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THE "INTENT" OF REPRODUCTION: REPRODUCTIVE TECHNOLOGIES AND THE PARENT-CHILD BOND

*Janet L. Dolgin**

I. INTRODUCTION

During the past twenty-five years, a revolutionary change in the means of human reproduction has occurred. During that period, a number of advances in technology have abruptly expanded the possibilities of fertility in a manner unprecedented in human history. It has suddenly, for example, become possible to extract ova from a woman's body and combine them with sperm in a culture dish. Once fertilization occurs, the multicellular fertilized ova can be implanted in a woman's uterus.¹ Alternatively, once fertilized, ova can be frozen and stored for later use. Moreover, new visualization and surgical techniques permit the examination and treatment of the developing fetus separately from the woman in whose body it grows. Not surprisingly, considering the human stakes involved, each of the possibilities mentioned has been acted upon as have others, still emerging.

To the interplay of rapid technological innovation and extraordinarily intense human reaction, two artifacts basic to culture have been forced to respond. The law, as an institution, has had to comment upon, and to some degree to govern, the emerging revolution. A judgment upon that revolution, and a self-adjustment, have been required of the intellectual and spiritual foundation of culture in general: the complex system of assumptions and principles upon which, in every society,

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1. *Developments in the Law: Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1537-38 (1990).

meaning and value are based.²

Understandably, both responses have been tentative, ambiguous, and difficult to apprehend. Both the law and fundamental systems in general are, for better or worse, almost always profoundly conservative. Both, devoted reflexively to precedent, tend to react to most deviations from the status quo with the deepest suspicion, and generally to prefer inertia to change. Confronted in particular with revolutionary change, both tend to withdraw into a subtle, often self-deceptive evasiveness, to buy time, so to speak, for careful consideration of the challenges they confront.

Both, however, if only perforce, do respond. And in their responses it becomes possible to bear witness to a phenomenon of endless fascination: the meditation of a culture upon itself, and the process by which, through such meditation, it unfolds.

Reproductive technology increasingly confronts the society and the law with possibilities that challenge familiar assumptions about the meaning of familial bonds. To that challenge, existing law provides practically no response. Moreover, the challenge presented by reproductive technology has appeared during a period of profound change in the society's and the law's view of the structure and definition of family. Courts are asked to consider disputes engendered by possibilities in human reproduction that were unimaginable a decade ago, and to do so just as traditional assumptions about the family and the character of kin relations are being questioned and eroded.

In these cases, courts are settling particular disputes, but they are doing much more than that. They are beginning to erect a frame within which to think about—and develop—the family of the future. They are, in short, being asked to develop a social—even a moral—vision of families and familial relationships *so that* they can determine the appropriate response to the social—and moral—dilemmas created by reproductive technology.

In their efforts to formulate an appropriate vision, courts have attempted, tentatively, and often quite unconsciously, to reconcile the dictates of two radically different ideological worlds: the world of status, and the world of contract. The result has been profound confusion, not surprisingly, since to the first of these worlds a number of truths

2. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) [hereinafter *Just a Gene*] (describing assumptions underlying judicial decisions about parenthood in surrogate mother and "putative" father cases); Janet L. Dolgin et al., *Introduction: "As People Express Their Lives, So They Are . . ."*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* (Janet L. Dolgin et al. eds., 1977).

are self-evident, immutable, and sacred, whereas to the second only the essentially secular and infinitely negotiable contract matters.

Prodded by extraordinarily rapid developments in reproductive technology to rule decisively, quickly, and clearly, but caught between the demands of, on the one hand, the world of family, home, enduring connection and loyal commitment—demands all seen to be rooted in the very nature of things—and, on the other hand, the equally pressing demands of the world of work, business, autonomous individuality and bargained decisions, contemporary American courts have, understandably (perhaps inevitably), like the society they reflect, stumbled in confusion.

Recently the confusion has been compounded as the courts, apparently at wit's end to perform a seminal intellectual task perhaps beyond their capacities, have fastened upon a deceptively simple concept, and charged it with mediating between the worlds of status and contract as they confront the challenges of reproductive technology. Unfortunately, the concept has been remarkably ill-chosen, and the charge has been remarkably ill-defined.

The concept is "intent," the apparently straightforward, but in fact vastly, perhaps endlessly, complicated study of motivation. The charge of the courts to themselves has been that the study of motivation will, somehow or other, enable the dictates of status and contract to be reconciled.

The results, thus far, have not been impressive. Because "intent" is of its nature very difficult to determine, because, as will be seen, it has been asked by the courts in particular cases to shuttle between status and contract in a dizzying and almost random fashion, and—most importantly—because, of its nature, it cannot in good faith act as mediator, it has fulfilled its task only sometimes and tentatively, if at all. Thus courts, invoking "intent" to mediate between the very different worlds of bargained interaction and love, of profane business and sacred connection, have rendered decisions which have uniformly resisted any absolute identification with either world.

In consequence, as noted, a significant confusion introduced into contemporary law by the effort of the courts to respond to the challenges posed by reproductive technology has been compounded significantly by the introduction of a concept designed to resolve the initial confusion.

This paper focuses on both confusions. It considers first a dilemma that, over the past two decades, has faced courts in many cases involving reproductive technology: whether to think about the family primarily through traditional metaphors of love and home, or through the met-

aphors of the market. In large part, courts do not seem aware of this dilemma; yet, it permeates judicial response, and in large measure accounts for judicial confusion. The paper then considers the effort by the courts to diminish the confusion by resorting to "intent" as the mediating principle between the demands of home and market. Finally, the paper discusses the limitations of "intent" as mediator in the contemporary legal meditation upon reproductive technology.

The paper performs each of its tasks by detailed analysis of cases involving frozen embryos, gestational surrogacy, and the use of a decedent's sperm.

II. STATUS, CONTRACT, AND CHOICE

For at least a century and a half, the concept of family as a domain of life largely distinct from the world of work and money has been threatened or challenged, depending on one's perspective, by the gradual emergence of an alternative vision. In the past several decades the American family has changed dramatically and widely.³ Responding to these pervasive changes in the form and meaning of the family, the legal system, in its understanding and regulation of families, has come more and more completely to view the family as a collection of separate but associated individuals, rather than as an enduring, hierarchical whole, united by the dictates of inexorable truth.⁴

3. Changes in the family have been described and discussed in the popular press and in scholarly journals. Among the more obvious changes are increases in non-marital cohabitation, divorce and children born to unmarried people. See, e.g., Elaine Tyler May, *Myths and Realities of the American Family*, in 5 *A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES* 583-587 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer, trans., 1991); Gerald F. Seib, *New Ideas Enter Standard Debate on Social Decline*, WALL ST. J., March 17, 1993, at A16.

4. The law's shifting perspective on the family is suggested in constitutional jurisprudence through a comparison of the assumptions underlying the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring Connecticut's birth control statute unconstitutional), and the assumptions underlying the Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (declaring unconstitutional Massachusetts statute prohibiting distribution of contraception to unmarried adults). In *Griswold* the Court relied on a traditional view of the family, one that differentiated the family from work and invoked marriage as a "sacred," "intimate," and "enduring" right. In *Griswold*, the Court wrote: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. at 486. In contrast, in *Eisenstadt*, decided only seven years later, the family was unmistakably characterized as a collection of separate, autonomous individuals. There, the Court wrote:

[T]he marital 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 governmental intrusion into matters so

In the midst of these changes, reproductive technology has emerged to dramatize the social and moral magnitude of the shifts occurring throughout the society in the understanding and operation of families. Reproductive technology has, for instance, presented a society already confused about the meaning of "mother" and "father" with babies having more than one biological "mother" and other babies conceived through gametes donated by dead "fathers." Soon, those technologies will make possible other remarkable combinations. Recent reports declare that within a few years it will be possible for humans, using a technique already successful with animals, to conceive babies through the use of aborted fetuses' ova.⁵ The press, reporting the latter possibility, has asked whether the women and girls whose fetuses' ova are so used can be called "grandmothers."⁶ The question alone suggests the extent and seriousness of the implications of the changes made possible by reproductive technology for traditional notions of family.

