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Family Law in a Brave New World:

_Private Ordering of Parental Rights and Responsibilities for Donor Insemination_

Sheila M. O’Rourke†

It is now technically possible to take sperm from any fertile male, an egg from any fertile female, join them by the _in vitro_ fertilization process, and implant the resulting embryo into any womb. After birth the child can be raised by any set of adults who may or may not have been participants in the child’s conception or birth.

The scenario may be as simple as sperm from Mr. Jones being joined in a petri dish with an egg from Mrs. Jones, who carries it and gives birth, and then the Joneses raise their child. It may be as complicated as a sperm from an anonymous party A being joined to an egg from party B, the gestation being provided by party C, and the child being raised by parties D and E.

It can become even more complicated: parties may die, divorce, disappear, change their minds, renge on agreements . . . .

**INTRODUCTION**

“‘A legal, moral, social nightmare’ is what Time Magazine called the current rise in the use of new reproductive technologies.” As the complex scenarios in the quotation above indicate, the influence of modern science on good old-fashioned human reproduction is raising questions that are baffling for lawyers, clergy, scholars, judges, doctors, legislators and laypeople alike. What will be the structure of our families

† J.D., anticipated 1986, Boalt Hall School of Law; law clerk for the Lesbian Rights Project. I would like to thank Robin Lipetzky, Jill Martin, Teresa Friend, Karen Landau, Suzanne Luban and the staff of the _BERKELEY WOMEN’S LAW JOURNAL_ for their editorial assistance; Roberta Achtenberg of the Lesbian Rights Project and Marjorie Shultz of Boalt Hall for their thoughtful criticism; Lisa Vittori, Terry Stewart, Marge Slabach, and Nancy Taylor for their ideas and encouragement; and most of all, Barbara Zoloth, Wendy P. Maryott-Wilhelms and Chris Peters for their unconditional love and emotional support.


when reproduction is no longer linked to biology? Who will have the legal and social responsibilities for child-rearing when one child might have five different parents?

One of the consequences of the availability of alternative reproductive technologies is that heterosexual couples in which one of the partners is infertile are now able to have children that are either genetically or gestationally related to at least one of them. A more controversial consequence is the use of alternative methods of reproduction by a growing number of individuals to create families by choice outside the traditional heterosexual nuclear family model. In particular, many unmarried women, heterosexual and lesbian, are choosing to bear children and raise them either alone or with other women.

Some of the problems raised by the creation of new family forms through the use of alternative means of reproduction are illustrated by a current California case, J.C. v. M.K. In this case, a lesbian woman made a decision to bear a child and raise it with a close woman friend. She inseminated herself with semen from a man she contacted through a friend and whom she had never met before they discussed the insemination. After the baby was born, the donor showed increasing interest in visiting the child, over the mother’s objections. The donor eventually filed a paternity suit, was awarded temporary visitation, and was ultimately declared to be the child’s legal father. The mother and co-mother are appealing the judgment of the trial court.

The parties in this case had no written contract regarding their respective rights and obligations toward the child, nor do the California statutes address the rights of an unmarried woman who inseminates her-

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3 The terminology itself reflects the biases of commentators. Some use the terms “abnormal reproduction,” “unnatural reproduction,” or “artificial reproduction.” Id. This article will use the term “alternative reproduction.”

4 It is estimated that one in six couples are now infertile, a threefold increase in the last 20 years. The Saddest Epidemic, TIME 50 (Sept. 10, 1984). See also, Yaeger, Doctors Making Progress In Treating Infertility, But Costs Are High, Wall Street Journal, Oct. 12, 1984, at 1, col. 1 (one in seven couples is infertile).


6 On November 17, 1984, over 300 women gathered in New York for a day-long conference on “Lesbians Choosing Motherhood.” New York Native, Dec. 3, 1984, at 16, col. 1. This conference was a follow-up of a conference on the same topic held in San Francisco in February of 1984, where over 250 women attended and several hundred more were turned away at the door for lack of space. Lesbian Rights Project Newsletter, Fall, 1984, at 2, col. 1.

7 The citation for the case is withheld to protect the confidentiality of the parties. Information was obtained from the trial transcripts on file at the Lesbian Rights Project, 1370 Mission St., San Francisco, CA 94103.

8 Reporter’s Transcript at 78, J.C. v. M.K.

9 Clerk’s Transcript at 113, J.C. v. M.K.

10 Id. at 175-76.

11 Id. at 229.

12 Id. at 232.
self with semen not obtained from a licensed physician. Thus, the decision of who should be the legal parents of the child was left to the discretion of a family court judge. The parties' use of an alternative method of reproduction and their intention to create an alternative family by choice were not recognized by the trial court. Instead, the judge treated the case as if it were an ordinary custody dispute between a divorcing couple who had conceived their child through their marital relationship.

Many commentaries have been written concerning the general legal issues raised by the new reproductive technologies, but few have addressed questions of child custody, child support, and parental obligations arising from the creation of new family forms. This Article will review the various means of performing donor insemination and the current state of applicable law. After discussing the nature and scope of the constitutional right to create families, the article will explore possible legal frameworks for achieving that right, concluding that state support of increased private ordering for parental rights and obligations is the most workable model for relieving current inadequacies in the legal response to the demand for donor insemination. The model of increased private ordering is consistent with current trends in family law, broadly protects the constitutional freedom to procreate, and adequately addresses issues of child welfare.

I. BACKGROUND

A. Methods of Donor Insemination

Donor insemination is a relatively simple procedure in which the

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13 CAL. CIV. CODE § 7005(a) (West 1983) provides, in pertinent part:

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

Thus, if the mother in J.C. v. M.K. had been a married woman, her husband, and not the donor, would have been the legal father. CAL. CIV. CODE § 7005(b) (West 1983) provides: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." Accordingly, if the parties in J.C. v. M.K. had used a physician to perform the insemination, the trial court would not have been able to construe the donor to be the child's legal father.

14 Reporter's Transcript at 71-72, J.C. v. M.K.


16 The term "donor insemination" is used instead of the common term "artificial insemination" because "we do not see the process as 'artificial' from a reproductive point of view. Sperm is injected into the uterus, and if it fertilizes an egg a child is created." B. Monty, Legal Aspects of Donor Insemination for Lesbians (November 1984) (unpublished manuscript on file at the Lesbian Rights Project).
semen from a male donor is inserted into a woman's vagina with a clean syringe. There are several methods of obtaining semen. The semen may be obtained through the professional services of a sperm bank or physician. It may be obtained privately directly from the donor or with the help of a "go-between." Each of these methods offers varying degrees of anonymity for the donor and accessibility for the recipient, and may also affect the legal rights and obligations of both parties with respect to the resulting child.

A woman interested in creating a nontraditional family without the involvement of the donor after conception might choose to use a sperm bank or a private physician. In these settings, donors are screened by medical personnel. Their identities are not disclosed to the recipients, nor are the recipients' identities available to the donors. The advantage of this method is that the parties' anonymity is fully protected and there is minimal likelihood of an eventual paternity suit. This method is disadvantageous in that there may be minimal or inaccurate information about the donors' medical histories. In addition, women have little control over the process, since the professionals usually control the selection of donors, as well as the policy governing which women have access to the services.

A woman who wants more control over the process but still wants some degree of anonymity might make a private arrangement through a go-between. A trusted third party helps to select a donor and transports the semen to the woman so that the parties' identities may be concealed. Ideally, this method allows the woman to retain some control over the selection of the donor while still avoiding future paternity suits. The drawback is that the go-between must be willing to keep the information about the parties' identities absolutely confidential over an

18 Id. at 253.
19 Id.
21 D. Hitchens, supra note 20, at 5; Kern & Ridolfi, supra note 17, at 253.
22 Curie-Cohen, Luttrell & Shapiro, Current Practices of Artificial Insemination by Donor in the United States, 300 NEW ENG. J. MED. 585, 586 (1979) [hereinafter cited as Curie-Cohen survey]. The Curie-Cohen survey noted that donors "were subjected to very little genetic screening. Family histories were usually superficial and biochemical tests were rarely performed. Most screening was performed by physicians who were not trained for this task," resulting both in inappropriate acceptance and rejection of donors. Moreover, "genetic screening depends upon the donor's recognition of inherited traits in reconstructing his family history... This screening also depends upon the donor's honesty. However, the financial incentive to be a donor may make this procedure less reliable." Id.
23 Kern & Ridolfi, supra note 17, at 254, (citing Curie-Cohen survey at 586).
24 Id.
25 Id. at 255; D. Hitchens, supra note 20, at 6.
extended period of time.\textsuperscript{26}

A third method is for the woman to make a private arrangement directly with the donor. This method allows the woman the greatest control over the selection of the donor and the process of insemination.\textsuperscript{27} It also allows the donor to be involved in the child’s life to some extent, if the parties so desire. Unfortunately, this method raises the possibility that the woman and the donor may disagree about the nature of the donor’s parental rights and responsibilities.\textsuperscript{28} These disagreements may lead to custody disputes, such as \textit{J.C. v. M.K.}, where family courts must allocate parental rights and responsibilities without the benefit of well-established legal guidelines.

There are variations on the above three methods which parties have used to alleviate some of the problems presented. A woman may inseminate herself with a mixture of the sperm of several donors. This gives her some ability to select the biological father while diminishing the chances that any one donor will attempt to bring a paternity claim.\textsuperscript{29} Alternatively, a woman may select a donor privately using the services of a sperm bank or physician to perform the insemination.\textsuperscript{30} In many states, this approach guarantees that the donor will not be considered the legal father, yet the woman is able to retain control over donor selection.

