conventional marriage and family. As with adoption, artificial insemination has been assimilated as closely as possible to the conventional norm; the elements of intent and choice are suppressed. It is frequently stated or implied by statutes regulating artificial insemination that only a married woman may be inseminated.129 And when she is, a single standardized outcome is imposed on all parties. The third party donor simply “disappears” from the scene; the woman’s husband becomes the legal father. No choice beyond mere participation is allowed; in contract terms, the agreement is one of adhesion. For instance, in the standard insemination of a married woman, the law recognizes no options regarding what role the donor is to play in the life of the child. And although few cases have been litigated, the need to conform outcomes to the bio-social convention appears to govern the adjudication of parental roles in atypical instances of artificial insemination as well.130 These standardized outcomes may or may not reflect the intentions and preferences of the parties involved. They almost certainly do not adequately serve the preferences of everyone who might wish to employ the technique. If opportunities to design alternative arrangements were made explicit and given legal effect, additional users of the technique would likely emerge, and some existing users would likely choose different arrangements than those that are now mandatory.

128. Thus, the Uniform Parentage Act presents the now more common rule that the semen donor will not be treated as the father; rather, the husband of a married woman who is artificially inseminated is legally deemed the child’s father. UNIF. PARENTAGE ACT § 7005, 9B U.L.A. 287 (1979). See also INFERTILITY, supra note 5, 240-50 (summary of state statutes).

129. INFERTILITY, supra note 5, at 246. In what seems either a triumph of willed blindness or a singular failure of imagination, many states seem not to have considered (or at least not to have statutorily recognized) that artificial insemination may be used and desired by women other than those in legal marriages. O’Rourke, supra note 11, at 144-47.

130. Thus in two cases courts have given semen donors fathering rights and responsibilities, despite alleged private agreements to the contrary, and despite the norms governing artificial inseminations of married women. See Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (semen donor granted parental visitation rights because statute preventing that outcome did not apply; facts of alleged agreement not to exercise parental rights were disputed); C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (1977) (semen donor granted parental visitation rights on basis that best interests of child; facts of agreement were disputed). The concern in both instances seemed to be that the child must have at least one father, and since the woman was unmarried, no man other than the donor was available to play that role. For discussion of the legal and equitable claims to single motherhood unimpeded by parenting claims of a male partner, see Bartlett, supra note 50, at 312-15.
Even within these limits, the redefinition and partial acceptance of artificial insemination does constitute a bridge between conventional marital/coital reproduction and a more intention-based and pluralist approach. Presumably, similar and more extensive changes in perception and labelling could and would evolve in other instances of reproductive technology. Such changes of characterization would help to redefine our perceptions about what is undesirable, thereby allaying some anxieties about the effects of reproductive technology on conventional marriage.\(^{131}\)

(2) Effects on parenting and the welfare of children

No evidence exists of special medical risks to children born through the use of new reproductive methods. However, a frequently expressed fear about reproductive technology concerns the psycho-social well-being of children born through these new techniques.\(^{132}\) In part, this is a concern about commodifying life, turning children into consumer goods. In part, it is a narrower anxiety about whether specific children will be adequately cared for.

Concerns about the well-being of children sometimes focus on the fact that in the procreative arrangements made by adults, the children who are the heart of the transaction get no say. Their consent, their preferences are not included in the decision making. In the language of contract, children are third parties, lacking in privity. But what does that mean? That they should not be bound by the agreement? Even if adults' arrangements are recognized and enforced, children are not bound by the agreement; they have no obligations. Rather, they are affected by the agreement. People are often affected—even in very central ways—by agreements and decisions in which they have no part, particularly if they lack factual and legal decision making capacity. Even under conventional legal rules, children do not get a say in who their parents will be, or for that matter, in whether they will be conceived or born.\(^{133}\) We do not ordinarily protect children's interests by letting

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131. Realistically, full recharacterization would probably take place only when anxiety is lessened. However, the flow of influence between language and feeling is interactive rather than unidirectional. See discussion in Radin, supra note 11, 1859-63, 1877-87 (discussing the effects of market rhetoric on behavior and values); see also Bartlett, supra note 50, at 293-95 (discussing the effects of legal categories and discourse on values, in this instance notions of parenthood).


133. A child may get a say in custody. See, e.g., Goldstein v. Goldstein, 115 R.I. 152, 341 A.2d 51 (1975) (where both parents are fit, substantial weight may be given to child's preference). See generally Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226 (1975). But children will have no choice about who will be their parent, either in ordinary natural parenthood or adoption, unless there is an adoption involving a child old enough to have her opinion considered.
them make these decisions. Rather, conventional rules leave such matters up to parents, aided or hampered by fate, and with the state having the role of intervenor of last resort where serious harm to the child is threatened.\textsuperscript{134}

The real issue, then, is whether parents-by-intention will be better, worse or similar to parents designated by current methods. Of course, no one knows for sure, particularly since children created through artificial reproductive techniques are still too recent a phenomenon to have been evaluated through research. However, logically, the issue rests first on what correlation exists between biology and good parenting and second, on whether conventional family forms are a necessary ingredient of quality parenting.

Our convictions about the link between biology and quality parenting typically help to anchor and justify legal assignment of parental rights and responsibilities. In part, legal assignment of parenthood based on biology reflects the age-old notion that “blood is thicker than water.” Blood ties are usually intensely felt and have extraordinary longevity. Moreover, biology’s linkage with committed interpersonal relationship has provided another reason for its use in determining socio-legal parenthood. Sexual relations are one likely index of which relationships among adults are strong enough to provide a desirable context for rearing children. Where the relationship is formalized in conventional marriage, there are additional gains. Entry into legal marriage submits the relationship to normative social control while simultaneously signalling commitment sufficient to ground parenting responsibilities. Thus, marriage has been, among other things, a means of expressing intentions that inferentially extend to parenting.

However, the capacity to separate biological procreation and sexual-relational intimacy means that now, for new reasons, biological coparenthood need not be tied to the sexual and personal relationships that are often formalized in conventional marriage. Given this potential separation, the question remains what is the appropriate prospective index of good childrearing? Is either biological relatedness or conventional marriage essential?

At the outset, any suggestion that honoring adults’ commitments regarding parenthood is antithetical to the interests of children seems

\textsuperscript{134}. For an example of state intervention schemes, see \textit{CAL. CIV. CODE} § 232 (Deering 1987) (circumstances under which minors may be declared free from parental custody and control; agencies authorized to initiate action). Moreover, an influential commentary on parent-child relations recommends that parental control over children be given deference within extremely wide bounds, with the state intruding only rarely. \textit{See generally BEYOND THE BEST INTERESTS, supra note 80} (urging that custody disputes be resolved by deference to the psychological parent).
wrongheaded. Adults who feel that their needs, concerns and choices have been respected, adults who feel that they are resourceful and efficacious, will likely cope better with the demands of parenthood than parents who are passive or powerless. Moreover, deliberative, articulated and acted-upon intentions regarding child rearing have great importance as indices of desirable parenting behavior. There is a correlation between choosing something and being motivated to do it consistently and well. Where the birth of children is not intended, as is sometimes the case with ordinary coital reproduction, biological connection will not guarantee love or adequate care. By contrast, where children are conceived and born because their parents chose to bring them into being, we at least know that if the law honors those intentions, the children will start life with parents who wanted and prepared for their advent. Of course, intentions can change; plans and promises can be broken. But then, neither biology nor conventional families ever guaranteed permanent or perfect parenting either.

As with biological ties, conventional family forms per se offer no guarantee of good parenting. If they did, the realities of current family

135. For an insightful discussion about what role the interests of adults should have in decisions about the custody of children, see Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 499-503 (1984); Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. Chi. L. Rev. 1, 16-21 (1987). Some have different views. Judith Wallerstein has demonstrated in the context of divorce that parental interests and children's interests should not be assumed to be parallel. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980). However, there is a distinction between assuming child-parent interests are automatically aligned and assuming that they are antithetical.


137. The general psychological rubric under which these correlations are discussed is "locus of control." Researchers have found that individuals who feel they can affect what happens around them, including choosing freely among alternatives, tend to perform better than those who feel their lives are governed by forces they cannot control. See generally H. LefcourT, Locus of Control: Current Trends in Theory and Research 81-99 (2d ed. 1982).


constellations in America would already have condemned huge percentages of our children to bad parenting wholly apart from artificial reproductive techniques. Family forms have greatly diversified due to divorce, blended families, single parenting, homosexual commitments and unmarried cohabitation. Many children are now raised in non-conventional settings. Evidence from these sources seems to suggest that familial arrangements based on non-biological ties can be very good settings for children, as long as they provide the physical and emotional nurturance that are the real essentials of healthy child development.

If society were to recognize intention as a basis for claiming parenthood in circumstances of artificial reproductive techniques, intention-based variations in family form would likely be better tolerated and less problematic. Legal recognition itself would alleviate some sources of instability and stigma. Both the number and the types of intention-based arrangements about parenthood would likely multiply. Conventional couples would make greater use of non-conventional techniques, particularly third-party assisted techniques, if they felt more certainty about protection of their expectations and reliance. Similarly, non-conventional family arrangements would likely increase unless barred by regulation.

Eventually, the heightened intentionality made possible by reproductive technology presses fundamental questions about whether parenthood is necessarily only a one man/one woman proposition. Might there be less than two parents? Or more? Might the gender of parent(s) vary from the biological-socially reinforced standard? Reproductive techniques could be used by single persons of either sex wishing to

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141. See, e.g., Beyond the Best Interests, supra note 80, at 12, 19 (adoptions yield successful parenting relationships; bond with psychological parent is crucial to child); see also Kagan, The Psychological Requirements for Human Development, in The Family in Transition: Rethinking Marriage, Sexuality, Child Rearing and Family Organization 373-83 (A. Skolnick & J. Skolnick eds. 5th ed. 1986) (criticizing tacit assumption in psychology that there is one correct way to raise healthy children, arguing that children can adapt to a great number of situations provided their most basic physical and psychological needs are met); O'Rourke, supra note 11, at 167-74 (summarizing arguments and data showing that children raised in non-traditional family units are healthy and stable); Gay & Lesbian Parents (F. Bozett ed. 1987) (social scientists discuss available evidence on gay parenting concluding that it represents a "highly viable family form"); Patt, Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests, 3 Berkeley Women's L.J. 96, 102-11 (1987-88) (addressing available evidence that continuity and stability of relationships are more important to a child's happiness than traditional indices of "best interest"); Chambers, supra note 135, at 503-41 (summarizing research on pros and cons of raising children in single parent households); 'Traditional Family' Not A Cure-All, Study Says, San Francisco Chron., Oct. 31, 1988, at A11, col. 5 (reporting recent study concluding that restoration of the 'traditional family' is not likely to reduce levels of teenage drug use, alcohol consumption or crime).
become parents. They could be employed by various types of "unapproved" couples, for instance gay or lesbian couples, heterosexuals who choose not to marry, or heterosexual couples actually barred from marrying.\textsuperscript{142} They could also be used by combinations of more than two persons who wanted to make a shared commitment to rearing a child.\textsuperscript{143}

Furthermore, if intentional decisions about parenting were more fully and explicitly recognized, parties to adoption, already partially intent-based, might seek greater control over the arrangements they make. Rather than wholly substituting adoptive for biologic parents, some adoption arrangements might establish hybrid or extended-family bonds that formally included more than two parents drawn from combinations of adoptive and biological relationship.\textsuperscript{144} Even "ordinary" heterosexual parents, married or not, might seek recognition and enforcement of intentional arrangements about who will or will not have parental rights and responsibilities for children they conceive in the ordinary coital fashion.\textsuperscript{145}

Procreational hopes and expectations are vital to personal fulfill-

\textsuperscript{142} See supra sources cited note 51 supra. The parental rights of homosexuals are contested in divorce custody disputes, as well as in adoption and artificial insemination. See Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, 102 HARV. L. REV. 617 (1989); Beargie, Custody Determinations Involving the Homosexual Parent, 22 FAM. L.Q. 71 (1988); Patt, supra note 141.

Heterosexuals, too, may sometimes be barred from marriage, and thus from parenthood. See LAW, SCIENCE AND MEDICINE, supra note 92, at 2-50 (describing various restrictions on marriage).

\textsuperscript{143} The legal status of non-traditional families is still uncertain. See id. at 731-755; id. at 140-42 (Supp. 1988) (discussing the meaning of "family" and cases litigating alternative family living arrangements in various contexts). Compare, in the context of families involving children, Moore v. City of East Cleveland, 431 U.S. 494 1977 (holding unconstitutional an ordinance limiting dwelling occupancy to members of a single family, narrowly defined). Although Moore involved an extended family (related by blood and/or marriage) rather than an intention-based commune, the Court's observations in dicta are relevant here: "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." Id. at 506.

\textsuperscript{144} This is the reality already in a growing minority of adoptions. Kathleen Silber, director of the San Jose branch of the Children's Home Society, estimates that 25% of the California adoptions her agency handles each year involve some form of continuing contact. Griffin, Girl's Guardian Parents Force Rare Kinship with Navajo Birth Mother, L.A. Times, May 15, 1988, § 1, at 3, col. 1. In some ways these arrangements are similar to step-families that arise after divorce. Blended families may include several de facto fathers or mothers for any given child. Under current legal arrangements, however, only one woman and one man may have formal legal ties of parental relationship to the child.

Compare also situations where both partners in a homosexual relationship want to have parental bonds with a child, but the law will not allow more than one woman or one man to have legal parental status. Even though the de facto—and in my terms intending—parents provide the traditional number (two), because they are both of the same sex the law refuses to recognize the parental rights of both. See Patt, supra note 141 (urging that second parent adoption by homosexual couples is in the best financial, emotional and psychological interests of the child).

\textsuperscript{145} See supra notes 68-69.
ment for many biologically fertile individuals within conventional mar-
riages. While marriage is one form through which intentions about
parenting can be expressed, it is not the only one. The tendency to
perceive others' choices as less important than one's own should be
resisted. While some may say to non-traditional families, "You made
your bed, now lie in it!", such admonitions are easier to speak than to
hear. They also unnecessarily assume current conventions as a fixed
point of reference. If the concept of "family" can be given some fluidity
and enlarged to capture essential interpersonal meanings rather than
frozen into fact-specific parameters, the creation and legitimation of
parent-child bonds within diverse relationships could actually be seen
as strengthening family ties rather than weakening them.

2. IS CONTRACTUAL ENFORCEMENT APPROPRIATE?

Above, I evaluated various policy arguments regarding intentional
procreation and regarding the proposal that the law should defer to
private ordering in determining parental status. The question now be-
comes whether legal enforcement of intentions about procreation and
parenthood is feasible and desirable.

When bargained-for intentions about the future meet doctrinal and
policy criteria, those intentions may become legally enforceable obli-
gations under the rules of contract.146 Enforcement of particular agree-
ments that manifest intentions and create expectations about paren-
thood may raise any of the various standard issues of contract law, for
every example: Was there consideration?147 Was there assent?148 Was there
a definite and final intention to agree?149 Resolution of such issues
would be as hard and as easy as it is in other types of cases.

In the wake of the Baby M decision, however, a different level of
issue about surrogacy agreements, likely applicable to other reproduc-
tive technology arrangements as well, has been raised. Much of the
debate asks not what particular regulations should be adopted to struc-
ture the use of reproductive techniques or to set limits on private de-
cisions about their application. Rather, proposals are made that such
arrangements be made illegal per se, or alternatively, that they be sub-

146. The Restatement defines a contract as "a promise or a set of promises for the
breach of which the law gives a remedy, or the performance of which the law in some way
recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). It then goes on
to state that a "promise is a manifestation of intention to act or refrain from acting in a
specified way, so made as to justify a promisee in understanding that a commitment has
been made." Id. § 2 (1).
147. See id. § 71.
148. See id. §§ 18-23.
149. See id. § 26.
jected to disincentives that are de facto crippling.\textsuperscript{150} For instance, decisions to disallow any monetary compensation of the parties to the arrangement (apart from medical expenses) will significantly hamper, if not eliminate, the practice of surrogacy.\textsuperscript{151} In light of such proposals, the task becomes not the resolution of typical doctrinal problems in a particular new context. Rather, the task is to assess whether such unusual and difficult problems would arise regarding this category of agreements that they should not be entertained as a subject for contractual ordering and enforcement at all. Some such issues—those that bear on the policies of family relations and reproduction—have been considered in the discussion of private ordering of parenthood. Another set of issues grows more from the mechanisms of contract creation and enforcement than from the substantive concerns of family policy.