A. *Status and Contract*

Writing in the late 1960's, anthropologist David M. Schneider described the American family as consisting of two kinds of relatives—"those related 'by blood' and those related 'by marriage.'"⁷ Schneider wrote:

It is the symbol of love which links conjugal and cognatic love together and relates them both to and through the symbol of sexual intercourse

[T]he contrast between home and work brings out aspects which complete the picture of the distinctive features of kinship

fundamentally affecting a person as the decision whether to bear or beget a child. 405 U.S. at 453. See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994).

5. See Eugene Robinson, *Furor Over Fertility Options*, WASH. POST, Jan. 11, 1994, at Z6.

6. The implications of the question are framed dramatically in the suggestion that children would be born "whose biological mother[s] [were] never born." *Id.* (commenting on implications of transplant from fetal ovarian tissue).

7. DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 37 (1968); David M. Schneider, *Kinship, Nationality and Religion in American Culture*, in *FORMS OF SYMBOLIC ACTION: PROCEEDINGS OF THE 1969 ANNUAL SPRING MEETING OF THE AMERICAN ETHNOLOGICAL SOCIETY* 117 (Robert F. Spencer ed., 1969) (hereinafter *Kinship, Nationality and Religion*) (summarizing essential argument of *AMERICAN KINSHIP* and showing that in American culture domains of religion and nationality are structured similarly from perspective of ideology with that of kinship). See also Dolgin, *supra* note 4 (analyzing shifts in United States Supreme Court's view of American family away from model described by Schneider in late 1960s).

in American culture. This can best be understood in terms of the contrast between love and money which stand for home and work. Indeed, what one does at home, it is said, one does for love, not money, while what one does at work one does strictly for money, not for love. Money is material, it is power, it is impersonal and universalistic, unqualified by considerations of sentiment and morality. Relations of work and money are temporary, transient, contingent. Love on the other hand is highly personal and particularistic, and beset with considerations of sentiment and morality. Where love is spiritual money is material. Where love is enduring and without qualification, money is transient and contingent.⁸

Thus, Schneider portrayed the American family twenty-five years ago as a unit of love, differentiated from the world of work and money—from the market—by the “enduring, diffuse solidarity” enjoyed by, and defining, its membership.⁹ At work, people are defined primarily as autonomous individuals, able, at least in theory, to define the terms of their own relationships and bargains. Relations formed at work are not expected to last forever; sometimes they do, but when that happens, the relationships are re-defined.¹⁰ Nothing binds individuals in the market together except the bargains they effect. When those bargains end, so, it is expected, will the relationships of the people who effected them. In contrast, people at home are inter-connected parts of one whole that encompasses family members and combines them into a unity. The world of home and family, defined by unalterable natural truths—the truths of sexual intercourse, genetics, conception, and birth—was traditionally a world that endured. Exceptions existed of course, but they were rare and disapproved of.

Moreover, relations at work are the putatively equal relations of separate individuals. Relations at home were traditionally—and in significant part still are—the relations of hierarchy and status: a son is a son, for instance, because he was born to a certain set of parents; that

8. *Kinship, Nationality and Religion*, *supra* note 7, at 119.

9. This description is in the present tense despite the shifts that have characterized the past several decades because, in large part, traditional understandings of the family, and of the contrast between the family and the market, survive and undergird contemporary confusion and ambivalence about the changing character of the family. Only to the extent that aspects of the description seem clearly inapplicable to today's family is the past tense used.

10. For a comparable analysis of the differences between gifts and commodities, see LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 56-73 (1979).

biological ("natural") relationship was understood as inevitably reflected, and actualized, in the hierarchical social relationship pertaining between the son and the parent.

The distinctions between home and work described by Schneider were apprehended one hundred years earlier by Sir Henry Maine, who contrasted a world defined through relations of status with one defined through relations of contract.¹¹ Maine wrote:

The movement of the progressive societies has been uniform in one respect. Through all its course it 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 Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals Thus [in Western Europe] the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract.¹²

Maine concluded:

All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then

11. SIR HENRY MAINE, *ANCIENT LAW* (J.M. Dent & Sons, Ltd. 1917) (1861). Reference to and analytic use of Maine's distinction between status and contract in this paper, does not endorse his specific argument that rights and duties in the contemporary world developed from rights and duties as defined in the kinship systems of earlier epochs. See Dolgin, *supra* note 4, at 1525 n.23; Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 *BUFF. L. REV.* 515, 519 n.12 (1990) [hereinafter *Surrogate Motherhood*].

12. MAINE, *supra* note 11, at 139-40.

we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.¹³

Thus, Maine describes a transition from a world in which virtually all relations were understood as inevitable products of natural truth to a world in which most relations are understood as the consequence of people's unfettered acts and choices. Schneider's ethnography of the American family at mid-century suggested that, at that time, the family provided an almost unique instance in the modern world of the status universe that, as Maine said, once defined almost all relationships among people. Since Schneider wrote, however, the society and the law have re-constructed the family to include contract¹⁴ alongside commitment and unalterable connection. Today, in society and in law, the family is defined as much by the dynamic that opposes contract to status as by either one alone. More and more, the law recognizes the applicability of the principles of contract to the definition and operation of families even as that recognition is hedged by invocations of the analogues of status.

During the past few decades American law has reversed itself almost completely in recognizing the place of contract in family relationships between adults. Today, the law permits adults within families wide scope to design the declaration, operation, and termination of family relationships. This was not always the case. Only beginning in the 1970's, for instance, did it become possible for parties entering marriage to sign prenuptial agreements to provide the terms that would govern the eventuality of divorce. Before that time, courts considered such agreements violative of public policies that favored marriage, and refused to enforce prenuptial agreements unless entered into in contemplation of death, not of divorce.¹⁵ Further, state courts have recognized and enforced contracts between unmarried cohabitants that provided for

13. *Id.* at 141.

14. See *infra* notes 15-30 and accompanying text (concerning importance of choice in families defined through contract).

15. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970) (taking judicial notice of the increasing ratio of divorces to marriages in the society); *Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981) (upholding an antenuptial agreement in case of divorce); *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982) (same).

the distribution of the couple's property upon separation.¹⁶ The most far-reaching change in the law's approach to adult family members is presented by the so-called "divorce revolution." Beginning only about twenty-five years ago, states for the first time permitted couples to divorce without holding either spouse at fault.¹⁷ Before that, accusations of fault were necessary and were frequently not sufficient. Today, the law largely recognizes adult family members as comparable to business partners and treats them accordingly.

With regard to children, however, and to the parent-child tie, the law has been more reluctant to view the parties as autonomous individuals. Here, the law has worked strenuously to preserve the dictates of status. However, even here, and especially in cases occasioned by reproductive technology, the law has begun to invoke the laws of the market along with those that have traditionally separated the market from home and family.¹⁸ The change is occurring with ambivalence and amidst confusion, but it is occurring. Cases involving reproductive technology, because that technology challenges traditional definitions of family based on assumptions about the "facts of nature," are pressuring courts more dramatically than others to recognize the parent-child tie, the sacred core of the American family, in new terms, the terms of the marketplace—the terms of work and money.

Thus, contemporary debates about the family, and especially debates about the character of the ties that bind parents to their children, are in essence debates about the differences between, and the comparative advantages of, the family defined through status and through contract.¹⁹ The "right" to freedom (or liberty or privacy) is contrasted and

16. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980).