\section*{B. The Legal Response to Donor Insemination}

In spite of the growing incidence of donor insemination,\textsuperscript{31} the courts and legislatures have failed to articulate new definitions of family structure and parental obligations that address the issues raised by nontraditional family units.\textsuperscript{32} Early cases held that donor insemination within a marriage was adultery.\textsuperscript{33} In later cases, courts took a more enlightened approach, but relied upon the traditional nuclear family model to determine parental rights and obligations. In \textit{Strnad v. Strnad},\textsuperscript{34} a husband

\begin{itemize}
\item \textsuperscript{26} D. Hitchens, supra note 20, at 5. It should also be noted that the go-between is not protected by the doctor-patient privilege and could be forced to disclose information in court if a suit were ever filed. \textit{Id.}
\item \textsuperscript{27} D. Hitchens, supra note 20, at 4.
\item \textsuperscript{28} A private arrangement was the method that was used by the parties in \textit{J.C. v. M.K.}
\item \textsuperscript{29} D. Hitchens, supra note 20, at 5.
\item \textsuperscript{30} Kern & Ridolfi, supra note 17, at 256.
\item \textsuperscript{31} Between 12,000 and 15,000 couples are reported to have requested donor insemination annually, and it is estimated that at least one quarter million children conceived by this method are now living in the United States. Behrman, \textit{Artificial Insemination and Public Policy}, 300 NEW ENG. J. MED. 619 (1975). See also, supra note 5, regarding the popularity of donor insemination among single women.
\item \textsuperscript{32} Donovan, supra note 5, at 194.
\item \textsuperscript{33} Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct. Cook County, Ill., Dec. 13, 1954) (Gorman, J.) \textit{appeal dismissed on procedural grounds}, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (donor insemination is contrary to public policy and “good morals” and should be considered adultery); Orford v. Orford, 58 D.L.R. 251 (Can. 1921) (donor insemination should be considered adultery on public policy grounds).
\item \textsuperscript{34} 190 Misc. 786, 787, 78 N.Y.S.2d 390, 391 (1948).
\end{itemize}
who consented to his wife being donor inseminated was granted visitation rights upon divorce. In *People v. Sorensen*, the husband, not the donor, was held to be the legal father of his wife’s child by artificial insemination. These cases give little indication of how a court might determine parental rights and responsibilities in a situation involving a nontraditional family with no marital contract upon which to rely.

In the only case dealing with a donor insemination child born to an unmarried woman, the court relied heavily on the marital expectations of the parties. The woman in *C.M. v. C.C.* inseminated herself with her boyfriend’s semen. In an action for visitation rights after the couple separated, the court held that the donor was the legal father of the child. It is probable that the outcome in this case was influenced significantly by the fact that the couple made the decision to perform the insemination with the understanding that they would raise the child together, the sole reason for conceiving by donor insemination being that they did not wish to have sexual relations before marriage. Thus, this case is also not indicative of how a court would resolve the difficult issues of parental rights and responsibilities raised by a conflict between a donor and a mother who had no relationship to each other beyond the arrangement for the insemination.

Twenty-seven states have adopted some form of legislation dealing with donor insemination. While no state has outlawed donor insemination without the supervision of a licensed physician. Fourteen other state statutes refer to physician involvement but do not provide criminal penalties for failure to use one. Under these statutes, the donor of

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37 Id.
38 Id.
41 ALASKA STAT. § 25.20.045 (1975); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1978); CONN. GEN. STAT. ANN. § 45-69(f)-(n) (West 1980); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1983); N.J. STAT. ANN. § 9:17-44 (West 1983); N.Y. DOM. REL. LAW § 73 (McKinney 1980).
semen is not considered the legal father of the resulting child unless the recipient is his wife. The practical consequence of this approach is that donors are willing to donate sperm, even to single women, because they are protected from future liability for child support.

The Uniform Parentage Act (UPA) sets forth model regulations concerning donor insemination. Nine states have adopted some version of this Act, which reads, in part, as follows:

§ 5 Artificial Insemination

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with the semen donated by a man not her husband, the husband is treated in law as if he were the natural father of the child thereby conceived . . .

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of the child thereby conceived.

Many states that have not adopted the UPA do establish the legitimacy of children born by donor insemination only to married women. Only six of the twenty-seven states with statutes concerning donor insemination have provisions addressing the paternity of children born to unmarried women.

The difficulty with the UPA and the other similar statutes is that they are too limited in their coverage. Typically, they only address the rights of the parties when a married woman who wishes to conceive by donor insemination with the consent of her husband is inseminated by a licensed physician. No provision is made for donor insemination of unmarried women, or for donor insemination without the involvement of

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a physician. California, Colorado and Wyoming have attempted to remedy one of these omissions by deleting the word "married" from section (b) of the UPA. However, this still does not account for a situation such as J.C. v. M.K., where an unmarried woman did not obtain the semen from a physician. These statutory gaps create areas of uncertainty regarding the legal status of nontraditional families-by-choice created outside of the institutions of marriage and medicine.

Two states, however, have adopted a different approach which provides a more comprehensive framework for accommodating nontraditional families. In New Jersey and Washington, the donor of semen to an unmarried woman is not the legal father of the child unless a written contract between the parties states otherwise. This definition of the obligation of the parties applies regardless of whether a physician is involved. Under this statutory scheme, an unmarried woman can choose to raise a child by herself, with the donor, or with a partner other than the donor.

C. Constitutional Perspective on Family Privacy

The United States Supreme Court has declared that marriage and family involve "a right to privacy older than the Bill of Rights." This right to family privacy is more than respect for the "sanctity" of the marital relationship. It is also an important part of our democratic system. In accordance with the importance of the family in our democratic system, rights to procreational choice and family autonomy have become a cornerstone of modern constitutional doctrine.

Several commentators have argued that the line of cases dealing with procreational freedom and rights of family autonomy must extend constitutional protection to nontraditional family units and alternative methods of reproduction. These arguments will be summarized in this

49 CAL. CIV. CODE § 7005(b) (West 1983); COLO. REV. STAT. § 19-6-106(2) (1978); WYO. STAT. ANN. § 14-2-103(b) (1985).
51 Griswold v. Connecticut, 381 U.S. 479, 486 (1965). "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." Griswold, 381 U.S. at 495 (quoting Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J. dissenting)).
52 "[T]he family unit does not simply co-exist with our constitutional system' but 'is an integral part of it,' for our 'political system is superimposed on and presupposes a social system of family units, not just of isolated individuals . . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 985 (1978). The family plays an important role as an intermediary between the individual and society, and the power of the state and balances the alienation that may result from a model of purely individual rights and state power. Id at 988.
53 Karst, Freedom of Intimate Association, 89 YALE L.J. 624 (1980). In the last 20 years alone, the Supreme Court has decided over 50 cases dealing with procreational choice and family relationships. Id. at 625.
54 Note, Reproductive Technology and Procreation Rights, supra note 5, at 678 (if married per-
section as background to the discussion of legal models for allocation of parental rights and responsibilities in the donor insemination context.

In a recent Harvard Law Review Note, the author states that the right to procreation was first given constitutional dimension in *Skinner v. Oklahoma*, where the Supreme Court struck down a law requiring sterilization of criminals on equal protection grounds. Noting that the Court emphasized the importance of marriage and procreation as "one of the basic civil rights of man [sic]" and "fundamental to the very existence and survival of the race," the author argues that the court meant the Constitutional protection for procreation to include procreation outside of marriage. "Sterilization does not deprive a person of the right to marry; yet if sterilized, one is deprived of the ability to have genetic offspring. Thus, the 'basic liberty' at stake in *Skinner* seems to be tied to procreation itself . . . ."58

The author further notes that contraception and abortion cases have continued to reflect the premise that privacy protections extend to unmarried individuals. While *Griswold v. Connecticut* referred to marital privacy, *Eisenstadt v. Baird* specifically extended the privacy protections to unmarried individuals. In *Eisenstadt*, the court stated:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a

sons have a right to procreate by means of reproductive technology under the due process clauses of the fifth and fourteenth amendments, denying unmarried persons identical access violates equal protection); Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 39 (1981) (legislation prohibiting donor insemination for unmarried women would violate fundamental right to procreation, and there are no compelling state interests which would justify such legislation); Donovan, *supra* note 5, at 222-25 (UPA is an unconstitutional burden on an unmarried woman's right to procreate and right to family autonomy); Kern & Ridolfi, *supra* note 17, at 258-83 (denying unmarried women access to insemination facilities and the common law recognition of donor's parental rights violates equal protection). See generally L. Tribe, *supra* note 52, at 886-990 (rights of privacy and personhood); Karst, *supra* note 53.


56 Note, *Reproductive Technology and Procreation Rights, supra* note 5, at 675. The author pointed out that an earlier case, *Buck v. Bell*, 274 U.S. 200 (1927), not followed, *Re W.*, 637 P.2d 366 (D. Colo. 1981) and Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984) (upholding the sterilization of imbeciles without their consent as violating neither due process nor equal protection), is now widely regarded as an aberration and a case that would be overturned if presented to the Supreme Court today. *Id.* at 675 and n.37.

57 *Id.* at 675-76.

58 *Id.* at 676.


60 381 U.S. at 479.