Each of these latter issues initially arises in a general form, but each ultimately implicates the particular problem of gender. This section addresses the general form of each argument including those dimensions that implicate “soft,” that is, cultural perceptions about gender. Reserved to Part III are those aspects of the overall argument that arise from the “hard” gender component of the issue—that is, how legal policy about parenthood should take account of biological differences in procreative role and of the gendered spheres of influence that rest upon those differences. Applying the general framework from this Part to the specific facts of the Baby M dispute, Part III will assess how sex-based differences in reproductive roles should be reflected in the law of parenthood.

\textit{a. Is rational management of these issues feasible?}

Contractual ordering assumes that the interests at stake lend themselves to deliberation, choice and commitment. Many commentators

\begin{itemize}
\item \textsuperscript{150} See infra note 241.
\item \textsuperscript{151} There is empirical evidence that barring payment will seriously discourage surrogacy arrangements. See Parker, \textit{Motivation of Surrogate Mothers: Initial Findings}, 140 Am. J. Psychiatry 117 (1983) (indicating that of 125 women who applied to be surrogates, 89\% said they required a fee for their participation). \textit{See also In re Baby M}, 109 N.J. 396, 438, 537 A.2d 1227, 1248 (1988) (“all parties concede that it is unlikely that surrogacy will survive without money”). However, even rulings barring commercial surrogacy may not deter the practice. \textit{See Edelman, Boom Follows Baby M Ruling}, Bergen Record, Feb. 5 1989, \S A-4, at 1. The prohibition of commercial surrogacy is arguably compatible not only with policies against babyselling, \textit{see, e.g.}, N.J. Stat. Ann. \S 9:3-54 (West 1978), but also with federal law prohibiting payment for human organs or tissue. \textit{See 42 U.S.C. \S 274e (Supp. 1988) (prohibiting payment for the transfer of any human organ). But see Posner, The Regulation of the Market in Adoptions, 67 B.U.L. Rev. 59, 60 (1987) (arguing that despite laws and rhetoric against babyselling, exchanges of money take place and a market for babies already operates, albeit inefficiently and inequitably). Making something that is in great demand illegal always creates problems of a black market and/or of supplying the demand from countries applying fewer restrictions.}
\end{itemize}
doubt that this is (or should be) so with decisions to parent or to give up parenthood. The arguments are of two types. First, at the general level, some believe that contractual ordering is appropriate to commercial economic transactions but should not be employed in the context of the family. Such views depend on an excessively dichotomized vision of the world that fails to recognize either the role of various intangibles and imprecisions (relationship continuity, altruistic and cooperative behavior, incompletely crystallized terms) within traditional commercial relationships, or the salience of tangible, transactional elements within intimate relationships. In the main, this dichotomy merely reflects what we are used to, or have become accustomed to thinking we are used to. The ideology of a “private” sphere of the family polarized against a “public” sphere of economic transaction is threadbare after recent critical analyses. Allowing contractual ordering of economic relationships while refusing it to “private” relationships simply perpetuates a corrosive denigration of expectations and intentions in personal life. It also denies the need for diversity and individual choice in the most intimate areas of life, and imposes the standardized conventional morality of particular groups and classes in the name of “privacy.”

Apart from these overarching concerns, certain questions specific to parenthood arise. Some argue that parenthood is so central to human experience, and that feelings concerning it are so intrinsically unpredictable and uncontrollable, that binding commitments should not be entertained. The profound nature of creating and sustaining life is

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152. See, e.g., Areen, Baby M Reconsidered, 76 Geo. L.J. 1741, 1758 (1988) (asserting that the ethic of self-gratification characterizes the marketplace, while family law appropriately invokes an altruistic ethic).


154. See generally, Shultz, supra note 78 (discussing the recently increased convergence of classical contracts law and the law of marriage).


unarguable, but the implications of the argument are pressed more broadly than they should be. A number of points confine the reach of this line of analysis.

Where contractual ordering is accepted, the state neither requires people to make binding commitments, nor bars them from doing so; it allows individuals to choose whether to make such commitments. Persons who believe that feelings about parenthood are too hard to predict need not enter binding agreements. What is really at issue is whether the state ought categorically to prevent anyone from entering such agreements on the ground that preferences may change.\(^\text{157}\)

Parenthood is not the only matter about which feelings and preferences change. Enforcement of promises occurs precisely because people change their minds about performing obligations they have assumed. Indeed, a subset of contract doctrine governs when changed circumstances should excuse non-performance.\(^\text{158}\) Presumably, even under existing doctrine, some changes of mind in the context of reproductive agreements might lead to excused performance. For instance, if a surrogate mother’s two existing children died in a fire during her surrogate pregnancy, a court might relieve her of the obligation to perform the surrogacy agreement. The fire would likely be deemed sufficiently outside her control, sufficiently unforeseeable, and sufficiently productive of hardship were the surrogacy agreement to be enforced that a court might well excuse her obligation to relinquish parental status to the intending parents.\(^\text{159}\) By contrast, if the surrogate simply mis-predicted how attached she would feel to this baby, the claim of excuse would be hard to sustain under existing contract doctrine.\(^\text{160}\) Probably the agreement itself would be deemed to assign the

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\(^\text{159}\) In this hypothetical, the fire would be an event beyond the promisor’s control whose non-occurrence was a basic assumption of the agreement. See RESTATEMENT (SECOND) OF CONTRACTS § 261 comment d (1979) (ordinarily excuse must hinge on acts of God or third parties). Under the terms of the Uniform Commercial Code excuse is predicated on an unforeseen contingency. See UNIF. COMMERCIAL CODE § 2-615 comment 4, 1B U.L.A. 195-96 (1977). Hardship of performance is also relevant to excuse. RESTATEMENT (SECOND) OF CONTRACTS § 261 comment d (1979).

\(^\text{160}\) See RESTATEMENT (SECOND) OF CONTRACTS § 261 comment d (1979) (excuse does not apply where unforeseen event is due to the fault of the obligor; fault includes negligence as well as willfulness).

The law and economics approach would determine excuse on the basis of who is better able to predict, avoid and/or insure against the change of circumstances. See Posner & Ro-
risk of changed feelings to the surrogate, and if not, the surrogate would likely still be in the best position both to control and to foresee the change of heart, thereby eliminating the justification for excuse.\footnote{161}

Thus, particular claims of excuse might be variously resolved under existing doctrine. The distinct issue here is whether there should be a generic, categorical bar to enforcement of procreative and parenting expectations on the grounds that circumstances are inherently too changeable to allow any commitment prudently to be made or enforced. Such a decision is tantamount to a judgment that the social and personal losses from barring any binding commitments are less important than the losses that would flow from allowing such transactions to be regulated by existing policies and doctrines.\footnote{162} I believe that the reverse is true.

Moreover, in considering the feasibility of binding agreements regarding reproduction and parenthood, it should be remembered that irrevocable consequences for parenthood arise regularly from choices about sex, birth control and abortion. In those “ordinary” instances,\footnote{161. Commentators speak of the foreseeability issue as one of contemplation, based on the concept of bounded rationality. \textit{See}, e.g., Joskow, \textit{Commercial Impossibility, the Uranium Market and the Westinghouse Case}, 6 J. Legal Stud. 119, 157 (1977). The difficult issue is whether emotions are something one controls, and if not, whether changes in feelings can be judged a matter of fault, or are simply “other” from the viewpoint of rational planning and accountability. Control apart, however, the risk of changed feelings is certainly foreseeable.}

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\textit{Macneil, supra note 153. Such rules have greater intuitive appeal in a context as personal as surrogacy. However, in contrast to Hillman’s paradigm, surrogacy involves a fairly discrete, albeit emotionally complex, transaction, which also need not be particularly long-term. If the surrogate and the intending parents contracted to have some continuing relationship after the child’s birth, the contract would more clearly fit within Macneil’s and Hillman’s theories.}

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outcomes in the form of children or not-children irreversibly attach to choices that are frequently far less considered than participation in arrangements employing reproductive technology.

Existing policy already allows individuals irrevocably to surrender or to acquire parental status in some circumstances: adoption, voluntary termination of parental rights, or acknowledgement of paternity. Jurisdictions differ regarding the circumstances or showings necessary to such actions, but there is considerable reluctance to allow such voluntary decisions about parenthood before a child is born. Enforcing reproductive and parental agreements would make such commitments binding at an earlier stage than is now typical. However, the fact that the intentions at issue here are formed before any child is conceived—that the expectations and reliance include the very creation of the child itself—suggests that there are strong reasons to accept an earlier cutoff point.

Furthermore, under current law, men can surrender or acquire parental status before a child is conceived, through the statutorily recognized process of artificial insemination. Some constraints are explicitly or implicitly established regarding who may use that procedure, and legal recognition attaches to a particular arrangement endorsed by statute rather than to open-ended private ordering. Nevertheless, the principle is already established that voluntary conduct can lead to conclusive attainment or denial of the legal status of fatherhood before a child’s birth.

In light of these points, the distance between where we already are, and where we would need to go to recognize agreements that intentionally negotiate parenthood is considerably smaller than it has been made to appear. The concern that the entire subject matter of parenthood is somehow incapable of deliberation and commitment is reduced to an objection to surrenders of prospective parental status by women rather than men. The premise apparently is that traditional changed circumstances analysis is insufficient to protect women from making these decisions; a total bar is needed. Alternatively, one might argue that it is not gender differences per se that matter. Rather, gender differences are simply a convenient shorthand for differences in the underlying nature of the decision that confronts a prospective father as compared to a prospective mother. Specifically, the argument would


164. It might be desirable to establish a cooling-off period for the surrogate to reconsider her decision, perhaps before conception is attempted or achieved. To allow such a cooling-off period to extend over nine months seems unconscionable with reference to the expectations of the adoptive parents.

165. See supra note 131.
be that the physical and emotional connections between a prospective child and a mother up to the time of birth are different from those of a father in ways that make differentiation in the bindingness of their decisions appropriate. Part III discusses my proposal in light of such biological differences in procreative sex roles. Here I note only that even if such differences did justify divergent treatment of men's and women's prospective decisions about parental status, one unfortunate cost of such differentiation would be its reinforcement of the sexist stereotype that women are ruled by unpredictable emotion.

b. Are choices voluntary?

Use of contract doctrines to enforce individual commitments presumes that such commitments were voluntarily made. Acceptance of contractual ordering of procreation and parenthood raises difficult issues regarding free will. The concern may be framed either as the problem of substantive transaction type just discussed ("These types of things are unknowable. They can't be deliberated"), or as a problem of contractual assent ("People [in this instance read "Women"] can't make truly free choices about these things"). Once again, the concern has weight. Women, especially poor women, have severely limited options and severely limited bargaining power in our sexist and classist society. Many women have internalized powerful messages about the centrality or even the necessity of childbearing and/or motherhood for feminine fulfillment. 166 Other messages emphasize the importance of children to their husbands'/lovers' satisfaction with them and with the relationship. 167

Granted that these messages exist and are influential, how should that affect policy? First, with reference to the surrogacy example, any impact these messages are alleged to have is inconsistent and unpredictable—different women make different judgments about surrogacy. Many, indeed most, women do not choose to be surrogates, including many who are in very pressured financial and personal circumstances. Moreover, of those who do choose to enter surrogacy arrangements, some wish to renege; most go through with the deal. 168

At best, sexist scripting is complex and contradictory. Who is to

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166. See discussion of pressures on women to have children in B. ROTHMAN, supra note 77, at 141; G. COREA, supra note 9, at 169-73.
167. See G. COREA, supra note 9, at 169-73 (discussing infertile women's sense of shame for their inability to give their husbands the babies they expected).
168. INFERTILITY, supra note 5, at 268 (few reported instances of parties reneging on their agreements); M. FIELD, supra note 11, at 98 ("overwhelming majority" of surrogates perform the contract without resistance).
say what is merely "adaptive" and what is "free" choice? In the surrogacy example, which is the sexist conditioned script? A surrogate's wanting another child? Her feeling that she can give the ultimate altruistic gift of life? Her panic that it is unnatural to "give up" "her" child. Her belief that her gestational and genetic services are of major value and therefore might sell in the world? Is the intending mother controlled by sexist scripting in wanting to bring her husband's genetic child into their family? Or are her critics following a sexist script in feeling she deserves to be punished by losing the child she wanted to mother because she did not give up or postpone her career? Or because she was reluctant to risk her health to have her "own" baby? Similarly, is the intending father acting out a male chauvinist vanity in wanting a child that is "his," or is he expressing a male commitment to nurturing a child?

The insight that choices may be adaptive is a useful theoretical construct; it challenges received ideas and aids reflection. But we still have functional and policy decisions to make. When a given choice is said to be adaptive, what should be done? Can we envision some pristine and separate self not shaped by outside persons, events and circumstances? The self is inevitably interactive and permeable. Identifying some pure component called individual will, unswayed and untainted by social, psychological or cultural conditioning is an illusion.

If uncritically accepted to resolve conflicts over policy, the adaptive choice argument obscures as well as illumines. Identifying which pressures create "unfree choices" in order that individuals not be held accountable for them is a recurrent necessity in contract law.
trines like duress, coercion, lack of capacity and unconscionability establish criteria under which particular choices can be treated as voluntary exercises of meaningful choice or not. However, where an adaptive choice argument is used to justify a categorical bar on enforcement of all procreational or parenthood agreements—for example all surrogacy agreements—something different is happening. Given that pressures on such choices, as on all human choices, are uneven and multidirectional, if no possibility of a freely chosen surrogacy arrangement is envisioned, then the argument is not really about pressured choice. Rather, it is either about surrogacy per se, or about women as a group lacking the capacity for free decision-making.

Under the first branch, if it is argued that surrogacy would never be agreed to by an autonomous and reasonable person, then a species of substantive unconscionability is being alleged. An argument that the transaction is unacceptable as a matter of substantive policy is simply framed as an argument that the choice is “adaptive” rather than “free.” The real conclusion—that surrogacy is bad—is, then, not articulated; it is assumed rather than demonstrated. The conclusion that surrogacy is unacceptable, however, is precisely the question to which the adaptive choice argument was addressed. Under the banner of respect for individuals, the adaptive choice argument, pressed to its logical conclusion, embraces the very evil it assails; prohibiting an entire category of individual choices on the ground that those choices are adaptive rather than free becomes a justification for substituting one’s own judgment about the underlying value issue for that of others.

On the second branch of the argument, the assumption is that because of dominance of women by men, women as a group lack meaningful choice; their choices are especially likely to be adaptive. Once again, gender issues growing out of biological differences in procreative roles are reserved to Part III. Those differences aside, constrictions that grow from sexist conditions and conditioning provide compelling reasons to work against sex discrimination and dominance, and for expanded opportunities for women. They are also reasons to examine particular agreements for evidence of duress, unconscionability, lack of capacity, etc. Analysis of these standard defenses would be improved by greater sensitivity to gender as a factor that, like poverty or lack of education, can reduce the meaningfulness of a particular woman’s particular choice. But the reality of sex discrimination is not a reason to presume categorically that women are unable to act freely and responsibly with reference to decisions about procreation and parental inten-

U.L. Rev. 195, 211-16 (1987) (discussing ways the legal system engages in value-laden decisions about which contracts are “ordinary” and therefore enforceable, and which are “exceptional”—tainted by duress or fraud or unconscionability—and therefore unenforceable).
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actions. Otherwise, again, the result is self-defeating. In the name of protecting their freedom, individual women are treated as non-autonomous persons.

Finally, there is a general symbolic as well as a specific outcome-determinative dimension to the issue of free versus adaptive choice. To be sure, there is a cognizable risk of papering over systemic duress with the ideology of free choice. But there is also a danger of undermining both the perception and the experience of responsible freedom through constant reiterations of determinism, however well-intentioned. The matter comes down to which risks one prefers.

As a matter of moral vision, the adaptive reasoning argument pressed to justify categorical preemptions of types of choices or choice-makers, ultimately proves too much. Pressures, motives, ambivalences, necessities, desires always exist, and always potentially distort individual "free will." Yet, however constrained the circumstances, however permeable or weakened the self, it is a vital affirmation of human dignity to believe and to act upon the conviction that some dimension of meaningful freedom always remains. Individually and societally, something must eventually be treated as meaningful choice, or one ends up with no freedom and no responsibility. Particularly with regard to such central personal matters as procreation and parenthood, neither determinism nor social engineering is attractive. Policies should be sought that remain deeply aware both of social conditioning and of the realities of constraint in individual lives, yet retain as their default position an assumption of and a preference for responsible individual choice-making.

c. Are contract remedies appropriate?