17. See Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401, 401 (1974) (in decade following California's promulgation of no-fault divorce rules in 1969 every state enacted statutes making some sort of no-fault divorce available).

18. The shift can also be witnessed in some cases that have not involved reproductive technology. For instance, a recent set of cases involving children's attempts to "divorce" their parents suggest the law's increasing recognition of the relevance of contract principles to the resolution of family disputes. See, e.g., William Booth, *Boy Wins Parental 'Divorce': 12-Year-Old's Case First of Its Kind*, WASH. POST, Sept. 26, 1992, at A1.

19. From a more encompassing perspective, such debates are also about the comparison between nature and culture. As Marilyn Strathern has suggested: "[O]ne can see encapsulated in English ideas about biological reproduction an indigenous social theory of a kind. These ideas reproduce and are about the reproduction of a relationship taken as fundamental to human social organization: the relationship between nature and culture." Marilyn Strathern, *New Knowledge for Old? Reflections Following Fox's Reproduction and Succession 14* (1993) (unpublished man-

compared with the virtues of responsibility that inhered in traditional, hierarchical families. In this transitional period, basic assumptions that have long undergirded definitions of the family have been challenged, but secure, generally accepted replacements have not yet appeared. For the moment, status and contract often appear together as viable *options* rather than as mutually exclusive alternatives.²⁰

Generally conservative, the judiciary has striven to preserve traditional conceptions of the family, even as its decisions threaten the old order. Even courts that would apparently permit the enforcement of contracts that provide for the reproduction and parentage of children have resisted fundamental redefinitions of family.²¹ Almost nowhere have courts expressly applauded displacing a traditional view of family with one that defines familial links as transient and their terms as negotiable. Mostly, the relevant cases reveal a judiciary deeply uncertain about the implications of the dispute and about the law's response to it.

That uncertainty is reflected in decisions that shift without apparent pattern between emphasizing and preserving the dictates of status and the dictates of contract.²² Indeed, as Marilyn Strathern suggests provocatively, "for contemporary Euro-American culture, we could say that there is both more status and more contract around."²³ As debates in the society and in the law about the meaning and future of the family intensify, appeals to both status and contract intensify correspondingly. In that process, the dictates of the world of contract (the freedom to negotiate the terms of everyday life) are invoked to protect the domain of status, and, simultaneously, the dictates of status (love, hierarchy, and enduring connection) are invoked to justify the resort to contract. For example, in resolving disputes occasioned by surrogate motherhood arrangements, courts have upheld surrogacy contracts in order to protect traditional family values;²⁴ other courts have reconstructed the dimen-

uscript, on file with the author).

20. See ROBIN FOX, *REPRODUCTION AND SUCCESSION: STUDIES IN ANTHROPOLOGY, LAW, AND SOCIETY* (1993); see also Strathern, *supra* note 19 (reviewing Fox's book).

21. See, e.g., *Matter of Baby "M,"* 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) (approving contract, at least in theory, but doing so to preserve traditional family, grounded in universe of status relations), *aff'd in part and rev'd in part*, 537 A.2d 1227 (N.J. 1988); see *Surrogate Motherhood*, *supra* note 11, at 535-42 (analyzing trial court opinion in *Baby "M."*).

22. See *Surrogate Motherhood*, *supra* note 11 (analyzing contrary decisions of New Jersey courts in *Baby "M"* case as equally concerned to preserve family as universe of status relationships).

23. Strathern, *supra* note 19, at 22.

24. See, e.g., *Matter of Baby "M,"* 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 537 A.2d 1227 (N.J. 1988). See *Surrogate Motherhood*, *supra* note 11,

sions of "natural" maternity in order to justify the use of a contract's terms.²⁵ At present, the social debate about reproductive technology reflected in the evolving effort by the legal system to define and regulate the families occasioned by that technology is heightening the confusion it intends to resolve.

B. The Generalization and Redefinition of Choice

The debate—in contemporary society and in the courts—that opposes status to contract and then applauds them both as simple options has been complicated in recent years, and, unfortunately, has been further confused, by the introduction into it of a new concept, intended ironically as mediator: the concept of choice.

Both the complication and the further confusion have resulted from the obvious but largely unnoticed fact that in the debate in which it has been enlisted, choice cannot serve as mediator since it is the natural ally of contract, and the natural enemy of status.

That to the universe of contract choice is essential is virtually self-evident. The presumption of unfettered choice defines the world of the marketplace and the actors who operate in it. The consumer society, consistently, and almost everywhere, stresses the appeal of unending choice. Represented by television and the advertising industry, it assures people that a better everyday life depends only on the appropriation of choices not yet tried. Thus, if one brand of shampoo fails to make life better, a new and better brand surely will soon appear.²⁶

Reproductive technology, if appropriated and understood through the idiom of the market, asserts that choices about parentage and familial relationships are fully comparable to other choices of the market. In fact, the market's presumption of choice—that everything has been chosen and that everything could have been chosen differently—increasingly is found in connection with the family.

People, for example, who only a decade ago could not have become biological parents may now choose to do so, and they may choose when and how to do so. The very "fact" of infertility, a fact

at 535-45 (considering relevance of courts' understandings of importance of status and contract in resolving *Baby "M"* case).

25. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). See also *Just a Gene*, *supra* note 2 (analyzing lower court decisions in *Johnson*).

26. See STEVE BARNETT & MARTIN G. SILVERMAN, *IDEOLOGY AND EVERYDAY LIFE* 69 (1979).

that may necessitate the use (and "purchase") of reproductive technologies, is described as unfortunate precisely because it limits or precludes choice.²⁷ Thus, reproductive technology helps to create a certain kind of choice—the choice to have children and to create "families."

Generally speaking, reproductive technology, simply by unfolding, invites human beings to become increasingly autonomous, and to enter into a range of contracts that may prove unlimited. It thus invites, and values, choice.

In doing so, it issues a fundamental challenge to the world of status, which in many crucial respects regards choice as essentially destructive—understandably, since a world defined through unchanging truths rooted in tradition and immutable law tends, of its nature, to prefer a validated status quo to untested change.

Thus, choice, of its nature, inhabits far more comfortably the world of contract than the world of status, and is a natural advocate for contract. For example, choice justifies the development and use of reproductive technology and simultaneously threatens traditional understandings of family.

That being the case, it is obviously imprudent to establish choice as the mediating principle between status and contract. Nonetheless, it has been so established, by courts anxious—perhaps increasingly desperate—to reconcile the two worlds, uncertain about how to proceed, and naively hopeful that, somehow or other, a society increasingly intrigued by the contractual choices offered by reproductive technology will, of its own volition—by choice—turn away from them, and back towards traditional definitions of family.

This hope—essentially, the quixotic expectation that choice will deconstruct itself—underlies much of the heightened confusion and ambivalence evident in several recent cases involving reproductive technology that have relied (largely without success) on choice to resolve competing ideological claims.

III. THE MULTIPLE MEANINGS OF "INTENT"

Before these cases can be considered in detail, attention must be directed for a moment to the reality underlying the concept of choice. That reality is intent. Intent precedes choice and, as Marilyn Strathern has explained, is "played back" to the person choosing "in the consum-

27. See Marilyn Strathern, *Disembodied Choice* 8 (1990) (unpublished manuscript, on file with the author).

er idiom of *choice*."²⁸ Choice enables intent. Moreover, the "real" meaning of a particular choice can be discovered through analysis of the motivating intent. Thus, intent explains choice.²⁹ Clearly, therefore, a legal system prepared to deal with the challenges posed by reproductive technology through the analysis of intent has implicitly conceded the inevitability of choice in allowing people significant freedom to define the scope and meaning of family. The failure of such a system to realize that it *has* conceded this merely assures that it will adjudicate the conflicting demands of status and contract in a confused, self-contradictory fashion.