61 405 U.S. at 438.
child.\textsuperscript{62} Roe v. Wade\textsuperscript{63} and subsequent abortion cases lend further support to this view by extending abortion rights regardless of the marital status of the woman.\textsuperscript{64}

In response to some commentators' arguments that an unmarried person's rights to abortion and contraception do not imply an affirmative right to procreation,\textsuperscript{65} the Harvard Note refers to the Supreme Court's "consistent reliance on expansive notions of individual privacy and autonomy in explaining its decisions in this area."\textsuperscript{66} The claim that the Supreme Court is concerned with expanding individual autonomy rather than minimizing unwanted pregnancies is further supported by the Court's recent opinion in Roberts v. United States Jaycees.\textsuperscript{67} Addressing associational freedoms, the Court stated that "the ability independently to define one's identity that is central to any concept of liberty" derives from the ability to have a family.\textsuperscript{68}

Having established that the Supreme Court has guaranteed an affirmative right to procreate for married persons, the Note argues that limiting access to alternative methods of procreation for unmarried persons while allowing it for married persons would violate the unmarried persons' right to equal protection of the laws.\textsuperscript{69} The Supreme Court has recognized that state interests in family values and child welfare are served equally well by marital and nonmarital family units.\textsuperscript{70} Furthermore, the Court has invalidated classifications emphasizing formal marriage rather than the underlying values of familial relationships.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{62}Id. at 676, (citing Eisenstadt, 405 U.S. at 453).
\item \textsuperscript{63} 410 U.S. at 113.
\item \textsuperscript{64} Note, Reproductive Technology and Procreation Rights, supra note 5, at 677. Cases subsequent to Roe v. Wade have placed some limitations on the right to choose abortion. However, these limitations apply to minors and do not undercut the autonomy rights of unmarried adult women in making the abortion decision. Id. at 677 n.48, (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979)).
\item \textsuperscript{65} One commentator said it succinctly: "Freedom to have sex without reproduction does not guarantee freedom to have reproduction without sex." Robertson, Preconcept Liberty and the Control of Conception, Pregnancy and Childbirth, 69 VA. L. REV. 405, 406 (1983).
\item \textsuperscript{66} Note, Reproductive Technology and Procreation Rights, supra note 5, at 677-78.
\item \textsuperscript{67} Id. at 678 n.53.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 679. See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972) (the state may not interfere with a nonmarital father's custody of his children without a hearing, where the father had been living with the children all their lives).
\item \textsuperscript{71} Note, Reproductive Technology and Procreation Rights, supra note 5, at 679 n.59, (citing Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) ("T[He Constitution prevents [government] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.")). In Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 843 (1977) [hereinafter cited as Smith v. OFFER], the court upheld the rights of natural parents, but stated that "biological relationships are not the exclusive determination of the existence of a family." The court also stated that the legal status of a family is not controlling, and that "a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationships." 431 U.S. at 844.
\end{itemize}
Given the fundamental nature of procreation rights, the state’s interests must be sufficiently compelling and the state’s means of achieving those interests must be narrowly tailored to actual differences between marital and nonmarital families to justify barring access to alternative reproduction for unmarried persons. Possible state interests in public morals or in health and safety may be significant, but the denial of access to procreative alternatives to unmarried women sweeps too broadly to pass constitutional scrutiny. Thus, the author of the Note concludes that all married and unmarried individuals may not be arbitrarily deprived of the ability to exercise their right to procreate through alternative methods of reproduction.

Another commentator adds the unmarried woman’s right to family autonomy to the argument that constitutional protection encompasses access to donor insemination for unmarried women. This fundamental right to be free from state interference with family privacy and child-rearing was first articulated in Meyer v. State of Nebraska. Subsequent cases continue to emphasize that the “primary responsibility for the education and rearing of children lies with the parents.” The author goes on to note that “this protected sphere of family autonomy is not limited to the education of children, nor is it limited in its application to the traditional nuclear family.” The author argues that state restriction on donor insemination for unmarried women would prevent them from forming families according to their own values and from transmitting those values to their children, thus violating their fundamental right to family autonomy. She concludes that statutory restrictions intended to further possible state interests in ensuring child welfare, protecting state revenues, or promoting traditional family values could not be tailored narrowly enough to pass the strict constitutional scrutiny required when a fundamental right is affected. Thus, constitutional protection of family autonomy includes the unmarried women’s rights of access to donor insemination.

Often overlooked in analyses of constitutional privacy rights is the

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72 Note, Reproductive Technology and Procreation Rights, supra note 5, at 680-81.
73 Id. at 682. Certain alternative reproductive techniques, such as artificial insemination and surrogate mothering, “are virtually identical to ‘natural’ procreation and thus involve no greater danger of physical injury to either children or parents.” Id.
74 Id. at 685.
75 Donovan, supra note 5, at 227-30.
76 Id. at 227, (citing 262 U.S. 390 (1923) (a statute forbidding public schools to teach German was held to be an impermissible interference with parents’ right to raise their children)).
77 Id., (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) (statute compelling high school attendance held invalid as applied to Amish children); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting child labor upheld); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute requiring all children to attend public schools held invalid)).
78 Id. at 228, (citing Smith v. OFFER, 431 U.S. at 816, and Moore v. East Cleveland, 431 U.S. at 494).
79 Id. at 228-30.
80 Id. at 230-42.
fact that social conditions may influence a person's freedom of reproduction just as much as legal rules or constitutional guarantees.\textsuperscript{81} The most important determinants of whether nontraditional mothers-by-choice actually can exercise their constitutional rights may be access to services and the financial means to ensure such access.\textsuperscript{82} Even when a constitutional right is established, women of different socioeconomic statuses may have different degrees of access to the means of exercising that right. Low-income women may be deprived of donor insemination if it is regulated in such a way as to be too expensive. Lesbian women may not have access if screening power is retained by a state administrative agency or by an elitist professional group.

The allocation of parental rights and responsibilities also has a tremendous impact on whether unmarried women or a nontraditional family unit will have practical access to donor insemination as a method of exercising their constitutional rights to procreation and family autonomy.\textsuperscript{83} If a donor has automatic paternity rights regardless of his agreement with the recipient, a woman no longer has the choice of raising her child by herself or with a partner other than the donor. If a donor has mandatory parental obligations regardless of his agreement with the recipient, then it is unlikely that he will be willing to donate semen to unmarried women because he may later be sued for child support.\textsuperscript{84} Thus, the legal model for allocating rights and responsibilities for child-rearing has important implications for the constitutional rights of mothers.

Various legal responses have been proposed to address the issues raised by the widespread demand for donor insemination outside of marriage.\textsuperscript{85} While legal rule-making alone cannot ensure equitable access, the form of legal response clearly influences which individuals can exercise their "rights." The constitutional right to procreative choice and family autonomy is meaningful only if it is accessible to as many as possible in the most equitable fashion. Thus, the possible models of legal response will be evaluated by examining the degree to which each model protects these constitutional rights by providing practical, equitable access to donor insemination.

Evaluation of the various legal responses will demonstrate that an

\textsuperscript{81} Robertson, supra note 65, at 406-07 n.7.
\textsuperscript{82} Id. at 464.
\textsuperscript{83} Kern & Ridolfi, supra note 17, at 273, (citing C.M. v. C.C. 152 N.J. Super. at 160, 377 A.2d at 821 (donor paternity claims are a barrier to the right to single parenthood)). See also J.C. v. M.K. (donor paternity claims are also a barrier to the right to form a nontraditional family by choice).
\textsuperscript{84} Donovan, supra note 5, at 220, (citing C.M. v. C.C., 152 N.J. Super. at 160, 377 A.2d at 821, in which the court held that the semen donor was the child's legal father, was entitled to visitation, and was required to pay child support).
expansion of private ordering is the most satisfactory model for protecting constitutional rights to procreation and family autonomy. In addition, the closing discussion will conclude that private ordering is not only compatible with current trends in family law, but that it also satisfies concerns for child welfare at least as well as, if not better than, more restrictive legal rules.

II. MODELS OF LEGAL RESPONSE AND CRITIQUE

A. The Biological Model

"[The] biological relationship is the test that has been used—since time immemorial—in our and other cultures for the fixing of support and other familial obligations, and it is biological relationship that underlies and is traced by legal relationship."86 One possible legal response to donor insemination is to continue to allow biology to control the allocation of parental rights and responsibilities. The biological parents of a child would share the exclusive legal rights and obligations of support and rearing.87 This model has the advantages of a long and deep historical tradition88 and an objectivity that provides a consistent standard of jurisprudence.89

The biological model, however, fails to accommodate changing social patterns.90 Long before the rise in popularity of artificial reproduction, there was a trend toward separating biological parenthood from actual parenthood. Firmly entrenched institutions such as adoption, foster families, and step-families belie the notion that biology should always control. Twenty-five percent of American children are not living with both natural parents, and experts predict that the figure will grow to forty percent by the 1990s.91

The biological model also fails to guarantee constitutional rights to procreation and family autonomy to persons with infertility problems or to individuals who wish to have families outside of a traditional nuclear family. A strict biological model, consistently applied, would result in a donor being the legal father in all circumstances. No woman, married or unmarried, would be able to choose whether to raise her child alone, with the donor, or with some other partner of her choice. Few donors would be willing to donate semen out of fear of being burdened with parental obligations. Therefore, application of a strict biological model of father-

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87 Wadlington, supra note 85, at 496.
88 H. Krause, supra note 86, at 69.
91 Id. at 880-81 (1982 census figure).
hood would make donor insemination impracticable for both married and unmarried women.

The initial legislation on donor insemination abandoned the strict biological model by making the husband of a married recipient, rather than the donor, the child's legal father.\textsuperscript{92} It is not clear, however, whether the biological model of fatherhood will be abandoned when applied to an unmarried woman's child.\textsuperscript{93} In response to the problem raised by \textit{J.C. v. M.K.}, the trial court judge reverted to the biological model, justifying his decision by saying that "blood is thicker than water, and that's about it."\textsuperscript{94}

\textbf{B. The Administrative Model}

A second possible response is to allocate the power to regulate donor insemination and determine familial rights and obligations to a governmental administrative body.\textsuperscript{95} One commentator has suggested that departments of health establish agencies licensed to administer alternative methods of reproduction.\textsuperscript{96} These agencies would have the authority to issue a certification of parenthood for individual children which, when submitted to the courts for a decree, would become final at birth.\textsuperscript{97} Such an agency could perform a screening function to ensure the fitness of both genetic and social parents and could make all transactions matters of public record.\textsuperscript{98}

A related approach is to make adoption the model for governmental administration of donor insemination.\textsuperscript{99} Such a model would include procedures such as screening, home visits, and termination of parental rights which are currently part of governmental regulation of adoption. The adoption-like agency would have the authority to administer donor insemination and to designate the legal father of the child.