Allowing procreative arrangements to be governed by private agreement implies a willingness to undertake dispute-resolution. Contractual enforcement assumes the availability of appropriate remedies for breach of a promise. Are such remedies available for the class of agreements dealing with procreation and parental status? The ordinary contract remedy is money damages; the extraordinary remedy,

173. The New Jersey Supreme Court worried that children such as Baby M would become bones of contention, citing this as a reason to make surrogacy contracts illegal. In re Baby M, 109 N.J. 396, 435, 537 A.2d 1227, 1247 (1988). However, any implication that disputes would arise only if contracts were enforced is unwarranted. Legal prohibition may reduce but does not eliminate disputes; making new reproductive technologies illegal may only drive disputes about them underground. See Edelman, supra note 151 (discussing the failure of the Baby M ruling to stop commercial surrogacy arrangements); Posner, supra note 151, at 61-62, 64-65 (discussing the pressures, inequities and inefficiencies of grey market adoption). Moreover, it is inaccurate to equate the amount of dispute generated under the currently indeterminate legal situation with what would occur if there were a settled policy of deferring to private ordering.
specific performance. In the context of procreative and parenthood agreements, concerns have been raised about both remedies; accordingly, the first issue is whether breaches would—both as a matter of prudence and of practicality—be remediable at all. The number of variations is potentially great; I will again use surrogacy as an illustrative example.

(1) Can the injury be monetized?

Under prevailing contract doctrine, assessment of the adequacy of money damages is the first step in analyzing the issue of remedy. The argument that no amount of money can compensate for the loss of a child is intuitively obvious and compelling. A child seems the epitome of that class of interests that "are by their very nature incapable of being valued in money." Similarly, monetizing the promise to parent a child would be exceedingly difficult. However, these conclusions are judgments, not facts. Our legal system monetizes many things that are difficult or "impossible" to monetize, for example: pain and suffering, reputational and dignitary harm, loss of the companionship of a loved one, etc. The real issue is whether a given injury is deemed important enough to justify the combination of deterrence and compensation that damages represent.

Monetary damages are currently awarded in several closely related situations. Parents have recovered for wrongful birth of children born after failed sterilizations, abortions or birth control, or after failure to advise them regarding important procreative choice-protecting opportunities. These cases monetize injuries sustained by becoming re-

174. See Restatement (Second) of Contracts § 359 (1979).
175. Id. § 360 comment b.
176. These cases include birth of healthy but unplanned children, often denominated "wrongful conception or pregnancy." See, e.g., Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (liability for costs of raising child born due to druggist's failure to provide proper birth control medication). They also include actions for "wrongful birth" of impaired children who, but for the tort-feasor's advice or act, might not have been conceived or born. See, e.g., Berman v. Allen, 80 N.J. 421, 404 A.2d 8(1979) (doctors liable for failure to inform about amniocentesis, thereby depriving parents of the option to abort an impaired fetus).

Many of these cases emphasize a wrongful interference with parents' procreative choices. For discussion of other legal theories regarding the medical profession's responsibility for foreclosure of patients' procreative choices, see Shultz, supra note 3, at 254-69. Awards for wrongful life (i.e. actions by the child) have generally been refused on the basis of policy and analytic concerns over how a court could value life and whether life itself should ever be declared an injury. See, e.g., Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (child's suit for injuries due to physicians' failure to inform parents non-actionable; impossible to measure the difference in value between life and non-life). A few courts have awarded special damages to a child for injury, even where that injury could only have been avoided by the child's not being conceived or born. See, e.g., Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).
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sponsible, through another's negligence, for a child whose birth was, or under given circumstances would have been, unintended.

A claim for the lost benefit of an intended child would bear some similarity to a wrongful death action, but would differ in two ways. (1) In the latter, the person is dead while in the former, she is not within one's "possession" or, more aptly, care and companionship. (2) The wrongful death action assesses personal injury damages to the person wrongfully dead and then transfers the award to a survivor. Despite these differences, however, in practical terms the action compensates a survivor for the loss of a significant person. A further analogy might be drawn to actions for loss of consortium that redress the loss of a valued relationship, including that of parent and child.\(^{177}\) Thus, in contexts of procreational and parenting agreements, a claim by intending parents for loss of an intended child would in some ways parallel wrongful death or loss of consortium actions. Wrongful birth, on the other hand, might be analogized to a claim by a surrogate against intending parents who breach the agreement, for the imposition of parenting responsibility for an unintended child.

Each of these recognized types of action establishes some willingness to monetize the life of and relationship with a child. The policies underlying actions for negligence differ from those for breach of contract, particularly in that negligence typically involves both culpability and physical injury. Nevertheless, some wrongful birth actions, particularly actions for wrongful conception or birth that involve a normal child, award damages for what is essentially a significant and costly change in life plan.\(^{178}\) The relationship involves physical health and the means by which the injury comes about is a failure in information or procedures affecting the body. But the essence of the claim is not

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178. Part of the debate about these cases derives from precisely this difference. They are in some ways similar to but in some ways different from ordinary bodily injury negligence actions. See generally Shultz, *supra* note 3 (discussing emergence of and need for new tort and/or contract theories to protect patients' preferences and choices in the context of medical care generally and procreation particularly).
physical injury but a defeat of intentions—precisely what is at issue in a breach of a surrogacy contract. Moreover, the intentions in most wrongful birth cases must be hypothesized and projected based on after-the-fact assertion. By contrast, as noted above, the intentions in an agreement about artificially assisted procreation and parenthood would likely be explicit and bargained for. The latter, then, presents the stronger case for remedy of the injury to expectation.

In calculating the damages in a wrongful birth action, the benefits of having a child should arguably be offset against the costs of rearing the unintended child, to get a net loss figure. Courts recognizing claims for rearing expenses of unintended but healthy children have typically offset benefits against losses, although most have not granted such an offset where the action is for wrongful birth of an impaired child. Because few courts discuss the issue explicitly, one can only speculate regarding what explains the failure to offset benefits in these latter cases. Perhaps some courts fail to see the issue. Others may prefer the rough calculus of simply limiting types of recoverable losses rather than attempting the difficult measurement of precise losses or benefits. Others may feel moral distaste or concern for harming the child by forcing a discussion of whether and how much parents find the life of the child desirable or worthwhile. Whatever the reason, because of the reversed posture of an action for loss of an intended child, as opposed to one for imposition of an unintended child, calculation of the benefits is essential to resolution of the former. Because courts have largely ignored benefits in the offset context, negligence actions that monetize a wrongful death or the loss of consortium could provide assistance in monetizing the loss of an intended child.

If monetization of the loss were deemed possible, other questions would arise about differences in the underlying relationships. The bulk of wrongful birth cases, as well as wrongful death and loss of consortium actions, are brought against arms-length strangers such as doctors or other health care providers. Extra problems of administrability and policy are thought to arise from intervention in intimate family relations. Several considerations alleviate this concern. First, given the

\[179. \textit{See Restatement (Second) of Torts § 920 (1977) (providing for equitable consideration of benefits as offsetting losses).}\]

\[180. \textit{See Hampton, supra note 176, at 50-51, 55-56.}\]


\[182. \textit{Where jurisdictions allow wrongful life actions, the child's recovery provides an alternative means of remedying losses barred by courts in parents' wrongful birth actions. However, few jurisdictions allow wrongful life actions at the present time. See sources cited supra note 176.}\]
comparative impersonalness of artificial reproductive methods, many procreational arrangements will involve persons who were non-intimates at least at the time of contracting, particularly those arrangements that are disputed in a legal forum. Actions on such agreements should not be barred by concerns about potential litigation between intimates any more than wrongful birth suits against health care providers are foreclosed by the argument that they may provide a precedent for children's suits against parents.

However, intimate partners might also make agreements with one another, as well as jointly with third and fourth parties, regarding reproductive and parental arrangements. Some claims analogous to wrongful birth actions have already been made between biological parents of a child conceived by ordinary coital means. Courts have generally repudiated these claims both because of a traditional reluctance to get involved in intimate relationships and because of an unwillingness to cut off a child's claim for parental support on the basis of arrangements made between the adults involved.

As already noted, the traditional reluctance to intervene between intimates has been substantially criticized. The problem of the child's interests in parental support is both more current and more substantial. It is less clear whether a willingness to enforce contracts regarding procreation and parental status would harm that interest. Recognition of parental status on the basis of express intention would not deprive children of legally identified parents; it would only alter the basis by which those parents are designated. Indeed, were the state to decide that intention would be the critical determinant of parental rights and responsibilities, a given child might end up with more adults to turn to in the role of parent than under existing law.

183. Most cases between parents are tort-based misrepresentation actions rather than contract-based actions. In such actions, one parent alleges wrongful imposition of parental responsibilities due to misrepresentation or breach of promise by the other regarding, for example, the fact of sterility or the use of contraception. See, e.g., Linda D. v. Fritz C., 38 Wash. App. 288, 687 P.2d 223 (1984) (holding that father's counterclaims regarding conception as a result of tort and breach of contract not cognizable in action for child support); Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980) (holding partner's misrepresentation about birth control not actionable because the behavior is too intimate for court resolution).

184. Note, however, that most such cases have arisen as counterclaims or defenses to actions for child support, or as actions disputing visitation rights.

185. For critical literature regarding so-called family privacy and the private/public distinction per se, see discussion and references, supra note 155. For discussion of traditional reluctance to enforce private ordering in intimate relations, see supra notes 79-80 and accompanying text.

186. Courts have been highly protective of children's rights (and the state's derivative rights) to seek financial support from parents. See, e.g., supra cases cited at note 65.

187. See generally Bartlett, Rethinking Parenthood as an Exclusive Status: The Need
a decision to embrace bargained-for intention as the criterion of legal parenthood includes the possibility of varying the number of parents, it does not require it, since particular regulatory limits on the basic enabling rule could still be set.

When the potential loss to children of enforcing adults' intentions about parenthood is evaluated, potential gains in parental motivation and commitment should be considered as well. Moreover, even under the present regime for determining parental status, many children have only one or even no persons to call on for legal support. Even fewer have two sources of support in fact. An unrealistically idealized model of family relations should not be used to preclude consideration of a new plan for determining parental status.

(2) Are substitute transactions possible?

Another issue to be considered in determining the adequacy of monetary damages is whether alternate transactions are possible. It might be suggested that when an intended child is not surrendered, what is lost is simply a child. If so, other children could, ordinarily, still be created—at least if surrogacy remains legal and other willing surrogates could be found. On this analysis, damages might be, as in any other contract action, the amount of any difference in fee that the father might have to pay to another surrogate, plus any incidental or consequential damages. While superficially plausible, this analysis offends our belief in the uniqueness of each individual. It inappropriately treats the miracle and complexity of particular individual lives as fungible. By contrast, surrogacy and other reproductive arrangements transfer the life and parental responsibility for a particular unique child. Moreover, an intending parent's interest was arguably not just in having a child to parent, but also in having the intended role in the life of each child in whose creation she shared, biologically and/or decisionally. Arrangement of a substitute transaction leaves that expectation wholly unmet.

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for Legal Alternatives when the Premise of the Nuclear Family has Failed, 70 VA. L. Rev. 879 (1984) (urging the acceptance of non-exclusive parental rights and responsibilities).

188. See supra note 23. See also Bartlett, supra note 50, at 313 (society already depends heavily upon unmarried women to raise its children); O'Rourke, supra note 11, at 165-67 (documenting that single parents are already de facto responsible for many children's support and welfare).

189. Conversely, if the intending father could not reproduce any more, if a father had used the last of a supply of frozen sperm to carry out this insemination, or if he was now too old to undertake the parental tasks, the inadequacy of monetary relief would be hard to refute.

190. This is somewhat analogous to the debate over whether women choosing to abort should not only be able to use abortion to control their bodies and their parenting status, but should also be able to control the destiny of the fetus, based on an interest in control of their genetic progeny. See supra note 74.
A less extreme version of this bargain-for-a-child-any-child approach might be a claim for the uniqueness of a child's or a surrogate's particular genetic traits. It might then be suggested that the adequacy of money damages would turn not just on the difference in cost for another surrogate pregnancy but on whether an "equivalent" surrogate could be persuaded to bear an "equivalent" child. Such an analysis raises issues not simply of conception and parenthood agreements per se, but of eugenics—attempts to determine particular traits of a child to be born—as well. The eugenics problem is complex and multi-faceted, posing questions that extend far beyond the scope of this Article. Any detailed response may also be inappropriate given how far downstream the issue lies. However, some preliminary observations can be made.

Society does presently accept some behaviors, such as mate selection, that may be motivated partly by concerns about specific traits of offspring. Moreover, while parents who procreate coitally cannot pick and choose traits of their offspring, many people approve the use of fetal screening and abortion (and perhaps even refusal of treatment for seriously impaired newborns) as means to control disease or disability in offspring. Similarly, procreative/parenthood agreements seeking to control offspring traits might attempt to govern procreative outcomes by including terms governing abortion decisions. Such terms would be highly controversial in that they would join debates over reproductive technology and trait control to the intense dispute already surrounding abortion. However, such eugenic abortions already exist; the new issue here is transferring the right of decision.

A surrogate's agreement to abort a fetus having specified genetic defects would be a means of attaining procreative and parental intentions; thus, under the analysis proposed here, such agreements would have an initial claim to deference under the proposed default rule. Terms surrendering control over abortion decisions would, however, differ from basic agreements regarding parenthood in that any specific enforcement of abortion provisions would invade the body of a pregnant woman against her will, while agreements about parenthood of a born child would not. The distinction offers an important reason why,

191. Of these, abortion is, to some people, the less controversial method in that it entirely eliminates the potential life, while refusals to treat impaired newborns, like efforts to remedy breaches regarding trait determinations, implicate a child that is alive. See K. Luker, supra note 10, at 229. Regarding refusal of treatment to newborns, see Bowen v. American Hospital Ass'n., 476 U.S. 610 (1986) (holding parents' refusal of treatment, rather than discrimination against the handicapped, was reason for hospital's withholding of treatment from seriously impaired newborn; "Baby Doe" regulations issued by HHS not authorized by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985)). Cf. supra note 48.
although monetary damages for breach might be analyzed as above, specific enforcement of this particular intention would likely be refused. Furthermore, under current law, a pregnant woman's constitutional right to exclusive control over abortion decisions would likely override any effort to enforce contractual surrenders of that right. That outcome is not inevitable, however. Constitutional rights can be surrendered if the surrender is sufficiently knowing and voluntary.\textsuperscript{192} Moreover, increasing dispute about fathers' rights regarding prebirth procreative decisions other than abortion is emerging as, for example, in the recent dispute regarding whether a father can veto his former wife's implanting of frozen embryos resulting from in vitro fertilization.\textsuperscript{193} New rules that affect the exclusivity of pregnant women's control over such prebirth decisions may well be forthcoming. If so, they might produce different responses to whether contract terms purporting to transfer abortion decisions to someone other than the pregnant woman should be enforceable.

Whatever the legal status of agreements about abortion, arguments that some trait-selecting behavior is currently accepted do not necessarily justify enforcement of reproductive agreements regarding specific traits. Such behavior, it may be argued, is not necessarily socially approved, but simply tolerated because ferreting out and enforcing limits on such conduct would intolerably intrude into the personal domain. Conception and parenthood are within the intimate realm. Yet, my considerable skepticism about whether cries of "privacy" or "intimacy" should bar legal concern or involvement in these domains leads me to reject such arguments by analogy here. What does seem true is that legal recognition and enforcement of private decisions is not the same species of intrusion as is represented by criminal prohibition of abortion, for instance. This distinction is, however, only partial; both the decision to defer to private ordering and the use of public resources for enforcement unquestionably implicate public policy.\textsuperscript{194}


\textsuperscript{193} See Davis v. Davis, No. E-14496 (Tenn. Cir. Sept. 21, 1989) (Westlaw, TN-CS database). While the woman's bodily involvement in pregnancy is greater, other participants in procreation/parenthood agreements have expectations and reliance at stake. Various medical developments—the capacity to fertilize embryos outside the body, the use of fetal tissue for therapeutic purposes, the possibility that fetuses may be transplanted or placed in artificial nurturing environments that avoid fetal death after abortion—raise difficult questions about the comparative interests and claims of men and women regarding these matters.

\textsuperscript{194} Cf. Shelley v. Kraemer, 334 U.S. 1 (1948) (state court order enforcing racially
So what should the policy be regarding arrangements seeking to control particular traits? Deference to private ordering does not require total absence of socially imposed constraints; rather it signals preference for substantial acceptance of private choice unless strong contrary policy reasons are advanced. Some limits on intentional agreements about specific traits seem appropriate.