And this it has done, and continues to do.

And courts, for example, relying on intent to resolve disputes engendered by reproductive technology, have failed to delineate the parameters and implications of "intent."³⁰ Almost nowhere are the obvious questions raised by judicial reliance on intent addressed. The decisions that exist have failed to explain how a party's real intent is discerned even though people's intentions are often and obviously multi-dimensional and complicated—even confused. The decisions have failed, as well, to explain why one intent is preferred over another in cases in which a party's intent changes. If intent were understood to be synonymous with contract, as some of the law review commentaries cited in the cases have suggested,³¹ the questions raised by courts' reliance on intent could be resolved through the principles of contract. But that is not the case. Courts have explicitly distinguished a party's intent from the same party's contractual agreements. In effecting a party's intent, some courts have referred to, and even relied directly on, a contract as evidence of intent. But in such cases, the courts have insisted that the need to effect a party's intent, rather than the obligation to enforce a contractual agreement, has necessitated their holdings.

28. *Id.* at 10.

29. The courts that have relied on intent to establish parentage have generally used the term intent, not intention even though the usage is sometimes awkward. Possibly, that use reflects the importance of "intent" in the criminal law and which, because familiar, seems to render judicial reliance on intent unexceptional.

30. In contrast, several recent law review articles which suggest that intent become the central tool through which to settle such disputes have delineated the contours of the concept. In each case, intent has been equated almost completely with contract. Thus, the articles urge that courts recognize and enforce contractual agreements concerning the creation of children and families. See generally Mario J. Trespalacios, *Frozen Embryos: Toward an Equitable Solution*, 46 U. MIAMI L. REV. 803 (1992).

31. See, e.g., Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

Judicial reliance on intent as the essential determinant of parentage in cases involving reproductive technology will inevitably engender a set of confusions and inconsistencies unless the law specifies how the relevant intent is to be identified. That could, of course, be done.³² It has in general not been done for a simple, though most unfortunate, reason: that the courts, in their confusion, find intent attractive precisely because it can be constructed to serve the apparent interests of status as well as those of contract. A party's intent³³ may indicate the terms of a contract into which that party has entered; or, equally, it may be taken to refer to an undeclared sense of self in connection to others (including familial others). Not surprisingly, therefore, in the process of constructing intent to serve various, often contradictory ends, the meaning of the concept shifts. If the law were clearly to delineate intent to reflect principles of contract, the concept would no longer be useful in the ideological debate about the contours and meaning of family. In fact, each court that has relied on the concept in confronting the challenges of reproductive technology has constructed the meaning of intent independently, and in each case the meaning constructed implies a parallel reconstruction of the relation between contract and status, and of the relation between the autonomous individual and the person-in-family—the person as a committed part of an enduring constellation of kin.

The relevant cases illustrate the pressures on the judiciary, and on the legal system more generally, to decide what constitutes a family and what the implications of *that* decision are for competing claims to embryos, children, and gametes. Moreover, those cases illustrate the deep confusions and inconsistencies in the law's response at present to the possibilities that reproductive technology occasions.

A. *Between Status and Contract: Intent as an Option*

The concept of intent suggests a world of contract, offering unlimit-

32. One commentator has suggested, for instance, that in cases involving artificial insemination "the parties' preconception intent" should "govern paternity" and law makers should consider "requiring that some documentation of that intent be filed with the state." Lori B. Andrews, *Legal and Ethical Aspects of New Reproductive Technologies*, 29 CLIN. OBSTET. & GYN. 190, 200 (1986).

33. The use of "intent" here in the singular reflects only the way courts are using the term. The presumptions that a person has only *one* intent and that that intent can be identified by others assumes far too much about the workings of the human mind and about the ability of the average judge to reveal those workings.

ed free choice, but courts, relying on the concept to resolve disputes involving reproductive technology, have constructed the concept to invoke the dictates of status as well as those of contract. For instance, courts have relied on intent *so as* to effect *certain kinds* of choices, choices that reflect the parameters of a traditional family. Other courts, hearing cases calling for a determination of parentage or of the right to control gametic material, have limited the choices that can be effected through judicial reliance on intent by suggesting that use of the concept be restricted to the resolution of cases involving some biological connection between the parties and the disputed child or gamete.³⁴ As a result, the freedom to choose implied by judicial reliance on intent may become the freedom of only certain parties (those with a biological connection to the child or gamete) to choose, or it may become the freedom to select only certain choices (those that support traditional family values).³⁵

In one recent case, the Tennessee Supreme Court delineated one approach for state courts facing disputes about the fate of cryopreserved embryos.³⁶ If possible, the court suggested, such disputes should be resolved by effecting "the preferences of the progenitors."³⁷ That approach was precluded in *Davis* itself because the progenitors disagreed.³⁸ The court thus declared:

34. In *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), the California Supreme Court expressly reserved judicial reliance on intent for cases involving disputes over parentage between parties who can each predicate their claims to parentage on a biological connection to the child involved. See *infra* notes 61-112 and accompanying text (analyzing *Johnson*).

35. Commentators suggesting that intent should become the determinant of parentage in cases involving reproductive technology have been more willing than courts to reject the old order and allow contract principles to govern. See, e.g., John Lawrence Hill, *What Does It Mean to Be a 'Parent'? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 357-58 (arguing "that the legal right to procreation can be read to support parental-rights claims of intended parents over the claims of biological parents, where the two types of claims conflict").

36. *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

Cryopreservation of gametic material involves storage by freezing. Early embryos produced through *in vitro* fertilization can be stored in a frozen state for extended periods of time. When thawed the embryos can be implanted in a woman's uterus to produce a pregnancy. Less success has been achieved to date with attempts to cryopreserve unfertilized ova. Karen Dawson, *Glossary*, in *EMBRYO EXPERIMENTATION* 247 (Peter Singer et al. eds., 1990).

37. 842 S.W.2d at 604.

38. *Id.* at 589. In *Davis*, the progenitors expressed antagonistic wishes for use of the embryos, but in addition, the wishes of each party changed several times during the course of the litigation. *Id.* at 590.

If [the progenitors'] wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.³⁹

Because in *Davis* the conflict between status and contract is both transparent and acute, the case frames dramatically the attraction that a procedure promising to permit contract but to preserve status (a procedure such as judicial reliance on the concept of intent) holds for courts.

The case arose as a divorce proceeding between Junior Lewis Davis and Mary Sue Davis. The two disagreed only about the status and fate of seven cryopreserved embryos, produced from Junior's sperm and Mary Sue's ova and stored in a Knoxville fertility clinic.⁴⁰ Three Tennessee courts heard the case. Each based its opinion on a view of the embryos' existential condition radically different from that of the other two courts. As a set, the three opinions stand for status (the trial court),⁴¹ for contract (the intermediate court),⁴² and for status modi-

39. *Id.* at 604.

40. As the result of multiple ectopic pregnancies, Mary Sue had lost the use of both fallopian tubes. As a result, she could become pregnant only through the use of *in vitro* fertilization (IVF). Six attempts at IVF failed to produce a pregnancy. In 1988 the fertility clinic where the Davises had been undergoing treatment offered the option of cryopreserving fertilized ova retrieved in one cycle for use in subsequent cycles. In December 1988, nine ova were retrieved from Mary Sue's ovaries. Two were implanted, but did not result in a pregnancy. The other seven were frozen and stored at the clinic for future implantation in Mary Sue's uterus. Two months later, Junior Davis filed for divorce. 1989 Tenn. App. LEXIS 641, at *8-*9.