The adoption analogy, while useful, is not perfect.\textsuperscript{100} Adoption deals with the placement of children already in existence, while donor insemination deals with the choice of individuals to bring children into the world and raise them. This added dimension triggers the constitutional protection of procreation and family autonomy discussed above.\textsuperscript{101}

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\textsuperscript{92} See Unif. Parentage Act § 5, 9A U.L.A. 592-93 (1979). "If . . . a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." See supra text accompanying notes 31-49.
\textsuperscript{93} See supra note 84.
\textsuperscript{94} Reporter's Transcripts at 69, \textit{J.C. v. M.K.}
\textsuperscript{95} Wadlington, supra note 85, at 497.
\textsuperscript{96} Frey, \textit{supra} note 85, at 337.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at 340.
\textsuperscript{99} Wadlington, \textit{supra} note 85, at 507.
\textsuperscript{100} \textit{Id.} at 511-12.
\textsuperscript{101} See infra text accompanying notes 167-70.
\end{flushright}
As one commentator notes, "state involvement requires a government decision as to who is worthy to be reproduced...[t]his is a characteristic of a dictatorship..." Traditional adoption procedures, such as agency screening and home visits, would constitute an impermissible level of government intrusion into family privacy in the context of a decision to bear a child by donor insemination. While child welfare concerns justify the intrusiveness of home visits for adoptive placements once the child is in existence, the decision to bear the child is constitutionally protected from undue governmental interference.

The administrative model is also problematic with respect to the issue of equal access to procreation by donor insemination. In an effort to locate the "best homes" for a shrinking supply of adoptable babies, adoption agencies often display a substantial cultural bias towards traditional middle-class nuclear families. Agencies usually consider income level, race, religious affiliation, and age in determining who shall become a parent. While all states permit single persons to adopt, the law nevertheless tends to uphold policies favoring couples over single parents.

An administrative agency based on the adoption model would tend to share society's biases favoring married women over single women, and heterosexual over lesbian women for the parenting role. It is easy to imagine that a lesbian woman wishing to raise a child might not get a warm reception at either an adoption or a donor insemination agency. Thus, an adoption-like agency vested with the authority to decide who could obtain donor insemination and to allocate parental rights and responsibilities would not be optimal for ensuring that the constitutionally protected rights of nontraditional families are recognized.

Currently operating private sperm banks are examples of how the

102 Kindregan, supra note 15, at 1417.
103 See infra text accompanying notes 194-202.
105 Kritchevsky, supra note 54, at 31 & n.151.
106 See, e.g., Adoption of H, 330 N.Y.S.2d 235 (1972), (citing financial and psychological security as factors in the decision); D.C. CODE ANN. § 16-302 (1977) (any person may petition for decree of adoption; spouse, if any, must join).
107 The popular view is that lesbians are incapable of being mothers and that they are unfit to raise children. Hunter & Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 BUFFALO L. REV. 691, 694 (1976).
108 Id.; Kritchevsky, supra note 54, at 32-33. The House of Representatives in the state of Massachusetts attached a rider to the Department of Social Services budget which states that children cannot be placed "in the care of person or persons whose sexual preference threatens the psychological or physical well-being of the child ... For the provisions of this restriction, a homosexual preference shall be considered a threat to the psychological and physical well-being of a child." The state Senate passed a rider with similar language. Guilfoy, Senate Passes Foster Measure, Gay Community News, June 22, 1985, at 1, col. 5.
109 It is possible that legislation providing nondiscrimination policies on the basis of race, marital status, income level, and sexual orientation for these agencies could remedy the problem. However, even assuming a broad antidiscrimination policy could be legislated, the difficulty of
in institutionalization of donor insemination might limit access for unmarried and lesbian women. In California and other states, the use of a sperm bank is the only way to determine absolutely that the donor will not be the child’s legal father. Currently, there are more than one hundred sperm banks throughout the country. Most of them will not provide services to single and/or lesbian women. Additionally, the costs of private sperm banks are high enough to deny access to women of limited financial means. Thus institutionalization has the potential to limit access in two ways: by denying services to certain women as a matter of policy, and by creating a system in which women must pay for an otherwise simple, non-medical procedure in order to take advantage of a predictable method of allocating parental rights.

The need for complete and accurate record-keeping is one justification in support of a governmental administrative system to control donor insemination and legal parenthood. Information about genetic heritage of the offspring of donor insemination might be important for the medical and/or psychological well-being of some children. If, however, restrictive policies and economic factors deprive significant numbers of women access to “official” donor insemination services, state regulation for record-keeping purposes will not succeed.

In addition, it is doubtful that donor insemination children would be given access to information about their biological fathers in any case. Adult adoptees do not necessarily have access to such information, and while courts have acknowledged the psychological importance of knowing such information, they have been reluctant to release the information without the consent of the biological parents. States that require record-keeping for donor insemination allow access to those proving and/or detecting subtle forms of discrimination make enforcement difficult in any situation where there is administrative discretion.

Telephone interview with staff member of the Sperm Bank of Northern California (Jan. 6, 1985). The Sperm Bank of Northern California is unique in providing services to single and lesbian women and in offering services on a sliding-fee scale. The Sperm Bank reports receiving requests for services from all over the country, indicating the degree of unavailability of sperm banks to single, lesbian, and low-income women nationally.

The reluctance of sperm banks to provide services to unmarried women may be a result of the personal philosophies or religious beliefs of the management, or it may be induced by the ambiguity of state laws regarding the legality of inseminating unmarried women. Note, Reproductive Technology and Procreative Rights, supra note 5, at 671.

The average cost of donor insemination is $100 per insemination and most women inseminate themselves two or more times per cycle. D. Hitchens, supra note 20, at 6. An average of four months is required for successful insemination. Telephone interview with staff member, Sperm Bank of Northern California (Jan. 6, 1985).

Obviously, there may be a variety of reasons why a child might not know his or her biological parent or their genetic history, including death, desertion, illegitimacy, or adoption. Kritchevsky, supra note 54, at 32.

records only by court order. Because the courts have been so reluctant to recognize the rights of adult adoptees to identify their natural parents, the concern for record-keeping does not justify implementation of the administrative model in the context of donor insemination, particularly in light of the attendant infringements on constitutional rights.

C. The Medical Model

A third model would entail entrusting the regulation of donor insemination to the medical profession. This model could be accomplished in two ways. First, legislation could be enacted making it illegal to perform donor insemination without the supervision of a licensed physician. Second, legislation could be enacted providing that the donor would not be the legal father only if the donation was made to a licensed physician. This would effectively compel the use of a physician.

A requirement that physicians perform donor insemination could serve several important functions. Physicians could perform medical screening to protect the health and safety of the parties involved—genetic screening to protect the health of the child and screening for infectious diseases to protect the health of the woman. There is evidence to suggest, however, that physicians who currently perform donor insemination do not adequately fulfill these functions. One survey indicates that the medical histories of donors tend to be limited to information that the donors voluntarily disclose. Thus the accuracy of the information is circumscribed by the donor's level of knowledge about his own medical history, as well as his honesty about conditions that may preclude him from donating. While physicians are capable of performing more complex genetic screening, the fact is that most of them do not spend the time or resources to do so. Given this reality, insemination with and without physician supervision probably provide equal health protection. In any case, a woman arranging a donor insemination without a physician is not any less able to ascertain the medical condition of the potential father than is a woman who seeks to become pregnant through sexual intercourse.

Furthermore, donor insemination is not a complex medical proce-
Donor insemination in fact probably became known as a medical treatment because it was seen as a therapy for infertile couples. In light of the increasing demand for donor insemination from unmarried women wishing to form nontraditional families, the medical model for donor insemination offers no distinct advantages with respect to the health and safety of the parties.

It may be argued that physician involvement may be useful for record-keeping and documenting what took place between the parties. Legislation could require physicians to keep records of the identity and medical history of the donor that would later be accessible to the child. For parties using a known donor, going through a physician could provide evidence that donor insemination was in fact the method of conception, as well as documentation of the intent of the parties regarding parental expectations.

The reality, however, is that physicians do not provide a reliable structure for record-keeping. Any thorough record-keeping would undermine the physician's crucial role in securing the anonymity of the donor. In addition, physicians may be unable to find willing donors if there is a possibility that the identity of the donor will be revealed at some future date. A recent survey shows that physicians deliberately keep inadequate records as a means of ensuring donor anonymity, out of fear that they might be forced to open the records under court orders. As for documenting the parties' intent, medical records are clearly inferior to a written document prepared by the parties' attorney.

The greatest problem with the medical model is that it burdens fundamental rights to procreation and family autonomy by placing impermissibly broad authority in the hands of an elitist professional group.

The American Medical Association (AMA) could establish an official policy against providing donor insemination to unmarried women, low-
income women, or lesbians. (A medical clinic at Wayne State University did have a policy prohibiting donor insemination to unmarried women, but changed the policy when it was challenged by a lawsuit.) If utilizing a physician is the only way a woman can obtain donor insemination without the donor being the legal father, exclusionary policies would discourage women wishing to create nontraditional families.

Even without an official policy, individual doctors could limit access to donor insemination for women outside the traditional nuclear family model. With one survey showing that only 9.5% of all doctors providing donor insemination would provide services to an unmarried woman, it is easy to imagine that few would be likely to provide services to an openly lesbian woman. In a 1982 Wisconsin case that received significant media attention, a physician was publicly criticized for providing donor insemination to a single woman who later applied for welfare. The county welfare department even discussed filing a paternity suit against the physician for child support.