On a purely practical level, present attempts to manipulate trait outcomes involve high degrees of uncertainty. Consequently, efforts to achieve preferred outcomes through screening and prediction—analogue to but capable of greater deliberation than mate selection—seem within an acceptable range, but promises to guarantee trait outcomes seem highly imprudent, perhaps even fraudulent, and thus should be denied enforcement. The scientific base will likely change, and such arguments may become obsolete. Moreover, our attitudes may change as we become accustomed to and skilled with issues raised by projects like the mapping of the human genome. At present, however, the line suggested seems an appropriate one.

As a matter of substantive policy, more restrictions should be placed on bargains for specifically described characteristics than on bargains arranging conception and parental status simpliciter. The latter type of agreement seems compatible with affirmation of life, respect for personhood, and reinforcement of responsible, caring relationship with children. Trait determination, however, introduces an element of "weighing and measuring" that fragments the person so evaluated, whether child or mother. Such bargained-for fragmentation is far more conducive to the harms envisioned from commodification than the bargain to procreate or parent per se. Furthermore, while some types of trait selection seem to be socially perceived as unobjectionable,

restrictive covenant in land sale contracts constitutes state action violative of Equal Protection Clause, U.S. Const. amend. XIV, §1). The case has not generally been followed in later decisions. The New Jersey Supreme Court expressed relief that its holding in Baby M prevented it from facing the Shelley problem. In re Baby M, 109 N.J. 396, 451, 537 A.2d 1227, 1255 n.15 (1988). However, the notion that legal enforcement of private agreements is an expression of state power and policy is widely accepted.

195. Our political and philosophical traditions conceive a person as of ultimate value. See Kant, supra note 107. In contrast to Radin, I believe an administrable line could be drawn between surrogacy that allows bargained-for intention to control parental status, and commodification of particular traits of children. See Radin, supra note 11, at 1925 ("When the baby becomes a commodity, all of its personal attributes ... become commodified as well"). However, my view that it is fragmentation of personhood that is objectionable conflicts with our society's apparent acceptance of transactions involving the sale of parts of the self—one's labor/time/image/name, etc.—while barring transfer of the whole self as amounting to slavery. Cf. Williams, supra note 108, at 8-11 (noting Tushnet's analysis of master-slave relations as "total," and critiquing that view by reanalyzing slavery as a fragmented, limited and limiting relationship). Perhaps the important distinction has less to do with partial or total, and more to do with context and purpose. See Radin, supra note 11, at 1926 (discussion of baby selling as not properly analogized to slavery because purpose of one is caretaking and of other is self-interested use).
as where parents seek to create an embryo or fetus that will not be afflicted with very severe disabilities, societal enforcement of intentions regarding other traits might be resisted on the ground that we deem these disappointed expectations (e.g., seeking a blue-eyed child or a tall one) to be morally frivolous. Moreover, agreements about traits that particularly raise the most negative spectre of eugenics—disadvantaging of “unpopular” groups on the basis of traits such as race, sex, intelligence, mild physical disability—ought to be unenforceable on public policy grounds.

(3) Specific performance?

Interestingly—if they do not persuade decision makers to make surrogacy and similar reproductive arrangements illegal—arguments about the sanctity and uniqueness of life in the context of debate over the adequacy of money damages cut the opposite way from what their proponents might wish in the context of specific performance. The more every child is unique, the more women and children are neither fungible nor reducible to specific traits, the stronger the claim for specific performance upon breach of any such agreement. Conversely, the more that offspring from alternative arrangements are deemed interchangeable either per se (as when they constitute merely an instance of the category “child”), or as interchangeable versions of a sub-category possessing particular traits, the stronger the claim that monetary damages will be adequate. Although it may seem counter-intuitive, the extraordinary remedy, specific performance of agreements about parenthood, in some sense affirms core values about the uniqueness of life.

If money damages are judged to be inadequate, a fuller assessment of specific performance must be undertaken. In making this evaluation, for reasons already discussed only the interests of the adult parties to the agreement are considered. Because a grant of specific performance is equity-based and discretionary, the policy issues regarding these issues are so dominant that narrower doctrinal analysis will likely be

196. Although public opinion supports reproductive manipulation to avoid defects, disabled advocacy groups might dispute this judgment. See I Am Not What You See: A Film Dialogue Between Sondra Diamond and Roy Bonisteel, in LAW, SCIENCE AND MEDICINE, supra note 92, at 1199-1204.

197. The interests of children are not opposed to the interests of the adults who choose and intend their creation and rearing. Moreover, if parents designated by the law are unfit, the rules governing child welfare, abuse and neglect would apply to parents under an intent-based rule as they do to parents under existing schemes. See supra text accompanying notes 136-49.
overwhelmed by prudential concerns. However, the criteria for awarding specific performance—difficulty of supervision and intrusiveness weighed against the adequacy of monetary relief—are rather well-established and may provide some guidance.\textsuperscript{198} Noting that adequacy of remedies is relative, the comments to section 359 of the \textit{Restatement (Second) of Contracts} say the "modern approach is to compare remedies to determine which is more effective in serving the ends of justice."\textsuperscript{199} The comments also refer to common sense and to the public interest as factors in the decision, and suggest that "[d]oubts (about the adequacy of money damages) should be resolved in favor of the granting of specific performance..."\textsuperscript{200} However, section 364 explicitly states that an injunction will be refused if it "would cause unreasonable hardship or loss to the party in breach ..." or if the terms of the agreement are "unfair."\textsuperscript{201}

Weighing these assorted considerations and once again using surrogacy as an example, several points should be made. In at least a formal sense, it would be relatively easy for a court to supervise the turning over of a child;\textsuperscript{202} the act is discrete and judging whether it has been performed is easy. Even easier to secure is performance of promises regarding who will be the parent; legal designation of parental status is directly within the law’s control. However, serious questions about intrusiveness and hardship are certainly raised by an order that a surrogate perform.\textsuperscript{203} On the other hand, the compulsion a surrogate would suffer from an order to perform differs in some ways from the type typically barred by the intrusiveness criterion. The surrender of the child is, at the most literal level, an act. Yet while likely a severe psychic

\textsuperscript{198} Specific performance is discretionary. \textit{Restatement (Second) of Contracts} § 357 (1979). See also id. §§ 358-369 comments (various factors to be considered in grant of specific performance).

\textsuperscript{199} Id. § 359 comment.

\textsuperscript{200} Id.

\textsuperscript{201} Id. § 364.

\textsuperscript{202} The rash of kidnappings in custody disputes, and Mary Beth Whitehead’s flight from the court’s jurisdiction in the \textit{Baby M} dispute, illustrate that formal orders are easier to achieve than factual compliance where parent-child relations are concerned. However, compliance is always a problem in law, and the willingness of some to flout a court order should not be a catchall justification for refusing to change the law. Presumably, if a new approach became customary, it would be less likely to yield outside-the-law reactions.

\textsuperscript{203} The liberty interest of the surrogate-promisor is severely compromised by an order to perform. See Schwartz, \textit{The Case for Specific Performance}, 89 \textit{Yale L.J.} 271, 296-98 (1979) (analyzing when a liberty interest is implicated by an order of specific performance, noting that specific performance is usually denied in individual contracts for personal services, but arguing that liberty-motivated exceptions to a rule of specific performance should not be created until particular liberty value shown to outweigh the goals of specific performance).

and emotional blow to a woman who has now changed her mind, the surrender is more in the nature of a compelled loss (i.e., a giving up of something) rather than an affirmative order to do something (i.e., a coerced commission). An order to surrender the child does not directly control the promisor's own body, time, services, selfhood in quite the way that compelled performance of a personal service against one's will is objectionable as requiring a kind of servitude. These differences are certainly not dispositive. They do, however, echo the classic legal distinction between commission and omission; if commission is the more punishable at law, presumably the giving up, the loss, the omission is more acceptably compelled.

The mother-child bond is significant and fundamental; its disruption seems, to many, unthinkable. It is less frequently noted, however, that if specific performance is denied where a surrogate refuses to surrender the child, an analogous loss is sustained by the father and, indeed, by the adoptive couple. A reproductive agreement creates expectations regarding the opportunity to parent a child; those expectations have vital importance to those who hold them. Arrangements may also have been made involving not only psychic but economic reliance. Even more emphatically, in a surrogacy example, a particular life actually comes into being because of such an agreement. Once conception has taken place, reliance on the promises made is about as intense and significant as could be imagined. If intentions and the expectations and reliance that result are taken seriously, the unfairness of denying the equitable remedy becomes comparable to the hardship of granting it. Moreover, the intrusiveness and hardship of compelling surrender of the child are somewhat alleviated by the fact that the surrogate has chosen this path at an earlier point in time, thereby setting in motion others' expectations and inducing their ir-

204. This description would be energetically resisted by those who emphasize the physical, psychological or mystical unity of mother and child. See, e.g., B. Rothman, supra note 77, at 90-105, 238 (arguing motherhood, especially pregnancy, is vital and intimate relationship). However, the father might claim a similar connectedness to "his" child based on his expectations and genetic link.

205. See supra note 203. Cf. Allen, supra note 163 (discussing the inalienable nature of the surrogate's privacy interest).

206. Barbara Rothman quotes a poignant expression of the loss experienced by intending parents when a mother changed her mind about giving them a child they had been promised they could adopt. B. Rothman, supra note 77, at 46. Whether physical differences in men's and women's procreative roles render their losses non-analogous will be discussed in Part III.

Studies of risk and loss suggest that "most people would insist on being paid far more to assent to a worsening of their situation than they would be willing to pay to improve their situation." Kelman, Cost-Benefit Analysis: An Ethical Critique, 5Reg. 33, 37 (1981). This might suggest that a surrogate's loss should be given priority over the intending parents' failed expectation. However, Kelman's proposition applies to comparisons within a given person's priorities, rather than between different persons. Kelman also states that the difference arises from psychological accustomedness and perceptions of one's "rights" to things. As Kelman recognizes, the analysis is circular because it depends on how terms are applied, and what one takes as the initial status quo.
reversible reliance. Whether that is sufficient justification for an injunctive remedy depends on resolution of issues already discussed, such as whether changes of mind should provide an excuse, whether choices of this type should be construed as voluntary, coerced or adaptive, etc. The analysis above suggests that while particular promises regarding reproductive arrangements might be excused or deemed coerced, unconscionable or violative of public policy, others could well be judged enforceable. Combined with the concern just expressed regarding expectations and reliance, the argument for specific performance in turning over a child born of a surrogate arrangement seems, at least in some instances, to be compelling.

While the most debated issue in surrogacy has been whether specific performance should be granted where a birth mother refuses to turn over a child, the potential for breaches by other parties must also be analyzed. Thus, if an intending parent, such as a commissioning father or couple in a surrogacy arrangement, were to refuse to accept a child, would an order to do so be appropriate? In evaluating a breach by the intending parents in a surrogacy agreement, it seems that compelling parents to accept a child they do not wish to raise more directly resembles the intrusive order for complex and highly personal action that the law has traditionally abhorred. The problem of poor performance by an unwilling parent is obvious and serious. True, the performance is not a personal service to the other party, a fact that reduces the potential for continuing friction. But the importance of the performance to the child undercuts the significance of that distinction. However, by contrast to a situation like Baby M where all parties wanted the child, in the circumstance hypothesized here, no solution involving willing parents is available.

In this light, several factors point toward the wisdom of ordering performance of the agreement where the intending parents refuse to perform. First, it is essential that someone be definitively designated as the legal parent of any child born. If we are to gain the advantages of legally recognizing deliberative intention, we must offset the risks such a regime poses of too contingent and indeterminate a parental responsibility for children created and birthed through such intentions. Second, there is an argument based on mutuality and symmetry of remedy; if one side to an agreement may be compelled to perform, the other should arguably be subject to similar compulsion. Once again, both expectations and reliance are significant. Because of the consuming and personal nature of parenting, money damages are not an adequate

207. See supra text accompanying notes 152-72.
208. Although mutuality of remedy is no longer a strict requirement of equitable orders, it has some, albeit not dispositive, weight. D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 49-52 (1973).
remedy for a surrogate who did not intend to parent the child she bears, but who now faces a reneging intending parent. The hardship and intrusiveness of having a child one did not expect to have is severe. Where neither wants the child, either party to an agreement could, as can parents of children born through ordinary coital means, give up the child for adoption. The intending parent should be compelled to perform, be legally recognized as parent, and should bear the responsibility for making and implementing parental or parenthood-surrendering decisions.

To provide illustrative grounding, I have discussed the problem of remedy largely in terms of breaches of a surrogacy contract after the birth of the child. Multiple other breaches could occur in various types of reproductive arrangements; not all can be discussed here. As with other contracts, the analysis of appropriate remedies should be carried out on a case-by-case basis as guided by general principles. The adequacy of monetary remedy and the appropriateness of equitable injunction will vary. For example, an injunction to undergo insemination pursuant to a reproductive agreement would present a far less compelling case for specific performance than the scenario just analyzed. Expectations would be shorter-lived and, consequently, less intense. Reliance in the form of life-creation would not yet have occurred. Moreover, an injunction to compel insemination would intrude into an unwilling individual’s body. Insemination would also be only a first step in a continuing dispute eventually involving the disposition of the child. Moreover, monetary damages might well be adequate to secure an acceptable alternate performance except in extraordinary circumstances. Thus, here, injunctive relief should be denied.

There remains one caveat to the conclusion that in some instances an order specifically to perform—together with an order declaring legal parental status according to the terms of the agreement—may well be appropriate. The unresolved question is whether, because of differences in biological procreative role, requiring a birth mother as distinct from a biological father, to perform as promised regarding parenting of a child, is peculiarly and distinctively unacceptable. In other words, are

209. See supra cases cited at note 176. In those cases, of course, the breach is one of medical service, not of a promise to parent. In such cases, there is no one else “available” to parent the child, as the intending parents are available in the situation contemplated here.

210. Such a resolution would settle an issue often raised in discussions of surrogacy: Who is responsible for upbringing if the child turns out to be impaired? See, e.g., Surrogate Mother’s Deformed Baby Rejected, N.Y. Times, Jan. 23, 1983, at 19, col. 1.

211. The trial court in Baby M held the parties’ rights were “fixed” after conception. In re Baby M, 217 N.J. Super. 313, 375, 525 A.2d 1128, 1159 (1987). See also Robertson, Resolving Disputes over Frozen Embryos, 19 HASTINGS CENTER REPORT 7 (1989) (proposing party wishing to avoid reproduction should prevail whenever other party has alternative means to reproduce).
the losses of parental role and opportunity truly analogous as between men and women? Once again, discussion of this issue is reserved for Part III, where the facts of the Baby M case provide flesh-and-blood immediacy to this most perplexing and critical inquiry.

C. The Analogy to Death

In considering the array of policy arguments about an intent-based regime of parental rights and responsibilities, the analogy to death, suggested at the outset of this Article, is once again illuminating. Some years back, advanced methods of mechanical life support began to obscure what had previously been a comparatively clear biological event. Consequently, death itself was redefined; new biological criteria (indicia of brain death) were substituted for old (heart-lung indicia). The need for humanly-initiated and humanly-adopted changes in the definition and determination of death—previously understood to be a fundamental “given” of nature—underscored the significant role of values and policy in these determinations. Moreover, as highlighted by the New Jersey Supreme Court in important recent decisions, individual patients may now legally exercise an unprecedented degree of choice and control regarding death. The United States Supreme Court, too, has recognized that the choice between life and death is a “deeply personal decision.” This new role of individual choice grows


213. For discussions of the way judgment and values are necessarily implicated in defining death, see generally Jonas, Against the Stream: Comments on the Definition and Redefinition of Death, in PHILOSOPHICAL ESSAYS: FROM ANCIENT CREED TO TECHNOLOGICAL MAN 132-34 (1974) (discussing death as continuous process requiring determination based on purposes rather than as discrete, identifiable event); PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DEFINING DEATH (1981) [hereinafter DEFINING DEATH] (discussing the role of values in decisions about how to define death); Dworkin, Death in Context, 48 IND. L.J. 623 (1973) (advocating functional definition of death).

214. See supra cases discussed note 1.

215. Suggestive of the important role of individuals' values in death decisions, see PRESIDENT'S COMMISSION OF THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 22-24 (1983) [hereinafter DECIDING TO FOREGO] (discussing the desirability of achieving "some harmony between an individual's death and personal values throughout life"); id. at 44 (advocating "the primacy of a patient's interests in self-determination and in honoring the patient's own view of well-being warrant leaving with the patient the final authority to decide").

out of the patients' rights movement, changing values about suicide, and, in a less obvious way, problems of medical cost containment. But it is also fueled by a new awareness of indeterminacy in matters previously regarded as self-evident and unequivocal. While fate and disease continue to control many aspects of when and why we die, increasingly there are also important individual choices about the method, timing and fact of particular deaths.