41. In response to the dilemma posed in *Davis*, the Tennessee trial court treated the case as one involving the custody of seven children. Judge Young for the trial court wrote:

It is the judgment of the Court that the temporary custody of the parties' seven cryogenically preserved human embryos be vested in Mrs. Davis for the purposes set-forth hereinabove, and that all matters concerning support, visitation, final custody and related issues be reserved to the Court for further consideration and disposition at such time as one or more of the seven cryogenically [sic] preserved human embryos are the product of live birth.

fied by contract and contract modified by status (the state supreme court). Each court understood, more or less certainly, that the definition of the Davis embryos depended on, and would affect, the society's understanding of the character of families and of the relationships that people within families should have with each other.

The possibility of freezing embryos, thawing them years later, and then using them to produce babies, dramatically disrupts ancient assumptions about the "nature" of human reproduction, and thereby questions the biological underpinnings of family connections. With cryopreserved embryos—separate in space and time from the humans who spawned the gametes—the link between human reproduction and human relationships is all but severed. To the extent that people continue to rely on such a link in defining families and actualizing familial relationships, they do so as a matter of *choice*.

The Tennessee Supreme Court recognized this, but attempted to embed the choice in a traditional context. The court forged a position that invoked status and contract but sided fully with neither. In doing this, the court first concluded that the embryos were neither property nor people.⁴³ The court, quoting Junior Davis's brief, described the embryos as lacking "[intrinsic] value to either party," but as having value in their "potential to become, after implantation, growth and birth, children."⁴⁴ In effect, the court described the embryos as moving, without the continuity of process, from a world in which their rights and future are determined by contract to one in which their rights and future are determined by the traditional dictates of status. Depending on perspective, therefore, the embryos can be defined through the principles of contract or of status. The court's proposal for resolving the case, and others like it, seems to reflect this multi-dimensional view of the embryos.

However, in reaching a specific holding, the *Davis* court bypassed

1989 Tenn. App. LEXIS 641, at *37. The court granted the embryos to Mary Sue on the ground that it "serve[d] the best interests of these children for Mrs. Davis to be permitted the opportunity to bring these children to term through implantation." 1989 Tenn. App. LEXIS 641, at *37.

Thus the trial court sided unremittingly with status.

42. The Court of Appeals of Tennessee reversed the holding in an opinion that contrasted utterly with that of the court below. Avoiding self-conscious philosophizing, the Court of Appeals concluded that, whatever the status of the cryopreserved embryos, they should be treated as property in deciding who could "control" them. 1990 Tenn. App. LEXIS 642, at *9.

43. 842 S.W.2d at 597.

44. *Id.* at 598.

the interests of the embryos and focused on those of the progenitors. Affirming the intermediate court's decision, the state supreme court decided that, unable to rely on the progenitors' preferences or on a prior contract between them, it would examine the weight of the progenitors' respective interests. The court thus proceeded to "balance" the interest of each party against those of the other, and in doing this, the court returned to the parties' intentions. The court delineated those intentions, compared them, and made a selection that reflected, finally, the court's sense of the more impressive intent.⁴⁵

In effect, therefore, *Davis* holds that first, in cases in which the progenitors agree—cases, presumably, in which their dispute is with a third party—the progenitors' wishes should be effected;⁴⁶ second, in cases in which it is not possible to rely on the progenitors' wishes but an existing contract delineates a past agreement, that contract should be enforced; and, third, in cases in which the parties do not agree and never agreed, the court should select among their intentions. In theory, that selection follows from the right to privacy protected by the federal and Tennessee constitutions.⁴⁷ However, the right to privacy offers no guidance in selecting among disputants' conflicting rights to procreational privacy. In particular, the constitutional frame within which the court "balanced" the parties' preferences posed the "right to procreate" against the "right to avoid procreation," described by the *Davis* court as "two rights of equal significance."⁴⁸ Within that frame, almost any decision can be justified. And so, the Tennessee Supreme Court considered such factors as the "emotional stress and physical discomfort" that *in vitro* fertilization ("IVF") causes women,⁴⁹ the "joys of parenthood,"⁵⁰ the "anguish of a lifetime of unwanted parenthood,"⁵¹ the

45. In balancing the parties' "interests", the court found Junior's interest in avoiding "unwanted parenthood," *id.* at 603, weightier than Mary Sue's interest in donating the embryos to another couple. However, the court declared that the case would have been "closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means." *Id.* at 604.

46. In contrast, the trial court focused on the *pre-conception* intent of the parties "to produce a human being to be known as their child." 1989 Tenn. App. LEXIS 641, at *9. See Robert J. Muller, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763, 787-88 (1993). The trial court in *Davis* granted the embryos to Mary Sue on the ground that it "serve[d] the best interest of these children for Mrs. Davis to be permitted the opportunity to bring these children to term through implantation." 1989 Tenn. App. LEXIS 641, at *36.

47. 1992 Tenn. LEXIS at *37-*40.

48. 842 S.W.2d at 601.

49. *Id.*

50. *Id.*

"emotional burden" of knowing that IVF had been undertaken for naught⁵² and the burden of "wondering" about one's "parental status."⁵³ The constitutional rights to procreate and to avoid procreating, described by the court as creating the frame within which it resolved the case, did not compel any particular decision. Rather, the court examined, characterized, and compared the parties' preferences and the emotional underpinnings of those preferences and then chose one party's preference.

Thus, the Tennessee Supreme Court in *Davis* appeared to side with status in recognizing the "respect" owed the embryos but in its holding, sided with contract as well. The procedure established by the court in *Davis* grants judges enormous flexibility to prefer one party's "wishes" to those of another party in cases in which the parties' own preferences are at odds. The court in *Davis*, presuming to "balance" the parties' interests, relied on the parties' preferences and effected one such preference, but not the other.

Davis has become a model for other courts facing disputes occasioned by reproductive technology.⁵⁴ The model allows courts to effect intentions and agreements, but also to *choose* between the dictates of contract and of status,⁵⁵ and is particularly attractive to courts anxious to permit contractual definitions of family but simultaneously to preserve traditional families (or, more accurately, the illusion of traditional families) apparently embedded in a world of status.

B. Maternal "Intent"

In at least two cases, state courts have relied on intent to establish the parentage of a baby with two biological "mothers." In each case, maternity was separated into aspects. One woman provided the ovum

51. *Id.*

52. *Id.* at 604.

53. *Id.*

54. See, e.g., *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 289, n.9 (1993) (asserting *Davis* balancing test not relevant in cases in which intent of parties can be discerned).

In fact, the decision in *Davis* cannot be easily applied to cases involving third party gamete donors or surrogates. See Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 350-52 (1993) (deciding between IVF participants that involve third parties).

55. In fact, of course, that apparent choice is illusory. Once the dictates of status are presented as a matter of choice, the universe of status has been fully embedded in a universe of contract. But, still, traditional families—families that seem to resemble those of yore—can be *chosen* over other sorts.

and another woman gestated the fetus that resulted from fertilization of that ovum. In each case, a state court declared the woman who intended to be the child's social mother before fetal conception to be the "natural" mother. In early 1993, in *Johnson v. Calvert*,⁵⁶ the California Supreme Court declared the ovum donor to be the baby's "natural mother;" in *McDonald v. McDonald*,⁵⁷ decided a half-year later in New York, the woman who gestated and gave birth to the child involved was declared the "natural mother."

In both cases, the courts were unable to rely on familiar assumptions about the significance of biological maternity. As a consequence, each court circumvented the parties' biological claims, and relied instead on their pre-conception intentions. On this basis, each court selected what it described as the baby's "natural" mother.