Financial considerations will also limit access to donor insemination under the medical model. The requirement of a physician adds hundreds of dollars to the cost of a procedure that could otherwise be done by the woman herself, by friends, or for a nominal fee. To say that a donor will be the legal father unless the procedure is done through a physician is to say that women with the money for physician's fees may choose to create their own families, while women without such financial means may not. The medical model therefore fails to ensure equal access for women wishing to exercise their rights to procreation outside the traditional nuclear family model.

D. Private Ordering

The fourth model of response would be to allow donor insemination to be regulated by private ordering through contract. Under this
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model, the intent of the parties involved would be controlling. The parties could determine for themselves the use of donor insemination and the allocation of parental rights and responsibilities for the resulting children. The state could enact legislation making verbal or written contracts enforceable, but it would not otherwise become involved in determining the conditions or consequences of donor insemination. Finally, in the absence of a written contract, the state could resolve disputes based on its determination of the parties' expectations, just as in any other contractual dispute.

Commentators have suggested that private contracts regarding alternative methods of reproduction would be unenforceable because of cultural and legal proscriptions against "baby selling." In the context of adoption and surrogate parenting, there are strong public policy concerns that militate against private ordering as creating a commercial market in children. Donor insemination, however, is distinguishable from adoption or surrogate parenting in that the entity being exchanged between the parties is semen, not live babies. Allowing private contracting for donor insemination would promote motherhood by choice for unmarried women, not a commercial market in "baby selling." Furthermore, semen is not a constitutionally protected entity, whereas a fetus and the mother's relationship to the fetus during gestation are constitutionally protected. The level of legal and public policy concerns over the exchange of semen do not reach the same heights as the concern over the welfare of live babies.

Currently, private arrangements concerning child-rearing and sup-

139 Wadlington, supra note 85, at 496.
140 This is the model utilized by New Jersey and Washington's donor insemination statutes that allow a written contract between the parties to determine whether the donor will be a legal father. See supra note 50 and accompanying text.
141 As an alternative, a state could enact some kind of "fall-back" legislation that would provide presumptions that could govern in the absence of a written agreement between the parties.
142 Wadlington, supra note 85, at 501.
143 See, e.g., CAL. PENAL CODE § 273 (West Supp. 1980) (it is a misdemeanor to pay for adoption or consent to adoption); Michigan courts have denied enforcement of surrogate mother contracts on the grounds that it violates public policy to allow payment for babies. Wadlington, supra note 85, at 501, (citing Doe v. Kelly, 106 Mich. App. 169, 307 N.W.2d 438 (1981)). But cf. Reimche v. First Nat'l Bank of Nev., 512 F.2d 187 (9th Cir. 1975) (agreement between natural parents of an illegitimate child for the father to adopt and the mother to keep quiet in exchange for a share in the father's will upheld because it was a family agreement, not "child bartering").
144 One commentator has suggested that allowing unmarried persons access to donor insemination but not surrogate parenting would constitute gender discrimination, relying on the close analogy between the two methods of alternative reproduction. Note, Reproductive Technology and Procreation Rights, supra note 5, at 680 n.67. Such disparate treatment would not be constitutionally impermissible under current equal protection doctrine, however, because the legislation would probably not reflect the requisite intent to discriminate on the basis of gender. Id., (citing Personnel Admin. v. Feeney, 442 U.S. 256, 274-80 (1979)). Further discussion of surrogate parenting is beyond the scope of this Article.
port obligations arising from traditional methods of conception are generally not upheld by the courts. The reasons articulated for this posture are the state's interest in child welfare, specifically in ensuring financial support for the child from both parents.

In states other than New Jersey and Washington, the common law not only fails to support private contracts regarding child support obligations arising from donor insemination, but, in effect, discourages them. For example, a contract between a woman and a sperm donor that the donor would have no parental obligations might actually accomplish the opposite result. Rather than using the contract as evidence of the parties' intent, the court might use it as evidence of paternity, and thus impose parental obligations on the donor.

Some of the resistance against allowing private contracts to govern the allocation of parental rights arises because private ordering raises difficult questions about the nature of familial and parental institutions in our society. Allowing private ordering in family matters acknowledges that the structure of the family may no longer follow the nuclear family model of a mother, a father, and their two children. If two women may contract to raise a child together, the child may have two mothers instead of a mother and a father. Alternatively, a woman may contract with more than one person to raise her child, and thus provide the child with three or four important parent figures.

Another question raised is partial parent status. A woman wishing to raise her child by donor insemination either alone or with another woman might still want the child to know the identity of the donor, and possibly even have visitation with the donor. As long as "parent" is an "all or nothing" status determined by the state, a donor with visitation privileges is also likely to be recognized as the legal father with all the resulting rights to physical custody and obligations to pay child support.

146 See, e.g., Fournier v. Lopez, 47 U.S.L.W. 2765 (Cal. Ct. App. May 2, 1979) (unmarried couple's agreement that mother would have sole responsibility for the child not upheld); Ernest P. v. Superior Ct., 111 Cal. App. 3d 234, 168 Cal. Rptr. 438 (1980) (paternity suit in which mother was awarded child support despite having agreed to accept $2000 from father to release him from future claims); Ruddock v. Ohls, 91 Cal. App. 3d. 271, 154 Cal. Rptr. 87 (1979) (a parent may not waive amounts due a child for future support).

147 The California code provides that an agreement relieving a party of support obligations is not binding. CAL. CIV. CODE § 7006(e) (West 1983).

148 These are the two states with statutory provisions for written agreements determining donors' parental rights and obligations. See supra note 50 and accompanying text.

149 Kern & Ridolfi, supra note 17, at 256; D. Hitchens, supra note 20, at 7.

150 See generally Halen, supra note 89.

151 This raises the issue of how to recognize legally the rights and responsibilities of nonbiological parents having contractual commitments to raise children. In J.C. v. M.K., the co-mother intervened in the suit requesting to be recognized as a de facto parent and to have visitation rights formally ordered by the court. The trial court granted her reasonable visitation rights, but did not recognize her as a de facto parent. The de facto parent ruling is now on appeal.

152 The Lesbian Rights Project reports getting numerous calls from women who would like the donor to be involved in the raising of the child but would not like him to have full parental rights or responsibilities.
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that follow from that status.\textsuperscript{153} Thus, a woman wishing to create a family of her own choosing will be faced with insufficient legal recognition of the partner of her choice if this partner is a woman or a man other than her husband, and excessive legal recognition of the donor if he is not someone she is choosing to be a full part of her family. The child's welfare can be harmed by conflicts between the parties the child recognizes as psychological parents\textsuperscript{154} and the parties the state recognizes as legal parents. The possibility of allocating and dividing parental responsibilities in new and different ways is clearly one of the ramifications of allowing for increased private ordering of donor insemination.

The availability of any method of alternative reproduction raises inevitable questions about changing familial and parental systems in our society. Private contracting is the most workable model because it provides the greatest flexibility for dealing with the variations in family structure made possible by donor insemination. In addition, there have been broad changes in the nature of contract law that suggest that it may be more appropriate for governing family systems than are state regulations.\textsuperscript{155} A "massive intrusion of public policy into the private domain of traditional contract" has created modern contractual relationships that are somewhere between contract and status and, thus, are more adaptable to family obligations.\textsuperscript{156}

A strong case has been made for increased private ordering in marital relationships without children,\textsuperscript{157} but the presence of children raises the more complex issues of child welfare, state economic interests, and parental obligations. Given the constitutional dimensions of the right to bear and raise a child without undue state interference, any meaningful right to procreation by donor insemination should include the right for parties to agree on how parental obligations and entitlements will be allocated.\textsuperscript{158} In light of the failures of the biological, administrative, and medical models to ensure access for nontraditional families, increased private ordering by contracting is the most workable model for a legal response that provides these constitutional freedoms for all. The following section will show how current trends in family law support private ordering as an appropriate legal model for donor insemination, and how child welfare concerns and state economic interests can also be satisfied by this model.

\textsuperscript{153} D. Hitchens, supra note 20, at 3. The donor also might have a right to joint legal custody in some states, as well as a right to custody in the event of the mother's death or incapacity. \textit{Id.}

\textsuperscript{154} See infra notes 203-246 and accompanying text.


\textsuperscript{156} \textit{Id.} at 303.

\textsuperscript{157} Shultz, supra note 155.

\textsuperscript{158} Robertson, supra note 65, at 436, 459-60.
III. THE CASE FOR PRIVATE ORDERING

A. Trends in Family Law

Family law is a legal field that was dormant for a century and then experienced radical change within a decade. The legal changes reflect a major shift in the cultural institution of the family in this country, where the feudal family as a social, economic, and political unit of society has been replaced by the liberal family which is a "voluntary collection of individuals held together by bonds of sentiment." The legal changes also reflect a major trend toward private ordering in family affairs. This movement from status to contract is clearly illustrated in various areas of family law, and supports private ordering for donor insemination as the optimal model for future legal reform.

Some of the most prominent reforms in family law have occurred in the area of marriage and divorce. The almost universal availability of no-fault divorce has changed societal expectations and behavior regarding the permanence and stability of marriage, and represents a trend toward greater tolerance of private ordering in the marriage context. In contrast, where "fault" is still required for marriage termination, this means that the state has significant control over the substantive marriage agreement. By abandoning this control through no-fault divorce statutes, the state is allowing the marital partners greater individual autonomy and control in making decisions about the structure and form of their family. While this legal reform has developed largely in response to changing social values regarding marriage and divorce, it paves the way for greater legal acceptance of nontraditional family structures.