Similarly, as the designation "parent" loses its biological obviousness, the role of societal values in choosing what criteria ought to determine parenthood becomes undeniable. As with death, public policy requires a framework for determinations of parenthood even where new reproductive techniques are used. But the state might elect a policy that recognizes explicit personal intentions as the best way of determining legal parental status, at least in the area of artificial and assisted reproduction. As in other arenas of policy, private ordering need not be absolute; particular regulatory constraints on private ordering might be adopted. For instance, commercial entrepreneurship might be prohibited or regulated, or screening of prospective surrogates and parents might be required to protect the interests of children. But subject

217. See Shultz, Patient Choice, supra note 3, at 220-29 (tracing the origins and scope of legal protection of patient autonomy); P. Starr, supra note 90, 388-93 (tracing the evolution of patients' rights movement and its influence on medical authority).


219. See generally D. Callahan, Setting Limits (1987) (arguing the societal need to decrease health care expenditures in the last months of life).

220. Patients make legal arrangements like: living wills and powers of attorney. See statutory provisions, supra note 8. The American Hospital Association estimated that 70% of the 6000 deaths that occur every day in the United States are "somehow timed or negotiated by patients, families, and doctors." Malcolm, Giving Death a Hand: Rending Issue, N.Y. Times, June 9, 1990, at § 1, p. 6, col. 4.

221. Many commentators have suggested restrictions on the profits made by entrepreneurs. See, e.g., B. Rothman, supra note 77, at 25. However, some of the premium brokers receive presumably reflects the risks of being sued. A more stable legal climate would hopefully lower the price of the middleperson's services. In my view, the focus should be not on barring commercial centers but on establishing minimum obligations for entrepreneurs, for example, requiring disclosure of success rates, fees, etc., and requiring that agreements be drawn up governing what the parties want to happen in case of eventualities occurring during the process, etc. See Section of Family Law Adoption Committee and Ad Hoc Surrogacy Comm., Draft ABA Model Surrogacy Act, 22 FAM. L.Q. 123 (1988) [hereinafter Draft ABA Model Surrogacy Act].

to ordinary rules ensuring that particular agreements meet standards of enforceability, private intentions about procreation and parental status should be the starting place for legal determinations. It is therefore disturbing that an increasing number of jurisdictions are considering rules that either heavily regulate or make illegal individual agreements regarding artificial or assisted reproduction.\textsuperscript{223}

In drawing the analogy between parenthood and death the differences are as instructive as the similarities. Although many people may be affected by a particular death, we tend to see death decisions as having first-order consequences primarily for the person whose death is involved. Accordingly, the critical element that justifies turning personal choices into obligations is missing: decisions made by a person regarding his own death do not create expectations or reliance in others. As a matter of policy, individuals' prospective decisions about death are not legally binding; they can be changed at any time.\textsuperscript{224}

However, death is retrospectively oriented; procreation, prospectively. Death terminates relationships, procreation creates and remains embedded within them. Parenthood implies relationship. Because the law institutionalizes the child's need for at least one adult on whom she can depend for care, at least two people's interests (the child's and one or more caretakers') are critically implicated in decisions about parental status. Moreover, at present,\textsuperscript{225} at least two adults are genetically involved in procreation. Where modern reproductive technologies are used, additional parties may also be biologically or psychologically involved. Thus, multiple adults will have significant expectations and substantial reliance invested in the conception and rearing of a given child.

The analogy between death and procreation underscores that, faced with the indeterminacy flowing from bio-technical developments society should defer to individual choice regarding major life events. However, differences between death and procreation suggest that whereas decisions about death remain non-binding up to the moment they are implemented, bargained-for choices about parental rights and obligations should be recognized and legally enforced, provided they meet both general and specially established doctrinal standards.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{223} See infra note 233.
\item \textsuperscript{224} See, e.g., California's Natural Death Act, CAL. HEALTH & SAFETY CODE § 7189 (West Supp. 1990) (revocation of directive regarding natural death); Durable Power of Attorney for Health Care, CAL. CIV. CODE § 2437 (West Supp. 1990) (provision for revocation).
\item \textsuperscript{225} See 15 ACADEMIC AMERICAN ENCYCLOPEDIA 99-100 (1989) (parthenogenesis, the development of an unfertilized egg into an adult organism, can occur in mammals such as rabbits and mice, but for unknown reasons the parthenote embryos die within a few days). There is as yet no evidence that parthenogenesis is possible in humans.
\item \textsuperscript{226} For some purposes the appropriate procreative analogue to death decisions may be conception or viability rather than birth. The trial court in Baby M held that the parties'
\end{itemize}
III. Toward a Gender-Neutral Standard of Parenthood: The Case of Baby M

Legal and societal responses to reproductive technology and to the issues it poses have thus far been fragmentary and tentative. Artificial insemination is fairly well accepted; many states have statutes governing its use and consequences. Ethical qualms have stalled federal funding of research on in vitro fertilization, while no definitive national policy has emerged, a few states have enacted regulations governing that work, and a few cases have been adjudicated. Considerable dispute prevails concerning whether use of fetal tissue for therapeutic purposes should be allowed.

A scattering of courts have ruled on aspects of surrogacy, and in a number of states statutes regulating the practice have been enacted or introduced. Because it rights were fixed after conception. In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987). See discussion of the appropriateness of specific performance as a remedy at supra notes 207-15.


228. As a consequence of the 1980 disbanding of the federal board charged with overseeing ethical issues in federally funded research, an estimated 100 or more research applications a year are not submitted. Fast Spread of Test-Tube Baby Clinics Spurs Growing Concern, L.A. Times, July 14, 1988, at 3, col. 1.


is the most visible and considered legal response to disputes engendered by reproductive technology, the influential Baby M case is a particularly illuminating context in which to address the broader issues under discussion here.

The New Jersey Supreme Court has earned a reputation for thoughtful resolution of legal issues posed by technological change in the context of death, yet its Baby M decision is ill-attuned to the developments in reproductive technology analyzed in this Article. The court pro forma acknowledged these developments, observing that "[t]his case affords some insight into a new reproductive arrangement." But it assessed the surrogacy agreement under which Mary Beth Whitehead agreed to bear a child for William and Elizabeth Stern through a pre-modern lens of conventional procreational and family patterns. In so doing, it failed to create a legal framework responsive to the growing role of personal intention in reproductive and parenting decisions.

A. Traditional vs. Intent-Based Rules

1. ROLE OF THE CONTRACT

New Jersey Superior Court Judge Sorkow and the New Jersey Supreme Court arrived at opposite conclusions regarding the validity of the contract on which the surrogacy arrangement rested. Given

26, 1988, at I, col. 6. Louisiana has enacted legislation prohibiting enforcement of commercial surrogate contracts, Nevada and Arkansas permit enforcement subject to judicial review. Id. Michigan recently passed a law making it a felony to arrange a surrogate mother contract, punishable by up to five years in prison and a $50,000 fine. Id. The Michigan law was challenged by the ACLU as an invasion of privacy, but the challenge was dropped when the state Attorney General agreed to interpret the law as merely prohibiting any requirement that the mother agree before birth to give up the baby. Judge Upholds Ban on Surrogate Birth Contracts, N.Y. Times, Sept. 20, 1988, at A15, col. 1. See generally INFERTILITY, supra note 5, at 275-88 (discussion of recent court cases, legislative initiatives and possible legislative approaches). A bill was introduced in Congress which would bar commercial surrogacy where interstate commerce is involved. See Unlikely Team Sponsors Bill to End Childbearing for Fee, N.Y. Times, Feb. 3, 1989, at A11, col. 1.

But see Draft ABA Model Surrogacy Act, supra note 221 (providing that paid surrogacy contracts are legal if following Act's requirements, and may be mutually specifically enforced); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 89 (Supp. 1990) (providing alternative regimes, one allowing for paid surrogacy with six-month period after insemination within which surrogate may freely change her mind, the other outlawing paid surrogacy altogether).

234. See supra text accompanying notes 1-4.
236. The child was conceived by artificial insemination of Whitehead with William Stern's sperm.
237. Judge Sorkow found the contract valid, In re Baby M, 216 N.J. Super. 313, 388, 525 A.2d 1128, 1166 (1987), except for the clause purporting to take control over abortion
that difference, it is surprising that both courts awarded custody to the Stems. Indeed, both resolved the custody dispute on the basis of the same legal standard—the best interests of the child. Judge Sorkow arrived at that standard through a rather creative process. Having upheld the contract, Sorkow decided that the Stems’ request for specific performance required that he determine the child’s best interests before granting that remedy. By contrast, the supreme court, having held the contract invalid, adopted the best interests standard as the ordinary rule for resolving custody disputes between natural parents.

Although it had little effect on the custody decision, the difference in holdings on the validity of the contract was sharply drawn in the two courts’ assignments of parental rights. Judge Sorkow terminated Whitehead’s rights and allowed Elizabeth Stern’s adoption of the baby immediately after he ruled in the case. The supreme court reversed both the termination and the adoption, retaining Whitehead’s status as the legal mother, and providing a broad basis for her claim to visitation.

The supreme court’s holding on the contract will have great significance in future cases. In New Jersey, absent legislative action, future surrogacy cases would be restricted to altruistic agreements, the only type the court indicated it would countenance. Moreover, because the supreme court mandated that the biological mother must be allowed to change her mind after birth of the child, a surrogate who wishes to do so will simply decline to turn over the child. In sharp contrast to the Baby M case, no order to transfer custody would then be made at the outset, and on the grounds of continuity of care for the child, the surrogate would likely win custody. The court’s no-payment and revocability rulings combined drastically reduce the likelihood of future surrogacy contracts since essential goals of each side are rendered unenforceable.

out of the hands of the surrogate. Id. at 375-76, 525 A.2d at 1159. The supreme court invalidated the contract as conflicting with the law and public policy of the state, In re Baby M, 109 N.J. 396, 421-22, 537 A.2d 1227, 1240 (1988).

 Judge Sorkow applied general principles governing the availability of injunctive remedies. In this regard he mainly analyzed whether there was an adequate remedy at law, concluding that because of the “singular subject” of the contract, money damages would be inadequate. In re Baby M, 217 N.J. Super. at 389-90, 525 A.2d at 1166. Surprisingly, the judge was silent on the question of intrusiveness. See supra note 203. Note the cleverness of the court's approach allowing it to incorporate the standard normally applied to custody disputes into a decision holding that contract law rather than family law governed the resolution of the dispute. Id.

241. See infra text accompanying note 320.
2. THE DE-LEGITIMATION OF INTENT

The central issue resolved by both trial and appellate courts was whether existing family law governs the facts of surrogacy.\(^{244}\) Once that decision was made, everything else followed. At trial, Judge Sorkow concluded that statutes governing baby-selling, adoption and custody disputes between unwed parents did not apply because the drafters of such statutes did not contemplate the types of arrangements made in *Baby M.*\(^{245}\) He therefore applied general contract, constitutional and parens patriae doctrines to resolve the case.\(^{246}\)

The supreme court, by contrast, treated the surrogacy transaction as tantamount to various factual situations already regulated by existing doctrine. It thus applied prevailing law. The supreme court stated: “[t]he factual issues confronted and decided by the trial court were the same as if Mr. Stern and Mrs. Whitehead had had the child out of wedlock, intended or unintended.”\(^{247}\) It treated the surrogacy arrangement as an agreement for private placement adoption, and applied statutes that criminalize the arrangement of adoptions for money.\(^{248}\)

The court was so convinced about its adoption characterization that it construed statutes to reach these facts, even when the statutory language itself would not have dictated that result.\(^{249}\) Thus, in discussing the statutes that provide for irrevocable surrender of a child for adoption, the court stated that “we construe the statute to allow a surrender only after the birth of the child.”\(^{250}\) It also used negative inference, divining a legislative intention to bar the disputed arrangement from the fact that such arrangements are not specifically identified


\(^{245}\) *In re Baby M*, 217 N.J. Super. at 372, 525 A.2d at 1157.

\(^{246}\) *Id.* at 375, 388, 525 A.2d at 1159, 1166.

\(^{247}\) *In re Baby M*, 109 N.J. at 418, 537 A.2d at 1238.

\(^{248}\) “Under current law, however, the surrogacy agreement before us is illegal and invalid. . . . We have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead.” *Id.* at 422, 537 A.2d at 1240.


\(^{250}\) *In re Baby M*, 109 N.J. at 431, 537 A.2d at 1245.
as permissible: "Contractual surrender of parental rights is not provided for in our statutes as now written." Finally, the court relied on a repealed statute as a source of fundamental state policy: "While not so stated in the present adoption law, this purpose [i.e., 'to the extent possible, children should remain with and be brought up by both of their natural parents'] remains part of the public policy of this State." Perhaps no inference should be drawn from the omission in the amended statute of the quoted statement of purpose. But in an era when so many children are raised in families other than ones involving "both of their natural parents," the legislature's change of expression may well have been intentional.

The court's decision to apply and even to stretch existing statutory schema to govern the Baby M case assumed or adopted conventional family design and past procreational experience as models for resolution of disputes that actually rest on quite different facts. The decision ignored and trivialized distinctions between conventional pre-technology procreation and the transactions and relationships in the surrogacy arrangement. To say that the factual issues are "the same" as if Whitehead and William Stern had simply had a child out of wedlock, ignores the centrally important fact that modern reproductive techniques allow the separation of personal and sexual intimacy from procreation. It ignores that these reproductive techniques have different meanings and occur in different factual contexts than those contemplated by baby-selling statutes. It ignores that the father here differs in important ways from stereotypical unwed fathers. In particular, it ignores that the child in question exists only because of its progenitors' individual intentions, their reciprocal decisions, and their behavior and expectations in the wake of such decisions. Those facts are fundamental and significant. They are sufficient to distinguish instances like Baby M from activities addressed by the baby-selling statutes.

251. Id. at 433, 537 A.2d at 1245.
252. Id. at 435, 537 A.2d at 1246-47.
253. See A. MACINTYRE, supra note 12, at 206 (arguing that behavior cannot be intelligibly characterized independently of intention and setting); Kluge, The Ethics of Deliberate Death, in LAW, SCIENCE AND MEDICINE, supra note 92, at 1106 ("the nature and identity of a given act resides precisely in its context and in the person's intention"). Cf. discussion of early characterizations of artificial insemination supra text accompanying notes 127-39.

Baby-selling statutes presumably aim to prevent economic pressures from causing parents to sell already-born or expected children that they would otherwise keep. The concern is that a species of duress infects the decision to part with the child. Cf. infra note 286. With regard to the rationality and morality of baby-selling statutes, see Landes & Posner, supra note 11 (developing a law and economics analysis of a more open market for adoption); Posner, supra note 151 (attempting to offset criticisms and clarify misunderstandings of the earlier article); Prichard, A Market for Babies?, supra note 11 (critiquing the Posner-Landes proposal).

254. See infra text accompanying notes 313-14.
As Judge Sorkow had held, intentions formed and bargained for before any pregnancy had begun set surrogacy dramatically apart from ordinary adoption, and signalled the common ground that surrogacy shares with other reproductive technologies. The supreme court, however, dismissed intention as unimportant. In embracing the unwed parents analogy, the court expressly stated that the analogy applied whether procreation was “intended or unintended.”

Even more directly, the court, in rebutting alleged differences between surrogacy and adoption, stated: “[t]he main difference, that the unwanted pregnancy is unintended while the situation of the surrogate mother is voluntary and intended, is really not significant.” Indeed, in speaking of the wrongfulness of making a mother’s decision to surrender a child irrevocable, the court repeatedly used the phrase “even prior to conception,” as if the fact that there was no pregnancy, no child conceived, before these intentions and agreements were formed, was a factor that reinforced rather than mitigated, the court’s characterization of the arrangement as wrong. Shortly after declaiming the irrelevance of intention, the court drew a crucial conclusion: “We suggest that her [Whitehead’s] consent is irrelevant.”