The cases arose quite differently. *McDonald* began as a divorce action. During their marriage, Olga Benitez McDonald and Robert McDonald had been unable to conceive children without medical assistance.⁵⁸ As a result, the couple relied on an egg donor. Donated ova were fertilized *in vitro* with Robert's sperm. The resulting embryos were implanted in Olga's uterus for gestation and eventual birth. In 1991 Robert McDonald commenced a divorce action and requested sole custody of the twin girls that had been born to Olga in June of that year. Robert argued that as the "only genetic and natural parent available," his claim to custody "was superior"⁵⁹ to that of Olga, the gestational, but not genetic, mother of the children. Relying exclusively on the decision of the California Supreme Court in *Johnson*, decided six months earlier, the New York court granted custody to Olga. The court wrote:

In the case at bar, we have a true "egg donation" situation and we find the reasoning of the Supreme Court of California on this issue to be persuasive. Accordingly, the Supreme Court, Queens County, correctly held that in the instant "egg donation" case, the wife, who is the gestational mother, is the natural mother of the children, and is, under the circumstances, entitled to temporary custody of the children with visitation to the hus-

56. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

57. *McDonald v. McDonald*, 608 N.Y.S.2d 477 (App. Div. 1994).

58. *Id.* at 478.

59. *Id.* at 479.

band.⁶⁰

Johnson,⁶¹ in contrast, involved a dispute between two "mothers," or rather, between one mother (the gestator) and another (the egg donor) along with her husband. In 1984 Crispina Calvert's uterus was removed surgically.⁶² Crispina continued to ovulate normally. However, in order to have children related to them genetically, the Calverts needed to rely on another woman who would gestate a baby produced from the fertilization of one of Crispina's ova with Mark's sperm.

In January 1990, the Calverts entered a gestational surrogacy agreement with Anna Johnson. Anna had learned of the Calvert's situation from a coworker at the hospital where Johnson and Crispina Calvert both worked.⁶³ The parties agreed that Johnson would gestate and give birth to a baby produced from Crispina's and Mark's gametes and would, at the baby's birth, surrender all parental rights to the Calverts. For this, the Calverts agreed to pay Johnson \$10,000 in a series of installments. In January 1990 a zygote, fertilized *in vitro*, was implanted in Anna's uterus. A pregnancy was soon confirmed. Several months later, before the birth, the parties were in court disputing the baby's parentage.

1. The Opinions in *Johnson*

All three California courts that heard *Johnson* held for the Calverts, but on different grounds. Judge Parslow, speaking for the trial court, determined Crispina and Mark to be the "genetic, biological, and natu-

60. *Id.* at 480 (citation omitted).

61. In analyzing judicial reliance on intent to identify a child's mother, this Article will concentrate on *Johnson* rather than *McDonald*. The *McDonald* court expressly and exclusively justified its decision by reference to the California Supreme Court's earlier decision in *Johnson*. *McDonald* is important, however, in its own right in that the court identified the "natural" mother by relying on parental intent without invoking statutes such as those in California that delineate rules for identifying a child's "natural" mother. Thus, in *McDonald* it is clearer even than in *Johnson* that use of the term "natural" mother is not simply a consequence of statutory language but expressly describes the character of the mother selected.

62. 851 P.2d 776, 778 (Cal. 1993).

63. Anna Johnson, unmarried and the mother of a young child, was a vocational nurse. Crispina Calvert, a registered nurse, worked in the same hospital as did Anna Johnson. Crispina's husband, Mark, was an insurance broker. *Just a Gene*, *supra* note 2, at 687 n.209; Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back into the Bottle*, 18 LAW, MED. & HEALTH CARE 345, 345 (1990).

Anna, part Black, part Native American, and part Irish, had been a sometime-welfare recipient. Crispina was a Filipina, and Mark was white. See Don J. DeBenedictis, *Surrogacy Contract Enforced*, 77 A.B.A. J., Jan. 1991 at 32, 33 (describing consequences of the parties' races on judicial decisions).

ral" parents of baby Christopher, born on September 19, 1990.⁶⁴ Judge Parslow recognized Anna's role in the creation of the child, but described her as a "genetic, hereditary stranger" to the baby, akin to a foster parent who knows, or should know, that she may eventually be compelled to yield her caretaker position to a child's "real" parents.⁶⁵ The trial court described genetics as the primary factor connecting a child to his or her biological parents:

Who we are and what we are and identity problems particularly with young children and teenagers are extremely important. We know that there is a combination of genetic factors. We know more and more about traits now, how you walk, talk and everything else, all sorts of things that develop out of your genes, how long you're going to live, all things being equal, when your immune system is going to break down, what diseases you may be susceptible to. They have upped the intelligence ratio of genetics to 70 percent now.⁶⁶

Thus, for the trial court, shared genetic material anchored the family unit. The gestational aspects of biological maternity provided no support to claims of legal (or natural) maternity.

For the trial court, the separation of biological maternity into aspects did not preclude identification of the baby's natural (and real) mother on biological grounds. For that court, a genetic connection, not pregnancy and birth, constituted the essence of biological maternity. Indeed, in Judge Parslow's view, Johnson's connection to the child was social and contractual, and only incidentally biological.

The appellate court affirmed the trial court's decision to recognize the Calverts as baby Christopher's parents, but that court relied on statutory rules rather than biological truths.⁶⁷ The appellate court did

64. *Johnson v. Calvert*, No. X-1633190, slip op. at 5 (Cal. App. Dep't Super. Ct. Oct. 22, 1990), *aff'd sub. nom. Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Cal. Ct. App. 1991), *superseded by* 822 P.2d 1317 (Cal. 1992), *aff'd sub. nom. Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert denied*, 114 S. Ct. 206 (1993), and *cert. dismissed sub. nom. Baby Boy J. v. Johnson*, 114 S. Ct. 374 (1993).

65. *Johnson*, No. X-1633190 at 5. See *Just a Gene*, *supra* note 2, at 684-85 (analyzing trial and appellate court decisions in *Johnson v. Calvert*).

66. *Johnson*, No. X-1633190 at 8. The trial court decision was rendered orally.

67. Clearly, the appellate court's choice of the statutory provisions through which to decide this case was itself the product of that court's sense of the "truths." However, the court refrained from making express declarations about its view of the essential character of the connection between the parties and the child. See *Just a Gene*, *supra* note 2, at 687-89 (analyzing appellate court decision in case).

declare Crispina Calvert the baby's "natural" mother, but on the basis of a provision of the Uniform Parentage Act, passed in California in 1975,⁶⁸ that allowed a woman (like a man) to be presumed a "natural" parent on the basis of blood tests which demonstrated genetic similarities between the woman and the child.

However, while describing the statutory rule as "rational and not arbitrary," the court acknowledged the possibility of other rational schemes.⁶⁹ In fact, California law itself provided for such an alternative scheme. Another provision in the statute provided that "between a child and the natural mother [the parent and child relationship] may be established by proof of her having given birth to the child." The appellate court determined that the provision only applied to women otherwise identified as "natural" mothers and thereby rejected Johnson's reliance on this provision as proof of her "natural" maternity.⁷⁰ Of course, in 1975, the state legislature could not have contemplated gestational surrogacy at all when it promulgated the provisions in question.⁷¹ The California Supreme Court affirmed the court of appeals decision, but recognized expressly that the statute on which the intermediate appellate court had relied provided no clear grounds for selecting between the statute's provision favoring the gestational "mother" and that favoring the genetic "mother." "Both women," declared the state supreme court, "have adduced evidence of a mother and child relationship as contemplated by the Act."⁷² Thus, biology and statutory law alike failed to direct the court in choosing between, or identifying, the baby's mother.

The court rejected the contention—presented by amicus curiae—that both women be designated as mothers to the baby. Instead, the court found California law to recognize "only one natural mother, despite

68. The Uniform Parentage Act was passed in California as Part 7 of Division 4 of the California Civil Code (§§ 7000-7021). See 286 Cal. Rptr. at 373-74; *Just a Gene*, *supra* note 2, at 688 n.215.