The second major area of change in family law is reflected in an increased tolerance and legal recognition for couples living together outside of marriage. Many states have repealed criminal sanctions against cohabitation or fornication, and one state has declared such sanctions to be unconstitutional. Case law has also indicated a limited

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159 Wadlington, supra note 85, at 510-11 (posing the question as to whether the reform cycle has run its course or will continue on to articulate a consistent body of jurisprudence regarding children).


161 Shultz, supra note 155, at 264-65. "The movement of the progressive societies has ... been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the family as the unit of which civil laws take account." Hafen, supra note 89, at 569, (quoting H. MAINE, ANCIENT LAW (1st Am. ed. 1870)).


163 Id. at 272-74.

164 Id. at 273.


166 Id. at 272-74.

167 Id. at 273.
willingness to uphold implied and/or express contracts between couples living together regarding support obligations.\textsuperscript{168}

This legal reform has reflected a dramatic change in the social reality of family arrangements.\textsuperscript{169} Many couples are opting to live together outside of marriage, thus exercising greater autonomy and choice about the structure of their families. The law's willingness to recognize the validity of these arrangements indicates that the state is relinquishing control over the form of family arrangements, and allowing individuals the contractual freedom to create nontraditional families.

A new wave of legal reform in the area of child custody is bringing the trend toward private ordering into the realm of child welfare as well. While parental autonomy in child-rearing within traditional marriages has been strictly protected by the law,\textsuperscript{170} the states have traditionally imposed their own standard of child welfare over the wishes of the legal parents in the event of divorce.\textsuperscript{171}

In divorce, the most common standard for child custody determinations is "the best interests of the child."\textsuperscript{172} Under the traditional way of determining custody upon divorce, the court is involved in the substantive details of child placement and support, often dictating exactly what days the child spends with each parent and how much support money is exchanged.\textsuperscript{173} Recently, however, many states are replacing the traditional "best interests" standard for determining child custody with a presumption in favor of joint custody.\textsuperscript{174} Under joint custody, the court continues equal legal custody by both parents and leaves to them the task of reaching an agreement about support and custodial arrangements. In essence, this minimizes the state's substantive involvement in favor of increased private ordering.

Thus an increase in private ordering is surfacing in child welfare matters as well as in the areas of marriage, divorce, and nonmarital cohabitation. If the state is surrendering its protective role in child welfare in divorcing families, and leaving child-rearing arrangements up to the parties, then it follows that the state could allow private ordering to

\textsuperscript{168} See e.g., Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (plaintiff allowed to bring an action on theories of implied contract or equitable relief); Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 5921 (1980) (couples living together are free to contract for personal services and there is no requirement that the contract be in writing; however, such a contract will not be implied in law). But see Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d. 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983) (obligations in a nonmarital relationship insufficient to establish entitlement to unemployment benefits).

\textsuperscript{169} The number of cohabitating couples has increased two hundred percent between 1970 and 1980; twenty-seven percent of these couples had children living with them. Blumberg, supra note 166, at 1128-29.

\textsuperscript{170} Karst, supra note 53, at 645. See also supra notes 76-77 and text accompanying for cases dealing with parents' rights to rear children free of state intrusion.

\textsuperscript{171} J. AREEN, CASES AND MATERIALS IN FAMILY LAW, 536-58 (1978).

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} See, e.g., CAL. CIV. CODE § 4600.5(a) (West 1983).
determine child custody and support for children born of donor insemination without harming child welfare.

One final development in the area of family law which indicates increasing deference by the state to the private ordering of the parents is in the area of child abuse and neglect. Recently, child abuse statutes have come under attack for being unconstitutionally vague, and thus failing to ensure sufficient parental autonomy in family affairs.\(^{175}\) Broad neglect statutes have been recognized as a distortion of the state's \textit{parens patriae} power, and the subjective application of these statutes according to judges' cultural and class biases has been recognized as an abuse of state power over parental autonomy.\(^{176}\) The realm of state intervention in families has shifted from neglect, where the state must make subjective judgments about the nature of child-rearing obligations, to abuse, where the state will only intervene in cases of concrete harm. This represents a presumption that parents are better qualified than the state to make child-rearing decisions.\(^{177}\)

Procedural issues in abuse and neglect cases also reflect a growing tendency to favor family autonomy over state intervention. In \textit{Santosky v. Kramer},\(^{178}\) the Supreme Court held that the burden of proof for termination of parental rights should be at least "clear and convincing," rather than a mere "preponderence of the evidence" standard. This increase in the difficulty of the burden of proof for the state means that errors will favor parental autonomy rather than the state. Implicit in this change is the belief that parents are to be preferred in child welfare decisions as a matter of law.

### B. Child Welfare Concerns

Regardless of the trend toward private ordering, courts typically raise very traditional concerns when faced with questions affecting childrearing rights and obligations. In \textit{Cramer v. Morrison},\(^{179}\) for example, the California Court of Appeal articulated the state's interests in a traditional nuclear family as "protecting children from the stigma of illegitimacy, preservation of the family, and insuring individuals rather than the government bear responsibility for child support."\(^{180}\) Other commentators have raised additional concerns such as child welfare and the prevention of "immoral" family structures.\(^{181}\)

\(^{175}\) See, e.g., \textit{Alsager v. District Court of Polk County Iowa}, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd., 545 F.2d 1137 (8th Cir. 1976).


\(^{177}\) \textit{Id.} at 1214.

\(^{178}\) 455 U.S. 745, 766, 768 (1982).


\(^{180}\) \textit{Id.} at 885, 153 Cal. Rptr. at 872.

\(^{181}\) Flannery, \textit{supra} note 162, at 1315; Kern & Ridolfi, \textit{supra} note 17, at 267.
An analysis of the social realities of family structuring reveals that a model of private ordering for donor insemination satisfies these concerns at least as well as do prevailing practices. It should be emphasized that in the interest of providing equal access to the constitutional rights of procreation and family autonomy for all, nontraditional families by donor insemination must not be held to higher standards than "traditional" biological families.

1. Protecting Child Support

One of the major arguments raised for limiting the availability of private ordering for donor insemination, and thus limiting the possibility of single parent or nontraditional families, has been an economic one.\textsuperscript{182} This argument assumes that a single parent or nontraditional family will not be financially able to care for the child and will create a burden on the state welfare system. The major public controversy which resulted when a Wisconsin woman who received donor insemination subsequently applied for welfare is a vivid illustration of this concern.\textsuperscript{183}

While single parenthood is undeniably a financial hardship, the social reality is that many women are coping with it, by necessity and by choice, without necessarily burdening the welfare system.\textsuperscript{184} Marital status is not precisely correlated with income level: a single woman may be wealthy, while a married couple may be indigent.\textsuperscript{185}

The lack of legal marital status also gives no indication of whether the child will have the support benefits of more than one "social" parent. Given the high rates of divorce and remarriage, a woman single when she chooses to have a child through artificial reproduction may later marry and remain so for the rest of the child's life. Alternatively, given the increasing popularity of cohabitation, a woman may have a nonmarital partner who is willing to support the child financially.\textsuperscript{186} Many lesbian women are part of stable couples or extended family units which will contribute to the support of a child conceived by donor insemination.

\textsuperscript{182} Kritchevsky, \textit{supra} note 54, at 29-30.

\textsuperscript{183} See \textit{supra} notes 117-136 and text accompanying. It is interesting to note that one catalyst for the litigation in \textit{J. C. v. M.K.} was a paternity suit by the state to receive child support from the donor when the woman went on welfare. Clerk's Transcripts at 163, 165, \textit{J. C. v. M.K.}


\textsuperscript{185} Donovan, \textit{supra} note 5, at 240-41 (state interest in protecting its revenues is not narrowly tailored enough to justify violating constitutional right of unmarried women to procreate).

\textsuperscript{186} In \textit{J. C. v. M.K.}, the mother had an agreement with a woman friend to share parenting and support for the child. Reporter's Transcript at 78-80, \textit{J. C. v. M.K.}
The presence of a legal father is no guarantee that support obligations will be met. Courts order child support only in some dissolution cases, and where such support is ordered, it generally constitutes less than half of the actual cost of raising the child. Moreover, getting fathers to pay once the support is ordered is a persistent problem. Of the many studies in this area, not one has found a state or county where more than one-half of the fathers fully comply with support orders.

To prohibit private ordering for donor insemination in order to ensure the financial welfare of the child is illogical when the woman could always exercise her right to procreate by traditional methods and achieve the same results. Since divorce and illegitimacy are by far the largest source of children without the financial support of two parents, it is irrational to attack the issue by limiting donor insemination to traditional families. In fact, a woman choosing to bear a child outside of a traditional family structure through a method as deliberate as donor insemination is probably much more emotionally and economically prepared for parental obligations than one who becomes accidentally pregnant or unexpectedly divorces.

The Supreme Court has imposed a constitutional limitation on state intervention in private ordering and procreation when the state's economic interest is ostensibly at stake. In Zablocki v. Redhail, the Supreme Court held that the state may not prevent indigents from marrying based on outstanding child support obligations from prior relationships. In dicta, the court stated that the decision to have a child is a matter of personal conscience and that a woman is free "to bring the child into life to suffer the myriad social, if not economic disabilities that the status of illegitimacy brings . . . ." If indigents cannot be prevented from marrying based on failure to provide support for children of a prior relationship, and if the choice to bear an illegitimate child is a matter of personal conscience, then it follows that the state cannot interfere with the choice to have a child by donor insemination based on some speculative inability to support the child.

A related question is whether a woman choosing to bear a child without a legal father should have the right to welfare payments. In several cases, state policies that burdened a woman's freedom to procreate

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187 Child support is awarded to 71% of White women, 44% of Hispanic women, and 29% of Black women. *Women in Poverty*, 15 CLEARINGHOUSE REV. 925, 928 (1982). This indicates that racial issues further complicate economic issues for women heads of households.