These statements are profoundly wrong-headed. They explain why the court resolved the case as it did. They also suggest why the court’s approach will fail to provide a framework within which the multiple issues of reproductive technology can be successfully resolved. The court was certainly correct that voluntariness does not conclusively insulate conduct from regulation. Yet it was just as certainly wrong in suggesting that voluntariness, intention and expectation are unimportant factors in assessing whether and how the conduct at issue should be regulated. To ignore the significance of deliberation, purpose and expectation—the capacity to envision and shape the future through intentional choice—is to disregard one of the most distinctive traits that makes us human. It is to disregard crucial differences in moral mean-

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255. In re Baby M, 109 N.J. at 418, 537 A.2d at 1238.
256. Id. at 439, 537 A.2d at 1248-49.
257. Id. at 422, 537 A.2d at 1240 (“before she has even conceived”); id. at 434, 537 A.2d at 1246 (“agreed to before conception”).
258. Id. at 440, 537 A.2d at 1249.
259. See A. MACINTYRE, supra note 12, at 209 (“The most basic distinction of all embedded in our discourse and our practice ... is that between human beings and other beings. Human beings can be held to account for that of which they are the authors; other beings cannot”); id. at 103 (“the ability to plan and to engage in long-term projects is a necessary condition of being able to find life meaningful. A life lived from moment to moment, from episode to episode, unconnected by threads of large-scale intention, would lack the basis for many characteristically human institutions”). See also Jones, supra note 12, at 46-48 (arguing the centrality of secure expectations and of contractual assent to the expression of our “deepest aspirations”). Compare Jonas, Philosophical Reflections on Experimenting with Human Subjects, in LAW, SCIENCE AND MEDICINE, supra note 92, at 899 (authentic deliberation and choice is even more important in rescuing persons from incipient reification, or “thinghood,” than is treating persons as ends not means).
ing and responsibility. To disregard such intention with reference to so intimate and significant an activity as procreation and child-rearing is deeply shocking.

The Sterns and Mary Beth Whitehead chose and intended the creation of this child. They acted to bring the result about and in reliance on their expectations that it would occur. They further intended that the Sterns would parent the child and Mary Beth Whitehead would not. Granted, Whitehead changed her mind. She made a new decision, a new intention, to keep the baby she originally conceived for the Sterns. Intentions do change. But why should her changed intention override her earlier one and the Sterns' constant one? Contrary to these deliberate and bargained-for expectations, however, the court decided that William Stern and Whitehead will share the rights of parenthood and companionship of the child. Elizabeth Stem will have a de facto share in the child's rearing, but the court gave her no legally recognized role in Melissa's life.

B. A Missed Opportunity for Gender-Neutral Access to Children

In its Baby M decision, the New Jersey Supreme Court not only trivialized the role of intention in procreative decision-making, it also missed a significant opportunity to alleviate gender inequities in the legal system. Part I described sex differences in access to, and burdens derived from, procreation. Determination of parental status on the basis of expressed and bargained-for intentions would create greater gender equity in access to child-nurturing roles than does the current system. Unlike biologically-based variables, the capacity to form and express intentions is gender-neutral. While intentions actually formed would, to some degree, reflect current gender experience, including gender stereotypes and gender-based limitations, such content would be malleable over time as gender roles evolve and equalize.

Because it failed to perceive Baby M as one instance of an important pattern in technological procreation generally, the New Jersey Supreme Court was forced to look elsewhere for resolution of the problems that confronted it. The court strove to deal humanely with the particular litigants and the difficult circumstances before it. However,

260. Judge Sorkow's discussion reflected substantial class bias, In re Baby M, 217 N.J. Super. at 394, 525 A.2d at 1168, insensitivity to Whitehead's experience, id. at 393, 525 A.2d at 1168, and personal pique at affronts to his own authority, id. at 394, 525 A.2d at 1168. The supreme court dealt far more judiciously with the same array of issues, expressing empathy for Whitehead's predicament, In re Baby M, 109 N.J. at 420, 537 A.2d at 1239, and taking seriously the issue of economic exploitation, id. at 439-40, 5337 A.2d at 1249. Judge Sorkow's approach reflects a tendency to see the issue in terms of imagined scenarios of "good girls" vs. "bad girls." See D. DINNERSTEIN, THE MERMAID AND MINOTAUR (1976) (describing society's schizophrenic alternation between idolization and contempt for women).
having rejected any role for intention, the court fell back on gender stereotypes to resolve the issues. Interwoven with and sometimes hidden by the particular outcome here, the court’s holdings in the Baby M case betray views on gender that are at best unexamined and, at worst, harshly regressive. The court’s decision reinforced stereotypes regarding the desirability of segregating women from the market, the unpredictability of women’s intentions and decisions, and the givenness of women’s biological destiny. Perhaps worst of all, it acted to lock in existing gender-based spheres of influence in our society, refusing to recognize fragile, emergent male efforts to claim a meaningful role in access to and nurture of children.

1. WOMEN AND THE MARKET

The most meaningful issue behind baby-selling policies is the fear of cheapening—commodifying—life itself. The question is whether procreative intentions are sufficiently important to overcome that concern. Part II of this Article argued that they are. The New Jersey Supreme Court decided to the contrary. A key reason was its fear that women would be exploited by surrogacy arrangements. The Baby M opinion repeatedly expressed this concern, noting at the outset that surrogacy was “potentially degrading to women.” Moreover, precisely in that segment of the opinion where the court declared intention to be insignificant, it explained that “initially . . . [there are] stronger reactions of sympathy for the mother whose pregnancy was unwanted than for the surrogate mother, who ‘went into this with her eyes wide open.’ ” But, the court continued, “[o]n reflection, however, it appears that the essential evil is the same, taking advantage of a woman’s circumstances (the unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree.” In the court’s defense, the views it adopted were energetically pressed upon it by some feminists, both in the newspapers and in amicus briefs. The concerns are legitimate, and the goals attractive, at least from some points of view. But the traps are also there.

The court’s holding that surrogacy arrangements would be acceptable only if they involve no compensation for the surrogate raises

261. See supra notes 107-19 and accompanying text.
264. Id. at 439, 537 A.2d at 1249.
serious concerns. In a narrowly doctrinal sense the holding can be justified: the court held surrogacy arrangements to be de facto private adoptions, in connection with which payment is forbidden by statute. In a more basic sense, however, the court's holding on this point was either disingenuous or disturbing. The court suggested that the practice of surrogacy was objectionable in a number of ways, (e.g. it ignores the fitness of the commissioning parents, it pays no attention to the primary consideration of the best interests of the child, etc.). Yet the court said it would not invalidate the practice if the surrogate were not paid. Perhaps the court was convinced that eliminating compensation would be tantamount to ending surrogacy; indeed, it hinted this. If so, it was being less than forthcoming in its explanations. If, however, the court genuinely meant that altruistic surrogacy is acceptable, that the underlying commissioning of conception and the transfer of the child are not socially problematic, then its real issue is with payment rather than with the array of other concerns it raised.

Stripped of objections to the factual practices themselves, the court's concern smacks all too familiarly of the notion that while men get paid for their efforts, skills and services, women, being women, should do their woman-things out of purity of heart and sentiment. Women are too delicate, too pure, to be tainted by filthy lucre. We have heard that story before, and while it has many appealing morals, and many touching images, we do not like the way the story ends. Both men and women experience altruism, nobility and sentiment; both men and women have needs for money, for recognition and compensation for skills and services. Neither gender should be restricted to only one side of the rich mixture of human motivation. Indeed, women's inability to get adequate, or any, monetary compensation for the tasks and roles they solely or primarily perform, is a central factor in the exploitation of women about which the court worried. This is as true of women who are economically disadvantaged as of those who are well-off. Nor do the data suggest that women who have agreed to be surrogates are typically poor. Any assumption that they will be itself reflects an unfortunate mixture of stereotyping and paternalism both about surrogacy and about poverty. While the court's concern is well-intentioned, its conclusions are troubling.

266. *In re Baby M*, 109 N.J. at 423-34, 537 A.2d at 1240-46.
267. *Id.* at 434-40, 537 A.2d at 1246-49.
268. *Id.* at 411, 537 A.2d at 1235.
269. *Id.* at 438, 537 A.2d at 1248.
270. Sperm are among the things for which men get paid. Revealingly, however, paid transactions in sperm are called "donations." See *supra* notes 43-44.
271. For economic data on surrogates see *infra* note 309. For discussion of the voluntariness of choice see *supra* text accompanying notes 166-72.
2. WOMEN'S NEED TO CHANGE THEIR MINDS

The court also held that to be valid, even an altruistic surrogacy contract must allow the surrogate—and only the surrogate—to change her mind after the birth.\textsuperscript{272} In cataloging its objections to the agreement in \textit{Baby M}, the court stated that "the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed."\textsuperscript{273}

The revocability aspect of the holding is perplexing and distressing. The court rejected irrevocable contractual surrender in this surrogate arrangement both because the surrender was made before birth, and because it was made through a private agreement.\textsuperscript{274} The court acknowledged that New Jersey adoption law allows irrevocable surrender of a child to an approved agency.\textsuperscript{275} In private adoptions, however, the court construed the statute as not recognizing voluntary surrenders as dispositive, irrevocable or even relevant.\textsuperscript{276} The rationale is that

\textsuperscript{272} No mind-changing provision is mentioned for the father, or for either the surrogate's or the father's partner. This may reflect a realistic judgment that the surrogate is more likely to want to change her mind. However, it may also reflect a cult of motherhood that assumes the surrogate's feelings are both more precious and more unpredictable than those of other parties. \textit{See infra} text accompanying notes 288-330.

The court's mandate of a mind-changing provision might seem to raise a doctrinal problem of lack of mutuality, as if the surrogate were saying: "I'll do it if I want to." Would that make the contract unenforceable under traditional rules? The essence of contractual obligation is making a present commitment about a future event, and the provision the court suggests would undermine the most essential term of the contract. However, modern courts are generally inclined to allow the parties to make their own decisions about whether the other's degree of commitment is sufficient, unless advantage taking, or mistake is present. \textit{See J. CALAMARI & J. PERILLO, CONTRACTS} 156-75 (2d ed. 1977) (discussing doctrine of mutuality of obligation and modern application). Assuming the commissioning parents knew about the mind-changing provision, no such advantage taking or mistake analysis would apply.

Some adoptive parents might claim that they were so desperate that they would agree to anything, leaving all power in the hands of the surrogate, but such an interpretation is unlikely—particularly since prevailing perceptions are that it is the surrogate who has relatively little power in these arrangements. Or the commissioning parents might be seen as desperate vis-à-vis the power of the middleman-entrepreneur. However, assuming no such duresse-like argument prevailed, current judicial inclination to accept any obligation, no matter how small, would likely obviate the mutuality problem. \textit{See, e.g.,} Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945) (provision to cancel at any time held sufficient consideration). Here, agreeing to be inseminated, as well as to go through the pregnancy, are performances that would satisfy modern consideration requirements. In essence, the commissioning parents would be bargaining for the chance that they would get custody. The trend is to accept such bargains for a chance if the chance is combined with some element of certain performance.

\textsuperscript{273} \textit{In re Baby M}, 109 N.J. at 437, 537 A.2d at 1248.
\textsuperscript{274} \textit{Id.} at 432, 537 A.2d at 1245.
\textsuperscript{275} \textit{Id.} at 425-32, 537 A.2d at 1242-45.
\textsuperscript{276} \textit{Id.} at 426, 537 A.2d at 1242.
private placements may be less attentive to the adequacy of the home, to the interests of the child, and to the counselling of women considering surrender than duly empowered public or publicly approved agencies. But these differences are thinner than the court made them appear. Private adoption may perhaps involve shortcuts, but it is increasingly used. Motivated mostly by a desire to get more or quicker access to available children, such arrangements provide important opportunities for those dissatisfied with constraints of mainstream adoption that are arguably more rooted in conventional moralism than in meaningful protection of the interests of children.

On the timing issue, the court's decision that the surrogate could not make an advance contract to surrender her child rested on its construing of the adoption statutes as allowing voluntary and irrevocable surrenders "only after the birth of the child." Once again, had the court accepted the novelty of the circumstances before it, it might have treated the absence of explicit language as indicative that surrogate surrenders had not been contemplated by the legislature. It might have declined to attribute meanings not stated and might instead have emphasized the statute's underlying policy. The main policy theme is clear: under appropriate conditions, a voluntary decision to surrender a child is valid. The statutory scheme assumes that biological mothers can make such decisions and expresses a conviction that, in many circumstances, such decisions are best made irrevocable. Thus, New Jersey statutes allow a woman who has just borne a child to make an irrevocable decision to give it up despite the great emotional, financial and personal strain that arise from unwanted pregnancy and childbirth. Given this, it is unclear why someone who initiates contact with a commissioning agency or couple and who, in an atmosphere

277. Public child placement agencies are not always superior to private channels of placement. Most complaints against public agency adoption center on the long waits and many state requirements to which public agencies must adhere. See supra note 70. For a more general critique of the institution of public placement, see H. KIRK, ADOPTIVE KINSHIP: A MODERN INSTITUTION IN NEED OF REFORM (1981) (socio-philosophical challenge to the assumptions underlying current ideology of adoption). Public agencies may do a better job of allocating available children independent of wealth and position, although they are not immune to these influences. See Posner, supra note 151, at 60-62 (discussing the role of money in adoptions, and noting that both agency and independent adoption favor the wealthy).

278. See supra note 23.

279. See Posner, supra note 151, at 61-62.


free of biological or time constraints, chooses to conceive with the intention of giving the child to someone else should not be able to make an irrevocable commitment to do so. The mother who surrenders her child for adoption after birth may well be seeking to regain a lifeplan that matches her preconception intentions. Treating surrogate agreements as ordinarily irrevocable would have the same result—effectuating preconception intentions. Yet one is allowed and the other is not.

This problem can be viewed as one of conflicting voices or "selves." Which "self" of the surrogate should be listened to? However philosophers might resolve this intriguing issue, it is certainly arguable that under traditional analyses, the state of mind, the availability of alternatives, and the opportunity for deliberation free of constraints make the decision of a surrogate different from the decision of a woman who, like many birth mothers who give up a child for adoption, is unwillingly pregnant. The differences make the preconception decision of the surrogate considerably more worthy of deference and enforcement.

In addition, in the surrogate instance, unlike ordinary adoption, putting the preconception intention into effect also honors the explicitly agreed-upon intentions and expectations of other persons. When the vital reliance and expectations of others are added to the nature of the deliberation, it is difficult to justify a preference for the reneging decision of the surrogate's post-birth "self." The court's opposite conclu-

283. While some mothers who surrender children for adoption may be acting because of changes of circumstance during a pregnancy that cause them not to want a child they earlier intended to keep, most likely did not want or intend to become pregnant in the first place.

284. See supra text accompanying notes 152-65 (discussing changed circumstances). If contracting were allowed, a revocability term could be negotiated by the parties themselves. Public policy could require that the issue of revocation be discussed, and any provision separately signed, or a box checked to be sure that the surrogate had considered the matter.

285. Various commentators have discussed which self ought to control when a person expresses different opinions at different points in time. Perhaps the classic parable was posed by Homer's description of Odysseus' order to tie him to the mast to avoid the temptations of the Sirens. The problem is also discussed in J. Rawls, A Theory of Justice 248-50 (1971) (discussing circumstances under which parties in the original position would acknowledge a need for paternalistic overriding of their present wishes in order to avoid irrational or foolish actions). For an interesting exchange regarding this problem see Dresser, Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law, 28 Ariz. L. Rev. 373, 379-81 (1986) (arguing that incompetent patient may be a different self than competent patient who signed advance directive), and Rhoden, Litigating Life and Death, 102 Harv. L. Rev. 375, 412-19 (1988) (discussing whether to adopt the viewpoint of the past or the present self in regard to directives about death).

286. There may, of course, be financial constraints, but they are not specific to this decision. If the surrogate needs money, she can choose various avenues to address that need, whereas the unwillingly pregnant mother has financial pressures that arise from her pregnancy and anticipated motherhood.
sion both reflects and reinforces a number of interrelated and highly controversial beliefs.

In holding that surrogates but not other parties to the arrangement must have an opportunity to change their minds after giving birth, the court reinforces stereotypes of women as unstable, as unable to make decisions and stick to them, and as necessarily vulnerable to their hormones and emotions. One need not denigrate the role of biology, pregnancy or emotion to be disturbed by the court’s treatment of these factors as one-sided, clear and dispositive. The court’s holding on revocability expresses the idea that the biological experience of motherhood necessarily “trumps” all other considerations. In so doing, it reifies a woman’s role as biological mother, treating it as the one role that is of the essence. In particular, it exalts a woman’s experience of pregnancy and childbirth over her formation of emotional, intellectual and interpersonal decisions and expectations, as well as over others’ reliance on the commitments she has earlier made.\(^{287}\)

3. GENDERED SPHERES OF INFLUENCE

The Baby M decision not only reflected stereotypes of women, it reinforced a division of the world into gendered roles, creating a de facto rule that children are within a realm rightly dominated by women. Doing so was both unnecessary and unwise.