69. 286 Cal. Rptr. at 380; see *Just a Gene*, *supra* note 2, at 688 n.217 (discussing other schemes).

70. 286 Cal. Rptr. at 377. See *Just a Gene*, *supra* note 2, at 689.

71. In 1975 gestational surrogacy was beyond the capacities of reproductive technology as it was then applied to humans. In 1978, Louise Brown, the first baby produced through an egg fertilized *in vitro*, was born in England. Only in 1981 was an embryo gestated in the uterus of a woman other than the egg donor. George J. Annas & Sherman Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 202 (1983).

72. *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993), *cert denied*, 114 S. Ct. 206 (1993), and *cert. dismissed sub. nom. Baby Boy J. v. Johnson*, 114 S. Ct. 374 (1993).

advances in reproductive technology rendering a different outcome biologically possible.”⁷³

In justifying this decision, the court made explicit a set of assumptions about families and about how families should be created and organized. Recognizing the developing reality of “multiple parent arrangements” in contemporary society, the court rejected that reality as a model for the law. Instead, the court stressed the value of old-fashioned families and described the Calverts as such a family. Here, the law preferred—and thus created—a family that, but for Crispina’s absent uterus, *could (or should) have been created* by what the society has long considered to be the natural processes of biological reproduction, over a family (the baby, the Calverts and Johnson) that was *really* created as a consequence of reproductive technology.

Moreover, the court preferred the Calverts to Anna Johnson as parents for the child. The Calverts, wrote Justice Panelli, “have provided [Christopher] . . . with a stable, intact, and nurturing home.”⁷⁴ “To recognize parental rights,” the opinion continued, “in a third party with whom the Calvert family has had little contact since shortly after the child’s birth would diminish Crispina’s role as mother”⁷⁵

Curiously, however, in order for the court to recognize—and thus to create—a traditional family in this case, it was necessary to challenge—and ultimately reject—the very assumptions about familial connections that have long undergirded traditional understandings of family. Thus, for instance, the court recognized that both Anna and Crispina “adduced evidence of a mother and child relationship,”⁷⁶ and that, in general, reproductive technology had made it possible for a child to have two biological mothers, one connected to the child genetically and the other through the processes of gestation and birth. Nevertheless, declared the court, “California law recognizes only one natural mother.”⁷⁷ In order to create a family that resembled old-fashioned, tradi-

73. *Id.*

74. *Id.* at 781 n.8.

This paper is not concerned directly with the importance of class differences in disputes occasioned by reproductive technology. However, class differences certainly separated the Calverts and Anna Johnson and may well have been an unspoken factor in the courts’ views of the case. See Appellant’s Reply Brief at 4, *Anna J.*, 286 Cal. Rptr. 369 (No. 6010225) (arguing that class differences between parties informed trial court decision: “The trial court’s knowledge of the Calverts was essentially limited to their economic wealth i.e. their ability to afford a new Mercedes Benz automobile which impressed the trial court.”).

75. 851 P.2d at 781 n.8.

76. *Id.* at 781.

77. *Id.*

tional families, the court displaced—and thereby challenged—the biological correlates of family that for centuries had been central to the definition of family.

2. "Natural" Maternity as the Product of Intent

With biology rendered suddenly mute as the arbiter of "natural" maternity, the *Johnson* court sought an alternative program for identifying Christopher's "natural" mother. The court relied on the notion of intent to identify the baby's mother, and in doing that reconstructed the meaning of the term. The court used the notion of intent to denote alternative, even contradictory, views of person, parent, and family. At one extreme, the term "intent" represents a contractual view of family. Through agreement, familial connections can be imagined, produced and then, with the law's assistance, enforced and solidified. At another extreme, intent—as a symbol newly substituting for "blood" or genes in traditional descriptions of the family—becomes the essence of familial loyalty and love.⁷⁸

In particular, the court did not use the label "natural" mother to mean "better" mother. Rather, the court sought to identify the *real* mother. That becomes clear from the court's response to the approach of the dissent in the case. Justice Kennard, in dissent, suggested that the case be decided by identifying the parent or parents who would best serve the child's interests.⁷⁹ The dissent explained:

This "best interests" standard serves to assure that in the judicial resolution of disputes affecting a child's well-being, protection of the minor child is the foremost consideration. Consequently, I would apply "the best interests of the child" standard to determine who can best assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement.⁸⁰

The majority described that suggestion as "confus[ing] concepts of parentage and custody."⁸¹ "Logically," the court continued, "the determination of parentage must precede, and should not be dictated by,

78. These different meanings of intent, along with others, are not presented in the text of *Johnson* as identifiable, separate options. The rest of section III(B) of this Article is devoted to sorting out, and analyzing, the multi-dimensional meaning of "intent" as used in the case.

79. 851 P.2d at 789 (Kennard, J., dissenting).

80. *Id.* at 799 (Kennard, J., dissenting).

81. *Id.* at 782 n.10.

eventual custody decisions.”⁸² Decisions about parentage—about who the parents *are*—the court asserted, must be made before decisions about custody. That is so, of course, only in a world in which inexorable, incontestible truths (such as those traditionally represented by claims based on “blood,” or genetic links) dictate the “facts” of family. The dissent presumed that it could establish parentage as well as custody through a best-interest determination.⁸³ That presumption suggests that parents can be linked to their children without reliance on inexorable truths about the everlasting essence of the parent-child connection and that the identification of parentage is a *social choice*. The majority, however, in sharp contrast, self-consciously and unequivocally sought the “real” and “natural” mother, not the “best” mother.

Unable to sort out and rely on the biological correlates of maternity, the court relied instead on parental intent. The court was clear:

We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.⁸⁴

The court expressly replaced biology with intent as the essential ground of “natural” maternity.⁸⁵ The replacement is curious. Intent suggests will and reason; it depends on choice and negotiation, and it provides for changing perspectives and shifting interactions. In almost complete contrast, biology, as a ground on which familial relations have long been rendered sensible, makes those relations inevitable and their termination unlikely.

Thus, the notion of “intent” was fashioned by—and useful to—the court in *Johnson* because that court *did not* abandon a view of family based on traditional notions of inexorable connection and replace it with

82. *Id.*

83. Justice Kennard described the majority as having confused “questions of custody” with those of “maternal parentage.” *Id.* at 799 n.4 (Kennard, J., dissenting).

84. *Id.* at 782.

85. The court reserved the use of intent for cases in which the biological “facts” failed to harmonize with traditional understandings of biological connection. *Id.* at 781 n.9 (arguing California statutes fail to identify the natural mother only in certain cases, such as those in which “the biological functions essential to bringing a child into the world have been allocated between two women”).

one based firmly and exclusively on notions of autonomous individuality— notions long perceived as more appropriate to the marketplace than to the home.⁸⁶ Rather, the court used the notion of intent, variously, and confusedly, as an element productive of traditional families and as one productive of families based on notions of contract and individuality.

In a number of regards, the court's understanding of the "natural" connection on which it predicated the existence of family as a result of its analysis of the parties' intentions is absolutely traditional. For instance, following a model of old-fashioned, traditional families, the court depicted relations in the family and at home ideally to be relations of enduring and solidary commitment⁸⁷— exactly the type of relations that have long been taken to make the family different from the world of work—a world in which relations are transient and oriented toward specific goals. In large part, therefore, the court responded to the challenge that the facts in *Johnson* presented to traditional views of the family by preserving a traditional view of family but, within that view, substituting new assumptions (for example, that intent is productive of familial connections) for old assumptions (for example, blood connections produce familial relations). In this sense, the court replaced "blood" (and genes) with intent as the inexorable foundation of familial commitment. To this extent, therefore, intent became a substitute for "blood" as the essential connection between parents and their "natural" children.