190 Kritchevsky, *supra* note 54, at 29.

191 Kern & Ridolfi, *supra* note 17, at 276.

192 Id. at 270.


194 Id. at 386.
without actually prohibiting procreation have been struck down as unconstitutional. These cases suggest that the denial of welfare benefits to a woman who exercises her procreational rights through donor insemination would be similarly unconstitutional.

However, in *Maher v. Roe*, the Supreme Court specifically held that a state restriction on the use of public funds to support the exercise of a fundamental right is constitutionally permissible. *Maher* dealt with the state's withholding of Medicaid money to perform abortions in order to encourage birth. Paradoxically, in the case of donor insemination, the withholding of funds to perform the insemination would discourage birth.

It would be inappropriate to extend the holding in *Maher* to allow a state to withhold welfare payments from afterborn children. The holding should be limited to funding for the performance of medical procedures at state expense, whether they be abortions or donor inseminations.

The state's interest in child welfare should distinguish the performance of medical procedures from the support of children already in existence. In theory, the welfare payments are the child's, not the mother's. Thus, the child should not be penalized for the procreative choices of the mother.

It is important to note that the original function of family lineage in our law and culture was to protect rights to property and material support. The emergence of public wealth in the past several decades has seriously diminished the role of kinship in this regard. The government has largely replaced private property as the major source of wealth, and thus issues of family lineage and child support strictly linked to biology no longer serve the interests they once did. Thus, the idea that individuals might make private contracts regarding the bearing and raising of a child, with the expectation that the state may provide support for the child if necessary, is not as unusual as it might have been fifty years ago.

2. Other Child Welfare Concerns

Child welfare issues are often raised in discussions of private order-


197 See also, Harris v. McRae, 448 U.S. 297 (1980) (state is under no obligation to fund abortion under the Medicaid program where federal funds were cut due to the Hyde Amendment).

198 This could limit access for low-income women, especially if a physician requirement was adopted. However, given the ease of home insemination, under a private ordering model the important access issue for low-income women would be the availability of welfare.


201 Id. at 733.
ing for donor insemination and child-rearing rights and obligations. Both psychologists and family courts agree that stability and continuity of relationships are essential for a child's optimal development.202 There is concern that private ordering would disrupt the stability provided by the traditional nuclear family.

Policies that favor state-defined marriage and child-rearing obligations are intended to maximize the stability of a child's home environment.203 Given the dramatic rise in the incidence of divorce, however, the traditional nuclear family is hardly a guarantee of such stability.204 In addition to divorce, the stability of the traditional nuclear family is threatened by other occurrences, such as death, geographical moves, and the absence of parental figures due to career obligations.

Even though the importance of stability has been firmly established, ideas about what is necessary to ensure family stability are changing. New psychological evidence indicates that healthy child-rearing can occur outside of a stable marriage. The noted family psychologist Virginia Satir has commented:

[T]he form of the family is not the basic determinant for what happens in the family. Form presents different kinds of challenges that have to be met, but the process that goes on among the family members is what, in the end, determines how well the family gets along together, how well the adults grow separately and with one another and how well the children develop into creative healthy human beings.205

Another widely held assumption favoring traditional families is the belief that child welfare is best served by the child being raised by its biological parents. However, social reality belies that assumption. Statistics indicate that fully one-fourth of children in the United States are not being raised by both biological parents, and this figure is expected to rise to over forty percent in the next five years.206 The statistics are even more extreme for black children, fifty-eight percent of whom did not live with both parents in 1980.207

Social psychologists have pointed out that young children actually have no conception of the biological tie, and instead rely on the adult figure who is their "psychological parent" for their sense of security in

202 J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 13-22 (1979) [hereinafter cited as J. Goldstein].
203 Hafen, supra note 89, at 495.
204 The divorce rate in this country more than tripled from 1960 to 1982. Bartlett, supra note 90, at 881 n.7, (citing Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Special Studies Series P-20, No. 380, Marital Status and Living Arrangements: March 1982 at 5, Table F (1983)). In 1975, it was estimated that 44% of all marriages would end in divorce. Id., (citing Preston, Estimating the Proportion of American Marriages that End in Divorce, 3 Soc. Methods & Research 435, 436, 457-59 (1975)).
205 V. Satir, Peoplemaking 195 (1972).
206 Bartlett, supra note 90, at 880-81.
207 Id. at 881 n.5.
the world. Only a parent who is actually physically present can provide the necessary nurturing, while an absent biological parent will soon become a stranger to a child.

The courts have recognized the importance of the "psychological parent" over the biological parent in a variety of situations. The Supreme Court articulated this view most eloquently in Smith v. Organization of Foster Families for Equality & Reform (OFFER), a case involving the inadequacy of New York's procedure for removing foster children from their foster homes. There the court stated:

[B]iological relationships are not the exclusive determination of the existence of a family. . . . [T]he importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association. . . . No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.

The presence or absence of a psychological relationship with the child is often influential in determining the degree of parental rights courts allocate to biological fathers who are not married to the mothers of their children. In Stanley v. Illinois, the Supreme Court held that an unmarried father who had been living with his children for years was entitled to a hearing before the children could be removed from his custody upon the death of their mother. In Quilloin v. Walcott, however, the biological father was not entitled to veto a step-parent adoption for his child where the father had never lived with the child or taken on parental responsibilities, and thus did not have a psychological relationship with the child. The presence or absence of a psychological relationship with the child was influential in the degree of parental rights that unmarried biological fathers were given in the illegitimacy cases.

The California Supreme Court has also emphasized the importance of the psychological relationship in a case dealing with artificial reproduction. In People v. Sorensen, a woman's husband was determined to be the legal father of a child born by donor insemination during the marriage. The court stated that the sperm donor had "no more responsibil-

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208 J. Goldstein, supra note 202, at 12.
209 Id. at 17, 19.
210 431 U.S. at 816.
211 Id. at 843-44.
212 405 U.S. at 645.
213 Id. at 658.
215 Id. at 256.
216 See Kern & Ridolfi, supra note 17, at 278; Donovan, supra note 5, at 204-07; see also, Caban v. Mohammed, 441 U.S. 380 (1979) (statute granting unmarried mother, but not father, veto over adoption of child was struck down). In Caban, as in Stanley, the father had lived with the children for several years and had helped raise them. 441 U.S. at 381.
217 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).
ity for the use of his sperm than did a blood donor for the use of his blood.\footnote{68 Cal. 2d at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.}

The "de facto" parent doctrine is a further example of judicial recognition of the importance of "psychological parents" in providing for the best interests of the child.\footnote{See, e.g., In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).} Under this doctrine, parties other than the biological parent who have lived with the child and formed significant psychological ties are given the right to notice and standing to appear in custody hearings.\footnote{Id. at 692, 523 P.2d at 253, 114 Cal. Rptr. at 454.}

A third child welfare issue arises from the belief that a child must have two parents, i.e. a mother and a father.\footnote{See, e.g., C.M. v. C.C., 152 N.J. Super. at 163, 377 A.2d at 825 ("It is in a child's best interests to have two parents whenever possible.") This was also the point of view taken by the trial court judge in J.C. v. M.K. (information obtained from the Lesbian Rights Project).} Not only is the familial model underlying this belief unrealistic given the rapid growth rate of single-parent households,\footnote{Children born to unmarried women constituted 17% of all births in 1979 as compared to approximately 10% in 1970. Kern & Ridolfi, supra note 17, at 252 n.1, (citing STATISTICAL ABSTRACT, supra note 184).} but the belief itself is undermined by the findings of psychological experts who have concluded that single-parent households are not injurious to children.\footnote{Kern & Ridolfi, supra note 17, at 270 n.132.} In 1971, the U.S. Department of Health, Education and Welfare (H.E.W.), concerned about the rising numbers of single-parent households, conducted an extensive review of the literature addressing the viability of the single-parent home for raising children.\footnote{Clerk's Transcript at 140, J.C. v. M.K., (citing HERZOG & SUDIA, BOYS IN FATHERLESS HOMES, U.S. Dept. of H.E.W. (1971)) [hereinafter cited as HERZOG & SUDIA].} In what has become a classic study, the authors concluded that prior research in the area had failed to show "evidence clear and firm enough to demonstrate beyond doubt whether fatherless boys are or are not overrepresented among those characterized by the problems attributed to them."\footnote{Id., (citing E. MACCOBY and C. JACOLIN, THE PSYCHOLOGY OF SEX DIFFERENCES (1974)).}

In what has become a classic study, the authors concluded that prior research in the area had failed to show "evidence clear and firm enough to demonstrate beyond doubt whether fatherless boys are or are not overrepresented among those characterized by the problems attributed to them."\footnote{Id. at 140-41, (citing Raschke & Raschke, Family Conflict and Children's Self Concept: A Comparison of Intact and Single-Parent Families, 41 J. MARRIAGE & FAM. 367, 372 (1979)).}

Other sociological and psychological research on female-headed households supports the conclusion that single-parent families are not detrimental to children. Boys raised in father-absent homes do not experience problems in their gender identification or sex-role behavior even though there is no male role model in their family unit.\footnote{Id., (citing HERZOG & SUDIA, supra note 224, at 61).} Children from single-parent families show no significant difference in their self-esteem when compared with children from traditional, two-parent families.\footnote{Id., (citing E. MACCOBY and C. JACOLIN, THE PSYCHOLOGY OF SEX DIFFERENCES (1974)).} The absence of a father did not affect school performance in a study of
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junior high school age children. Finally, numerous studies have indicated that juvenile delinquency is not associated with being raised in a single-parent household. Contrary to the belief that being raised in female-headed households is harmful to children, current studies indicate that such child-rearing may be in fact advantageous to a child’s development. One study noted that children from single-parent families showed “feelings of increased self-esteem, independence and a genuine sense of competence.” Another study found that children from female-headed households were overrepresented in a group of children with exceptionally high IQs. The researchers for H.E.W. noted that:

On the whole, in our society, the single-parent family has been viewed as a form of unfamily or nonfamily or sick family. There are a number of reasons why it would be of advantage to recognize the single-parent family as a form that exists and functions, rather than an aberration. [One reason is the prevalence of such families.] Another is that, as a number of investigators have discovered, such families can be cohesive, warm, supportive, and favorable to the development of children. As this social science research reflects, it is not the existence of a mother and a father that determines a child’s welfare, but whether the existing family unit functions effectively.