No policy should opt for formal neutrality while ignoring reality—biological or social. No body of rules should systematically disadvantage whole categories of people on the basis of ascribed traits, like sex, that they cannot choose or control, unless doing so is irreducibly necessary. This is one of the most powerful claims not only of basic justice but also of the feminist movement. But neither should policy opt for formal neutrality while ignoring reality—biological or social. A second fundamental justice claim is that those similarly situated should be treated similarly; those differently situated should be treated differently. Men and women have biologically different roles in reproduction. The argument may be offered that the burdens of procreation are not parallel for men and women, so why should the benefits be? Some will feel that since women disproportionately bear the burdens, they should disproportionately receive the benefits of procreation and parenthood.\(^{288}\) Such a claim has force; but there are compelling counterarguments.

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\(^{287}\) In so doing, the court is not alone. Many feminists have taken a similar position. See, e.g., Schuler, supra note 100, at 130 (“The woman who carries the child should be considered the mother—without modification”).

\(^{288}\) Analogously, it might be argued that traditional presumptions of maternal preference in child custody disputes should be continued on this ground, although policies against gender discrimination arguably cut the other way. For a discussion of the history and ar-
Where sex-based childbearing and childrearing roles disadvantage women's access to dimensions of life that are sought after by both genders, society should act to offset the liability. Thus, in the hotly contested California Federal Savings & Loan Association v. Guerra (Cal. Fed.) case,289 many feminists supported California's statutory requirement that employers guarantee leave and return rights to women interrupting their jobs in order to give birth.290 Others urged that when granted only to women, such a privilege constitutes special treatment that is constitutionally offensive, prudentially unwise and strategically mistaken.291 However, the United States Supreme Court, rightly I believe, upheld the challenged statute as necessary to achieve equitable access to gainful employment for both genders.292

The obverse of the same debate has been little noted. In Cal. Fed., the issue was access to market employment, long a male domain in which women's responsibility for children has imposed significant disadvantages. By analogy, children have historically been a female domain; men's more remote and limited biological role has disadvantaged their access to having and nurturing children. Granted, men have often been uninterested in nurturing children. Granted also, men have often taken control of aspects of the domain of children that have been of

Arguments regarding the maternal presumption see Ex parte Devine, 398 So. 2d 686 (Ala. 1981) (holding the tender years presumption an unconstitutional gender-based classification). For scholarly commentary on the prudence of and empirical bases for the presumption, see Chambers, supra note 135 (arguing against the maternal preference); Fineman & Opie, The Use of Social Science Data in Legal Policymaking: Custody Determinations at Divorce, 1987 Wis. L. Rev. 107 (supporting maternal custody as generally proper result). See also Chambers, The Abuses of Social Science: A Response to Fineman and Opie, 1987 Wis. L. Rev. 159; Fineman, A Reply to David Chambers, 1987 Wis. L. Rev. 165.


292. Cal. Fed., 479 U.S. at 289 ("California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs").
historic concern to them—designation and begetting of heirs, control over economic advantages or assets generated by children, confirmation of male potency, virility, etc.\textsuperscript{293} The physical risks, the day to day drudgery, and the responsibility of consistent care have been left to women.

But women's behavior and views are also two-edged.\textsuperscript{294} We not only decry the burdens but celebrate the wonder, meaning and joy of children in our lives. Moreover, we, as women, increasingly urge that men should share more equally in the personal, economic and social burdens of childrearing. The rub, of course, is that in the main, they do not yet do so.\textsuperscript{295} The goal of equalizing benefits and offsetting burdens, either in employment or in access to and responsibilities for children, is far from realized. Women's angry sense that they get the short end of both sticks can readily be understood. Yet if we mean what we say, and if we seek to make it happen, we should shape rules that lead us toward the future to which we aspire.\textsuperscript{296} We should attend to claims that at least some men may actually want what we have said we want them to want: they may genuinely and affirmatively choose to nurture a child.\textsuperscript{297} William Stern may be such a man.

If the law makes the specialness of biological motherhood wholly dispositive in disputes over access to children, is it recognizing the undeniable fact that the surrogate has spent months of bodily risk and involvement in the gestation and birthing of a child? Was the New Jersey Supreme Court trying fairly to align benefits and burdens of pregnancy? Yes it was. But it also risked turning pregnancy into an icon, adopting legal policies that unnecessarily and unwisely entrench rather than mitigate the sex-based biological dependency of men on

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\textsuperscript{293} See, e.g., G. Corea, supra note 9, at 34-46.
\textsuperscript{294} For a sensitive analysis of the double-edges in analysis and policy regarding men's and women's differing relation to children, see Bartlett & Stack, Joint Custody, Feminism and the Dependency Dilemma, 2 Berkeley Women's L.J. 9, 15-23 (1986).
\textsuperscript{295} See Kay, Beyond No-Fault: New Directions in Divorce Reform in Divorce Reform at the Crossroads 39-40 (S. Sugarman & H. Kay eds., forthcoming, 1990) ("women are overwhelmingly responsible for the nurturance of children and care of the elderly and infirm"); Bartlett & Stack, supra note 294, at 13 (gains in achieving men's rights to children have been realized at a faster pace than women's demands that men share more equally in the care of children); A. Hochshfield, The Second Shift (1989) (analyzing the effects on marriage of the disparity between men's and women's performance of home tasks). Women in all career tracks still do an average of 79% of the housework. Bernardo, Shehan & Leslie, A Residue of Tradition: Jobs, Careers, and Spouses Time in Housework, 49 J. Marriage & Fam. 381 (1987).
\textsuperscript{296} Cf. Bartlett & Stack, supra note 294 (making an analogous argument in favor of a long-term view about joint custody).
\textsuperscript{297} Professor Kay has contributed a perceptive discussion of differences between race and sex discrimination that illumines this point. She observes that whereas elimination of race discrimination involves a unidirectional demand to share in power and privilege, eradication of sex discrimination requires a two-way exchange of traditional power and privileges. See Kay, Models of Equality, 1985 U. Ill. L. Rev. 39, 45-47, 63-77.
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women. While some have urged that surrogacy wrongfully uses a woman as a means to accomplish a man’s end, men might point to women’s sole control of abortion,\textsuperscript{298} rights to implant frozen embryos over the objection of the father,\textsuperscript{299} and unilateral privilege to revoke a surrogacy contract to claim they are treated as sperm-producing means to women’s reproductive ends.\textsuperscript{300} Ultimately, the means-ends analysis is too manipulable. What is clear is that by ignoring intention to parent a child as an appropriate focus of analysis, the court refused to concern itself with the fact that William Stern had done \textit{all that he could do} to have and rear his child.

Given that it opted to ignore intention, the supreme court had to weigh the competing claims of the two biological parents. It did this partly on the basis of individual personalities and familial circumstances, but in the absence of a neutral conceptual framework, gender-situatedness also played a key role in its determinations. Since the court ultimately awarded custody to the Sterns, with visitation accorded to Whitehead, no arbitrary and inevitable maternal preference in the domain of children may be alleged. But the court’s underlying gender role assumptions bled through, playing a role particularly in the doctrinal holdings that will govern future surrogacy arrangements. Even if the particular facts and legal posture of this case overcame the court’s gender assumptions, different facts, particularly the different facts that would be \textit{produced} by the court’s ruling here, will likely yield different and more stereotypically gender-determined outcomes.

In his effort to uphold the surrogacy contract, William Stern claimed constitutional protection of his procreational interests. The court acknowledged William Stern’s procreational interest but held the interest satisfied by the producing of natural children; the right did not include “the custody, care, companionship, and nurturing that follow birth.”\textsuperscript{301} The court was emphatic, saying, “[t]here is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child.”\textsuperscript{302} On the other hand, the court opined that the mother had a

\textsuperscript{298} Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1975) (statute requiring spousal consent to abortion unconstitutional).


\textsuperscript{300} I am indebted for this point to Ed McNamara, a student in my seminar on Legal Issues in Bio-Medical Ethics.

\textsuperscript{301} In re Baby M, 109 N.J. at 448-49, 537 A.2d at 1254.

\textsuperscript{302} Id. at 449, 537 A.2d at 1254. The court also expressed a less gender-tilted version of this point: “The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected but that involve many considerations other than the right of procreation.” Id. at 447, 537 A.2d at 1253-54.
constitutionally protected interest in the companionship of her child. However, because the court’s reversal on statutory grounds of the lower court’s termination of Whitehead’s parental rights provided protection for that interest, the court found precise determination of the mother’s constitutional right unnecessary.\footnote{Id. at 450, 537 A.2d at 1255.}

Because the parties in Baby M did not advance parallel claims, and because the court found it unnecessary to decide several potentially significant issues, it is difficult to draw definitive conclusions regarding the court’s views about how biological differences in procreative function affect claims to parent children. However, the court’s rhetoric broadly embraced Whitehead’s nurturing claims while sharply delimiting those of William Stern,\footnote{Id. at 448-49, 537 A.2d at 1254.} suggesting that the court had different instincts about fathers and mothers. In stating that the right Whitehead asserts is fundamental and protected, the court began its description with the phrase, “As a mother, she claims the right to companionship of her child.”\footnote{Id. at 450, 537 A.2d at 1255 (emphasis added).} The language endorsing Whitehead’s claim was warmly affirming. By contrast, the language denying William Stern’s nurturing claims borders on the strident.

Further indications of the court’s attitude toward male-female differences in child nurturing arises from the court’s consideration of a second constitutional claim. In discussing William Stern’s plea of a denial of equal protection (by comparison with the state’s treatment of more typical instances of artificial insemination), the court made several telling comments before concluding that his argument was inapplicable. It recognized a potential equal protection claim here but said that claim was “really” Elizabeth Stern’s.\footnote{Id. at 450, 537 A.2d at 1254.} It ignored the equal protection claim that could be presented by William Stern: a fertile father wishing to cooperate procreatively with a third-party female with the consent of his infertile spouse in order with her to gain sole custody and parental rights could claim unequal treatment by comparison with a fertile mother who could, under current law, gain full custody, using the procreative cooperation of a third-party male with the consent of her infertile spouse. The fact that the court apparently did not even see this characterization of the claim reveals the degree to which it assumed the centrality of mothering and of the mother-child bond. The court’s emphatic assertion in this same context that sperm donors and surrogate mothers are not similarly situated (because women put so much more time into gestation than men put into sperm donation), highlights the court’s awareness of sex-based differences in procreative

\footnotesize{303. Id. at 450, 537 A.2d at 1255.}
\footnotesize{304. Id. at 448-49, 537 A.2d at 1254.}
\footnotesize{305. Id. at 450, 537 A.2d at 1255 (emphasis added).}
\footnotesize{306. Id. at 450, 537 A.2d at 1254.}
function. There was no countervailing awareness that society might wish to offset rather than reinforce the consequences of that difference.

The court did state that a biological father and mother stand on equal footing with reference to custody. It also awarded actual custody of Baby M to the Sterns. Yet the overall tone of the court's discussion reveals an underlying maternal preference in the domain of child nurture. Perhaps the court's rhetoric is pro-maternal but its behavior is to the contrary. More likely, the gender-stereotyping that runs through the opinion will surface in future cases except where the court views the father as dramatically more qualified to parent than the mother. It is unclear, for example, whether, were the gender of the litigants reversed, the court would protect a right of companionship in the biological father if the surrogate mother sought termination of the father's parental rights.

The court's rulings on monetary compensation and unilateral revocability combine with the nuances of its comments about male-female biological differences in procreative and nurturing rights to reinforce gendered spheres of influence. The best-interests standard under which the court determined custody is notoriously nebulous, an open invitation to stereotyped assumptions about gender, as well as about race and class. If these tendencies in the New Jersey decision are superimposed on current federal constitutional jurisprudence, the like-

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307. Id. at 450, 537 A.2d at 1254-55.
309. Class biases will often favor the father, since he is likely of a higher socioeconomic class, and may well have a more stable conventional marriage if he is in a position to commission surrogacy. However, these factors should not be exaggerated. What little research has been done suggests that many surrogates come from the middle class and that while commissioning fathers are often economically better off than surrogates, they are by no means wealthy. See Auster, The Tempest of Creation, Bergen Rec., June 14, 1987, at A-1, Col. 1 (research showing average commissioning couple's income $55,000; average surrogate family's income $32,000); see also infertility, supra note 5, at 274 (demographic surveys of surrogate mothers). The Sterns and Whiteheads reflected this pattern. In re Baby M, 109 N.J. at 439-40, 537 A.2d at 1249.
310. The court worried that endorsement of William Stern's claim would allow an assertion "that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right to procreation." In re Baby M, 109 N.J. at 448, 537 A.2d at 1254. Yet if Whitehead's right to procreation were as narrowly drawn as the court described that of William Stern, it is not clear that this is so. Her right to produce natural children would, like William Stern's, have been realized. Probably the court means that enforcement of the contract would destroy another's parental rather than procreational rights. However, its confusion of the two rights for mothers and its emphatic separation of them for fathers is precisely the point being underscored here. It is unclear whether the court is equally concerned about destroying a father's parental rights. See infra text accompanying notes 321-22.
311. Chambers, supra note 135, at 480-85 (discussing the open-ended quality of the best interests standard); Mnookin, supra note 133, at 255-62 (describing the best interests standard as an extreme example of indeterminacy).
likelihood that any future father will get custody of a child born through a surrogate arrangement becomes slight indeed.

Although the United States Supreme Court has yet to rule on the rights of unwed fathers of newborn children, statements in cases affecting older children suggest that that Court would likely view the mother as the predominant claimant to custody disputed at or near the time of birth, on the grounds of her gestation of the child. The Court has emphasized the necessity of a "developed" relationship between father and child to anchor unwed fathers' rights. These constitutional decisions have rested in part upon the assumption that unwed fathers are typically "uninterested" in their children. Although fathers commissioning surrogate births are the factual antithesis of that characterization, the New Jersey Supreme Court ignored this critical distinction regarding intentions, and treated the surrogacy arrangement as the equivalent of a dispute between any unwed parents. Whether the United States Supreme Court, faced with the facts in Baby M would do the same is, of course, not clear. It could and in my view should

312. See, e.g., Caban v. Mohammed, 441 U.S. 380, 389 (1979) ("Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased"). Caban dealt with competing claims of biological parents of older children. See also id. at 392 n.11 (decision here does not reach the constitutionality of differential treatment of fathers and mothers of newborns).

313. Lehr v. Robertson, 463 U.S. 248, 258-63 (1983) (upholding constitutionality of a statute limiting the categories of unwed fathers entitled to notice of adoption proceedings regarding their children and discussing the critical difference between a mere biological relationship and one that is socially actualized). The Lehr majority picked up Justice Stewart's earlier emphasis on whether a father's relationship with his child was "established" as a crucial variable in analyzing laws differentiating fathers and mothers. Id. at 259-60 (citing Caban v. Mohammed, 441 U.S. at 395-97 (Stewart, J., dissenting) (found violative of equal protection a statute distinguishing between unmarried mothers and unmarried fathers regarding consent requirements for child's adoption)).

314. See, e.g., Caban, 441 U.S. at 399 (Stewart, J., dissenting) ("Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested"). Justice Stewart's discussion of the legitimate distinctions between involved and uninvolved fathers was cited approvingly by Justice Stevens writing for the majority in Lehr v. Robertson, 463 U.S. at 260. An earlier case on unwed fathers' rights, Stanley v. Illinois, 405 U.S. 645, 654 (1972), also reflects the generalization that most unmarried fathers are neglectful, even while it holds that an individualized determination is required before terminating an unwed father's custody of his children. Moreover, all of the statutes at issue in these cases presume an unwed mother's interest in her children while requiring an unwed father to demonstrate or legitimate his. The Supreme Court's decisions accept this assumption and analyze only those circumstances in which an individual father is treated unfairly as a result.

315. See supra text accompanying note 247.

316. While the United States Supreme Court was not explicitly faced, as was the New Jersey Supreme Court, with a dispute arising from reproductive technology, the Court's decisions about unwed father's rights have used fairly standard married/non-married, male/female stereotypes to resolve the issues. This Article argues that those paradigms are inadequate to address issues arising under new technological methods.
choose to see the intentions embodied in the surrogacy agreement itself as an analogue to the "developed relationship" it emphasized in prior cases: that is, as the expression of an active desire to embrace a fathering role.