Although some cases clearly indicate a preference for a mother and a father over a woman raising a child alone, commentators have argued that the state cannot limit artificial reproduction in order to protect this interest. Unlike child abuse or neglect, a child growing up without a father is not the kind of situation which warrants state intrusion. Such state action would be similar to an action to prevent a child from growing up poor, or of mixed race, or with a certain kind of education; all of which have been declared unconstitutional intrusions on family privacy. An Illinois court astutely recognized the danger of this

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228 Id. at 141, (citing Kopf, Family Variables and School Adjustment of Eighth Grade Father-Absent Boys, 19 Fam. Coordinator 1945, 1951 (1970)).
229 Id. at 141-42, (citing Wilkerson, The Broken Family and Juvenile Delinquency: Scientific Explanation or Ideology?, Soc. Probs. (1974); Andrew, Violence Among Delinquents by Family Intactness and Size, Soc. Biology (1978); Austin, Race, Father Absence and Female Delinquency, Criminology (1978)).
231 Id., (citing Albert, Cognitive Development and Parental Loss Among the Gifted, Exceptionally Gifted and the Creative, Psychological Rep. (1971)).
232 Id., (quoting Herzog & Sudia, supra note 224, at 82).
233 See, e.g., C.M. v. C.C., 152 N.J. Super. at 163, 377 A.2d at 824 (“The courts have consistently shown a policy favoring the requirement that a child have a father as well as a mother.”); Reporter’s Transcript at 70, J.C. v. M.K. (“You are going to have a hard time convincing this court to call him anything but the father of that child, because I will not do that to this boy.”).
234 See, e.g., Kritchevsky, supra note 54; Donovan, supra note 5; Kern & Ridolfi, supra note 17.
235 Donovan, supra note 3, at 238-39; Kern & Ridolfi, supra note 17, at 252, (citing Karst, supra note 53, 657-58 (“promotion of this [nuclear family] ideal constitutes an insufficient justification for the state's suppression of different forms of intimate association, absent some showing of independent harm resulting from these alternatives.”))
level of intrusion when it denied recovery in tort by an illegitimate child against its parents for having been born illegitimate. The court implied that there was no right to a "normal" home under the guise of the state's interest in protection of child welfare.\(^{236}\)

A final child welfare issue is the concern for minimizing conflicts over child custody. Authorities on children in the divorce context have noted that it is extremely difficult for a child to maintain contact with two parents who are not in positive contact with each other.\(^{237}\) The conflicts of loyalty generated by two parents quarreling over custody and visitation can have devastating effects on the child.\(^{238}\)

If a donor's paternity status is determined by biology rather than by private agreement, there is a possibility of child custody disputes between the donor and the mother.\(^{239}\) An unmarried woman very likely chooses donor insemination because she wants to make some arrangement with the biological father other than the parental status that would follow from conception by intercourse.\(^{240}\) This could be an agreement that the donor would not be involved at all with the child, or an agreement for partial parenting by the donor. Recognizing a donor as the legal father based on biology creates a full right to actual custody, not just to visitation and support.\(^{241}\) In some states this may also give the donor a right to joint custody, a right to sole physical custody if the mother dies or becomes disabled, a right to have his name on the birth certificate, or authority over decisions in the child's life such as medical care, geographic location, and education.\(^{242}\) While a court would probably not grant custody to a donor if the mother has raised the child, a single mother, particularly if she were a lesbian, would always live with the fear that the donor could bring a custody action against her. Such a suit would be disruptive to the stability of the child's family unit, regardless of the final outcome.\(^{243}\) Furthermore, it is conceivable that a donor could win a custody suit against a single or lesbian mother, particularly if he were heterosexual and married. Even in a situation in which there were efforts to use an unknown donor, such as donor insemination with a go-between, the availability of the human leucocyte antigen (HLA) test makes it possible to determine paternity with ninety-eight percent accu-

\(^{236}\) Zepeda v. Zepeda, 41 Ill. App. 2d 240, 255, 190 N.E.2d 849, 856 (1963), cert. denied, 379 U.S. 945 (1964) (tort action based on illegitimacy denied because it would give illegitimate children rights that legitimate children don't have: the right to a "normal" home).

\(^{237}\) J. Goldstein, supra note 202, at 38.

\(^{238}\) Id.

\(^{239}\) See J.C. v. M.K. The parties have been in conflict for the child's entire life, over five years.

\(^{240}\) Kern & Ridolfi, supra note 17, at 274.

\(^{241}\) Sexual Orientation and the Law, supra note 48, at 1:67-69; D. Hitchens, supra note 20, at 3.

\(^{242}\) Sexual Orientation and the Law, supra note 48, at 1:67.

racy. Thus, recognizing a donor as a legal father based on biology when the parties have a different agreement has great potential for harming child welfare by disrupting the stability of the mother and child's chosen family unit.

Conflicts may still arise when the parties make private agreements about parental rights and responsibilities for a donor insemination child. A donor may want to have more or less of a parental role than the parties originally agreed upon. Two women who agree to co-parent a donor insemination child may have a conflict over their agreement as the child grows older and circumstances in their lives change. However, the proper role for the court should be to inquire into the nature of the parties' agreement and the child's actual emotional bonds, rather than to rely on the existence of biological ties or outmoded legislation in naming the legal father. According to one commentator:

This situation is not susceptible to legislation [footnote omitted] regarding the rights and duties of the parties, however, because an equitable solution to a dispute depends on the parties' original intentions and expectations. If the man donates his sperm with the understanding that he would be treated as the child's father just as if conception has been by intercourse, his paternal rights should be protected. If the mother, however, accepted sperm from a man because he had waived all interests in serving as a parent, he should not be permitted to claim parental rights at some point after the birth. A man should not be given the parental rights he had originally waived simply because a judge favors finding every child a father.

Similarly, a woman should not be able to sue a donor for child support after the parties have agreed that he will not be the legal father. Where the parties' agreement is unclear, the court should look to the familial expectations of all the parties, including the child if possible. In resolving disputes, the court should focus on preserving the child's psychological family unit rather than on trying to create family structures that follow the traditional nuclear family model.

In summary, the child welfare concerns discussed above will not be

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244 The HLA test is a white blood cell typing test that has been determined by some courts to be admissible for proving paternity. See, e.g., Cramer v. Morrison, 88 Cal. App. 3d at 878.

245 In Alameda County, California, there have been two cases where lesbian couples who agreed to co-parent a donor insemination child subsequently separated and went to family court to settle their disagreement over custody and visitation. Loftin v. Flournoy, No. 569630-7 (Alameda Co. Super. Ct., Sept. 4, 1984); In re The Matter of Petitioner Hicks & Respondent Isaacks, No. 595782-8 (Alameda Co. Super. Ct., 1985). In the first case, the family court created jurisdiction even though there was no established action to bring the matter before the court, such as a dissolution or complaint for paternity. The court awarded visitation to the nonbiological mother. See Oakland Tribune, April 29, 1983, at A-1, col. 1. In the second case, currently pending before the Alameda County family court, the attorney filed a "Complaint to Establish Maternity" as a way of getting into court. The Lesbian Rights Project anticipates that these cases will become more frequent as the donor insemination babies of the lesbian "baby boom" come of age. (Information obtained from the Lesbian Rights Project).

246 Kritchevsky, supra note 54, at 40-41.
addressed by restricting donor insemination to traditional families and limiting private ordering. The current state of family structures in our culture and data on the psychological needs of children suggest that permitting individuals to make private agreements for determining rights and obligations regarding donor insemination children protects child welfare just as much as the status quo does, if not more so.

CONCLUSION

The new reproductive technologies are rapidly becoming a fixture in American family systems. It is estimated that one quarter of a million children have been conceived by donor insemination in this country.247 A coherent, equitable response on the part of the legal system will determine whether these new technologies lend further instability to changing family systems in our society, or provide new freedoms for individuals to bear and raise children in stable family structures of their own choosing, both traditional and nontraditional.

The biological model for allocating parental rights and obligations has been made obsolete by the institutions of adoption, step-families, and foster parenting, and by initial legislation on donor insemination in many states. Both the administrative model and the medical model fail to provide equal access for unmarried and lesbian women. Such restrictions on access violate protected constitutional rights to procreative choice and family autonomy.

A model of increased private ordering through contracting provides the optimal response for ensuring equal access to donor insemination for nontraditional families. The model gives individuals the freedom to create alternative extended family systems and raise their children according to their own expectations and values without undue state interference. This model is supported by trends in family law indicating a greater state deference to individual decision-making in family matters. Evidence also supports the fact that conventional child welfare concerns are provided for by the types of family units likely to result from private ordering as by the traditional family model in our society.

The law is a "relatively crude instrument" for supervising interpersonal relationships.248 The legal system should not try to force the creation of families on people who had no relationship in the first place249 by imposing state-ordered parental obligations in opposition to the parties' agreement. By allowing private ordering for donor insemination, the legal system can foster the freedom to create family systems that will move our society into the future.

247 Friedrich, supra note 2, at 56.
248 J. Goldstein, supra note 202, at 49-50.