Unless courts facing the issue in the future reject the New Jersey approach, a father through surrogacy will not have an equal claim to custody of his child where a dispute arises before or shortly after birth. At the time of birth, no father has yet had an opportunity to "relate" to the child. Under the decision in Baby M, only the mother's experience of pregnancy and not the father's (or commissioning mother's) intention, emotion and expectation seem to count as "relating." Moreover, if the surrogate can as a matter of law change her mind after birth, she can prevent the father from having any opportunity to develop the kind of relationship the courts recognize, or can at least be certain that even if a court orders visitation, the father's opportunity will never be equivalent in time or intensity to her own.317 Indeed, the United States Supreme Court has already declined to be swayed by the fact that a mother actively barred the development of such a father-child relationship in deciding to uphold a statute preventing the unwed father's objection to termination of his parental rights upon adoption of his child from being heard.318

William Stern's opportunity to develop a relationship with his child was created largely by the trial court's pendente lite order enforcing the contracted-for surrender. Under the New Jersey Supreme Court's mandate that a surrogate may revoke after the birth, such orders will not be available in the future. Moreover, even if a commissioning father seeks custody on the basis of the child's best interest, the court directed that "When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother pendente lite. . . . Any [such] application [will require such extreme proof] as to make it unlikely that such application will succeed."319 This directive, combined with the traditional weight attached to continuity of care in determining the interests of the child, means that a commissioning father would have virtually no chance to prevail at the final custody hearing either.320

How ironic then, that as it moved from discussion of custody to

317. Under the New Jersey decision, the intending father will have the right to apply for visitation, to be determined on the basis of the child's best interests. In re Baby M, 109 N.J. 396, 466, 537 A.2d 1128, 1263 (1988). But see infra text accompanying notes 320-22.
318. The majority ignored this aspect of the mother's role, which was discussed by the dissent. Lehr, 463 U.S. at 268-71 (White, J., dissenting).
320. He is, however, likely to be required to provide economic support. Professors Capron and Field both recommend this, partly as a disincentive to surrogacy arrangements. Capron, supra note 5, at 698; M. Field, supra note 11, at 139-48.
visitation, the New Jersey Supreme Court finally took note of the factual differences between this case and more traditional custody disputes—
to the disadvantage of future intending fathers. Observing that while visitation is almost invariably granted in divorce cases, the court cautioned that these facts differ, more closely resembling “cases where the non-custodial spouse has had practically no relationship with the child.” The court, however, pointed out that this particular case only seemed to resemble such no-relationship cases because here, where the surrogate will be the non-custodial spouse, Whitehead had de facto custody for the baby’s first four months. It then directed that she would have visitation rights. But the court’s highlighting of the no-relationship characterization, if applied to future intending fathers and if combined with the factors already discussed, will sorely tempt courts in future surrogacy cases to deny even visitation rights.

So the argument comes full circle, creating a Catch-22 for an intending father. Because of his sex, he has no developed relationship. Because he has no developed relationship, he has no protectable right to create one. Despite the court’s brave rhetoric about the equality of biological parents’ rights, fathers are likely to have no rights in these circumstances at all. The result not only locks in fathers’ sex-based lack of access to children, it reinforces separate gendered spheres in the world.

The United States Supreme Court’s most recent decision on parenthood makes even less likely any legal recognition of fathering intentions effectuated through new reproductive techniques. In Michael H. v. Gerald D., involving a child conceived by ordinary coitus between a married woman and a man not her husband, the Supreme Court further narrowed unwed fathers’ rights, holding that even this father’s three-year relationship with and economic support of his child were insufficient to protect his claim to the continued companionship of his child. The reason: the mother was married to someone else both at the time she conceived and bore the child, and at the time of the litigation, and her husband affirmed his role as the child’s father. Many states have a presumption that a married mother’s husband is the legal father of the child. The decision in Michael H. upholds the constitutionality of such presumptions, even when they conclusively bar a definitively established biological father from continuing a developed and intended relationship with the child. In Michael H., paternal rights

322. Only the nature, not the fact of visitation was open on remand. Id. at 463, 537 A.2d at 1261. See supra note 241.
323. Id. at 453, 537 A.2d at 1256.
falter not directly because of maternal preference but because the legislature and the Court desired to protect the idea of conventional marital families over both biological and relational realities.

At first glance, this decision may not seem to affect the discussion in this Article of agreements regarding artificial reproduction. However, the attitudes expressed have important implications for these arrangements. At the most literal level, while presumptions analogous to the one in *Michael H.* (i.e. husband of woman artificially inseminated is legal father of child) are usually circumvented in professionally arranged surrogate contracts by having a married surrogate's husband refuse consent to her insemination, some husbands may refuse to cooperate; other couples may not know the rules because they deal informally rather than through an organized center, thereby activating the presumption. Furthermore, as *Baby M* shows, courts have disregarded clear facts and express intentions of parties to reproductive agreements, and have been willing to pick and choose which parts of state law to apply in deciding such disputes. A future court might decide that a spouse's pro forma non-consent was legally invalid, particularly if it followed the United States Supreme Court's preference for the merest illusion of a conventional family.

More generally and more importantly for purposes of this discussion, *Michael H.* suggests that before they can realize their desire to parent, intending fathers in surrogacy agreements will have to contend not only with a gendered preference for child-nurturing by mothers, but also with preferences for the conventional family even in the face of clearly inconsistent behavioral and biological facts. Unbridled deference to convention, especially when accompanied by unwillingness to examine or legitimate individual intentions, bodes ill for arrangements involving reproductive techniques generally, and for men seeking fatherhood through such techniques particularly. It reinforces gendered spheres of influence precisely because they are conventional. Until we have a dispute over parental status (not just custody) that pits a married biological father against an unmarried woman with whom he conceived a child, we will be unable to determine whether the Court would give priority to biological motherhood or to conventional marriage if the two were disaggregated. What seems clear from *Michael H.* is that where the two—conventional family morality and conventional biological determinism of female destiny—are aligned,

326. Given that the family in question differed rather drastically from the conventional family ideal, *Michael H.*, 109 S. Ct. at 2337, the Court's sentimentalized rationale about protecting the integrity and peace of the family unit seems at best ironic and at worst wishful thinking.
fathers, even deeply committed and interested fathers intending to enter the traditionally female sphere of access to children, will be out of luck.

There is a final irony to the Baby M decision analyzed in light of these recent Supreme Court cases. The Court has emphasized that mere biological connection is not sufficient—is indeed "irrelevant"—to ground a father’s claims to rights regarding his child. Yet for mothers, biology is (still) destiny. The combined effect of the New Jersey Supreme Court’s decision in Baby M and the United States Supreme Court’s decisions on unwed fathers’ rights is to create a priority for mothers in surrogacy disputes regarding newborns that rests to a substantial degree on “mere biological connection.” Admittedly, that connection is months of pregnancy rather than minutes of sperm production. The difference is real. But it also makes vital and life-long social roles turn on traits that are inborn and unalterable rather than on those that are individually chosen or achieved.

Resting legal categories, and accompanying social roles and responsibilities, on inborn differences, particularly ones that have had stigmatic significance, unless it is essential to do so is the essence of what is meant by discrimination. Unlike roles that derive from chosen traits, ascribed statuses are assigned on the basis of characteristics over which the individual has no meaningful control; they reflect neither desert nor responsibility. Policies that depend on ascribed rather than achieved roles limit equality and constrain freedom rather than enhancing them.

The decisions just analyzed assume and reinforce the notion that women are appropriately dominant in the realm of children and that men are and will remain secondary because of their biological roles in procreation. There are elements of truth in these assertions, as there are in most stereotypes. But even where there are physiological differences involved, legal intensification of stereotypically gendered spheres is undesirable. It pulls us backward to the sex-limiting and sex-biased roles of the past. If the move toward greater gender freedom and flexibility is to continue, a Cal. Fed. analogue should be created in the sphere of children and family life. We need to beckon men to share

\[\text{327. Lehr v. Robertson, 463 U.S. 248, 262 (1983); Michael H., 109 S. Ct. at 2340.}\]
\[\text{328. A well known articulation of the difference between ascribed and achieved statuses can be found in R. Linton, The Study of Man 115 (1936) (ascribed statuses are assigned at birth and do not reflect individual differences or abilities; achieved statuses are those requiring special qualities attained through individual effort).}\]
\[\text{329. I attempt no formal legal analysis of discrimination. My claim here is not that a court would find the policies under discussion to be unconstitutional. Rather, I advert only to policy, prudence and justice in arguing that constructing mandatory social roles on the basis of unalterable categorical traits is undesirable.}\]
\[\text{330. Cf. Minow, supra note 244, at 62 (arguing that “feminism must challenge the assumption of separate but equal spheres”).}\]
the burdens and the values of domains where women have predomi-
nated. To do this, we must grant more equal access to those realms,  
creating rules that offset even biological differences and disadvantages.

C. The Aftermath

The final outcome of the Baby M case appears to be that at least 
three de facto parents, and perhaps as many as four or five, will share 
this child—the Sterns and Whitehead, potentially augmented by White-
head's past and present husbands. Such an arrangement bears some 
practical similarities to the circumstances of divorced spouses who cre-
ate new blended families by remarriage. The New Jersey Supreme Court 
seemed unconcerned with one difference—the fact that it imposed a 
shared parenting relationship on William Stern and Whitehead when 
they never had any chosen relationship except the one reflected in the 
surrogacy contract. 331 Surely this is as odd a couple, or as unusual a 
"family," as anything individuals themselves might intentionally cre-
ate. On the other hand, if individuals saw that having multiple legally 
recognized parents—based on varying combinations of intention and 
biology—was an option, they might elect some version of the court's 
final resolution for themselves. Until intention is more fully and fre-
quently recognized as a legitimate path to parenthood, we will not know 
what these or other people's preferences would be.

More generally, under the Baby M precedent, the original inten-
tions of all the adults involved in the agreement, intentions without 
which the child would not exist, will be ignored by New Jersey courts 
and others who follow their lead. Particularly in combination with the 
ban on payment and the revocability ruling, this will seriously dis-
courage the making of surrogacy arrangements and is likely to chill use 
of other artificial or assisted reproductive arrangements as well.

The extraordinary visibility of the Baby M case, combined with 
the prestige of the New Jersey Supreme Court, seems to have resolved 
the uncertainties felt by legislatures and courts confronted with these 
issues around the country. Where for a while decision-making seemed 
to be stalled by the extreme ambivalence many felt regarding the Baby 
M case, a number of states are now rushing to embrace the New Jersey 
approach. 332 The desire for resolution is readily understandable. But 
the direction of current movement is seriously misguided and the new 
clarity likely to be short-lived.

331. Professor Kay discusses this and several other ways in which surrogacy differs 
from other circumstances in which the “best interests of the child” is the standard used to 
resolve custody disputes. Kay, supra note 11, at 3.
332. See supra note 233.
IV. SUMMARY AND CONCLUSION

Through most of human history, fate—in the guise both of accident and of necessity—has played a large role in procreation. Intention, defined as behavior that is unambiguous in purpose and that selects from among available alternatives, has been a comparatively minor determinant. More recently, the advent of effective birth control and comparatively safe and legal abortion have brought substantially greater personal control over reproductive destiny, albeit control in a negative rather than a positive form.

Modern reproductive technology expands and extends the potential for conscious control and purpose in procreation. Modern reproductive methods have subdivided the previously unitary biological process. That subdivision creates new options, both physiological and social, allowing and sometimes demanding that individuals, and ultimately society itself, make new choices. The new reproductive methods allow broader procreative choice to a number of individuals who previously had little. The most obvious expansion of available options occurs for those who are biologically infertile. Such individuals can now often find processes or persons to replace or substitute for impairments in their own reproductive capacities. In addition, the separation of procreation from sex—the depersonalization of reproduction—allows individuals who have been unable to procreate because of choice or circumstance (single persons, homosexuals) to do so. Still other individuals may undertake technologically-assisted reproduction for any of a wide range of personal reasons having to do with health, employment, preferences about characteristics of offspring, etc.

Whether individuals will be allowed access to the choices that have become technically possible depends on resolution of public debate about the meaning and consequences of the new methods as well as about how the law should accommodate those developments. Objections range from a fear that human control of basic natural processes represents excessive arrogance to anxiety about the depersonalization inherent in subdividing activities of sex, procreation and childrearing that have been historically joined. Particular concern centers on the consequences of reproductive technologies for marriage, parent-child bonds, and the conventional family.

While these concerns are understandable, they are outweighed by countervailing arguments. The capacity to procreate and the opportunity to parent children are profound motivations and deep aspirations of many individuals. The parent-child relationship is central both to the values and to the realities of many people’s lives. Obstructing available opportunities to create and shape procreational-parental bonds would be costly as a matter both of social values and of individual
fulfillment. Moreover, children are dependent on adults; at least in the main and at the outset, their interests are not likely to run contrary to those of adults who choose to bring them into being. Personal commitment plays a vital role in good parenting. Honoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike. "Successful families" and "good parenting" depend more on the quality of relatedness and meaning than on any particular family forms or demographic characteristics.

This potential for significant social and personal gains means that basic societal decisions about reproductive technology are mandatory, even if only decisions whether to encourage or discourage the development of those techniques. More importantly, decisions about what legal rules ought to govern the use and consequences of such technologies also now confront us. Essentially, the law has a choice: faced with new reproductive arrangements, it can recognize and facilitate emerging procreative choice and intentions about parenthood. Or it can cling to definitions and frameworks suited to a different biological and social reality, as did the New Jersey Supreme Court in deciding Baby M.

The capacity to envision and plan for alternative futures is a crucial and distinctive trait of humanness. The law should embrace and facilitate the opportunities that flow from the more decisive role that intention can now play in procreation. Within the realm of artificial and assisted reproduction, the law should assign parental rights and responsibilities on the basis of bargained-for expectations and induced reliance. The rules governing adoption and artificial insemination already reflect some variation from standard means of attaining parental status. Thus far, however, those factually diverse instances have been assimilated as closely as possible to the traditional scenario provided by biology and endorsed in social convention and law. The continued expansion of modern reproductive techniques, and the opportunities and problems posed by their use, demand a more fundamental reconsideration of how the law assigns parental rights and responsibilities.

Contracts are a major legal tool for projecting intention and choice into the future. Where arrangements involve several persons, where the opportunity for planning and deliberation exists, where reliance is weighty, where expectations are substantial and their validation is personally and socially important—as is true of reproductive agreements—contracts offer a means of arranging and protecting these various interests. If we are to construct legal policies that effectuate intention in assigning legal parenthood, contract law can contribute a set of principles and rules attuned to the problems of private ordering. Some gloss—a body of specialized sub-rules designed for the particular circumstances of reproductive agreements—may well be needed, as has
been the case in other transactional contexts. Perhaps special regulation of disclosure and consent procedures is necessary, as in the doctor-patient relationship. Perhaps public policy should require certain screening procedures, or should bar clauses that seek to control rights to abortion. Perhaps some choices or reasons for using reproductive techniques would be barred (e.g. selection of embryos on the basis of sex, eye color, etc.). Individual legislatures or courts may differ; state variation in matters of family policy has been the norm. What is uniformly important, however, is that the principle of private intention be given substantial deference and legal force; the law should not make rules that fundamentally resist the reproductive arrangements that technology now makes possible.

For the foreseeable future, most reproduction will occur in the ordinary way and legal parenthood will likely remain governed by existing rules. However, intentional arrangements that arise out of reproductive technology offer the opportunity for a constructive experiment. In considering such an experiment, it should be borne in mind that existing status-based parental responsibility has hardly been a model of success, particularly as regards divorced or unwed fathers’ obligations to children. A narrow experiment with chosen rather than imposed responsibility could hardly come off worse than the dismal realities of abdication and non-compliance that now confront us.

Determining legal parenthood on the basis of intentional agreements also has the potential to create more gender-neutral avenues to parenthood. Parenthood has been determined exclusively on the basis of biology for women, and on the basis of biology augmented and constrained by social and legal convention for men. In both instances, individual intention and commitment regarding parenthood have been obscured. New methodologies provide the opportunity and sometimes the necessity to reconsider old formulas. The Baby M decision ignored that opportunity. Under its gender-stereotyped approach, conflicts regarding what affect sex differences should have on access to child-nurturing roles will remain painful, if not intractable. Where, because of reproductive technology choice and explicit reciprocal commitment are the origin of a given child’s creation, parental status could instead be assigned on a basis that is equally accessible to both genders: intention. Such an experiment would be positive and instructive for the future of children and adults alike.