The court in *Johnson* also recognized that its reliance on the notion of intent implies a contractual view of family. The court expressly approved, although it did not directly enforce, the contract into which the parties had entered and on which the court relied in discerning their intentions.⁸⁸ Such contracts, explained the court, are not inconsistent with public policy.⁸⁹

The court used the notion of intent as a justification and elaboration of its central determination—"that Crispina is the child's natural mother."⁹⁰ This usage of the notion of intent may initially appear effective, and thus determinative, because it seems to bring the correlates of

86. See Dolgin, *supra* note 4, at 1531-34.

87. See SCHNEIDER, *supra* note 7, at 52-53; see also *supra* notes 74-77 and accompanying text.

88. 851 P.2d at 783-85.

89. *Id.* at 783.

90. *Id.* at 782.

status and the correlates of contract into harmony, with each pointing to Crispina Calvert as the baby's mother.

However, that harmony can be shattered easily. The court presented the parties' intentions as revealing the baby's *real* and only mother; but at the same time, the court itself connected the parties' intentions to the contractual agreement among them. More particularly, the court embedded a contractual understanding of family in the rhetoric of family as a realm of status, a hierarchical realm defined through love, loyalty, and enduring commitment. Complications and contradictions are evident. For instance, the court recognized the strength of biological connections in order to transcend the implications such connections carry. The court wrote:

Thus, under our analysis, in a true "egg donation" situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.

The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions

Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interest of the child is not with her.⁹¹

The opinion asserts unhesitatingly that intent is determinative of "natural" maternity. Although the egg donor emerges as the "natural" mother in *Johnson*, in another case, the gestator might be the "natural" mother. Thus, for the court, the designation is entirely independent of biology, but performs the same service of identifying families that biology previously performed and that, apparently, biology alone will continue to perform in other cases. In effect, intent substitutes for biology in cases in which biology fails to delineate parentage with certainty.

The court expressly limited reliance on the notion of intent in determining parentage to cases in which the biological facts seem to resist

91. *Id.* at 782 n.10.

any clear determination of natural maternity or paternity.⁹² Moreover, in the court's view, intent, revealed through examination of the surrogacy contract, can be used to predict the quality of the parentage identified in that contract. Anna Johnson, by the very act of entering the contract, conceded her inferiority as a parent.

Insofar as traditional families comprised and represented a universe rendered sensible, and thus real, because they were inexorable, that universe is threatened by invocations of contract and intention. In fact, the California Supreme Court decision in *Johnson*, in attempting to elaborate contract in the name of status and to preserve status through the forms of contract, is deeply self-contradictory. If parentage can be secured through contract, then, as the dissent assumed, courts may select the best parent in such cases, but they cannot identify and distinguish the real parent. If, on the other hand, parentage flows inevitably from the "facts" of nature or the "facts of family,"⁹³ then, at least in theory, courts can identify the real parent as well as the best parent. That possibility leaves no room for negotiation and intent. The contradictions underlying *Johnson* are important because they are reflective of a set of contradictions found pervasively within present-day family law and within the larger society, and are thus worth exploring further.

3. The Construction of Intent: Intent as Status and as Contract

Again and again, the California Supreme Court in *Johnson* elaborated upon the notion of intent by invoking simultaneously the assumptions central to a world of contract and those central to a world of status but without acknowledging the differences and contradictions between those two sets of assumptions.

In reviewing and reacting critically to the arguments through which the court justified its reliance on intent to determine maternity,⁹⁴ the dissent concluded that the "court should look not to tort, property or contract law, but to family law, as the governing paradigm and source of a rule of decision."⁹⁵ The observation that the court relied on the law of the market, rather than on family law, is accurate in this case. However, that observation reflects only partially the majority's ap-

92. *Id.* at 782.

93. See Janet L. Dolgin, *Family Law and the Facts of Family* in NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS (Sylvia Yanagisako & Carol Delaney eds., forthcoming 1994).

94. 851 P.2d at 795-99 (Kennard, J., dissenting).

95. *Id.* at 799 (Kennard, J., dissenting).

proach. The majority did not simply rely on the laws of the market; it appropriated those laws and refashioned them to reflect the correlates of status along with those of contract.

For instance, the court initially justified its reliance on intent by claiming that "*the child would not have been born but for the efforts of the intended parents . . .*"⁹⁶ Certainly, "but-for" arguments,⁹⁷ familiar to the law of torts, have not generally been invoked in the resolution of family disputes.⁹⁸ However, the court framed its discussion to suggest that Crispina Calvert's causative intention effected a fundamental and enduring connection between her and the baby—a connection as strong and certain as any connection predicated on the biological correlates of maternity. So understood, intent becomes connective. More than the musings or determinations of the private person, intent joins people more strongly than any contract can. The court explained:

[T]he mental concept of the child is a controlling factor of its creation, *and the originators of that concept merit full credit as conceivers*. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child.⁹⁹

As the dissent noted, this language is reminiscent of another area of law generally unrelated to family disputes—the law that protects intellectual property.¹⁰⁰ In effect, the court argued that those who conceive of a child mentally have ownership rights similar to the rights of someone who conceives of a song or an invention.¹⁰¹ The dissent wrote:

96. *Id.* at 782 (quoting John Lawrence Hill, *What Does It Mean To Be A "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991)).

97. Justice Kennard's dissenting opinion criticized the court's "resort to but-for causation" to justify its conclusions since Anna Johnson and Crispina Calvert were both "indispensable" as "mothers" to the birth of Christopher. *Id.* at 795-96 (Kennard, J., dissenting).

98. Recently, courts have begun to acknowledge the viability of intrafamilial tort suits. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989) (arguing against preservation of doctrine of interspousal tort immunity). The law's increasing acceptance of intrafamilial suits generally suggests that in the eyes of the law, family members need not be distinguished from the world of business or of happenstance.

99. 851 P.2d at 783 (quoting Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986)) (emphasis added by California Supreme Court).

100. *Id.* at 796 (Kennard, J., dissenting).

101. *Id.* (Kennard, J., dissenting).

[I]t may be argued, just as a song or invention is protected as the property of the "originator of the concept," so too a child should be regarded as belonging to the originator of the concept of the child, the genetic mother.

The problem with this argument, of course, is that children are not property. Unlike songs or inventions, rights in children cannot be sold for consideration, or made freely available to the general public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property.¹⁰²

However, the court did not simply equate children with songs and inventions; rather, the court interpreted Crispina's intent to *constitute* her maternity and to provide evidence of her ability to parent well. For this reason, in the court's view, her intent, similar to another mother's "blood" or genes, connected Crispina to the child and made that child hers.

The court further justified its reliance on intent by declaring that "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."¹⁰³ The dissent responded:

The unsuitability of applying the notion that, because contract intentions are "voluntarily chosen, deliberate, express and 'bargained-for,'" their performance ought to be compelled by the courts is even more clear when the concept of specific performance is used to determine the course of the life of a child. Just as children are not the intellectual property of their parents, neither are they the personal property of anyone, and their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breaching party to deliver a truckload of nuts and bolts.¹⁰⁴

Again, however, the court did not simply appropriate rules traditionally used to resolve market disputes and apply them to determine a child's parentage. Rather, the court reconstructed the meaning of the rules, and thus the rules themselves, so that, in the context of decisions about parentage, those rules assume connection as well as autonomy, and unalterable truth as well as negotiated, changing arrangements. The

102. *Id.* (Kennard, J., dissenting).

103. *Id.* at 783 (quoting Shultz, *supra* note 31, at 323 (footnote omitted)).

104. *Id.* at 796-97 (Kennard, J., dissenting).

court did not enforce the parties' "bargained-for" intentions as it would any contract. It effected those intentions as the embodiment of a set of truths about familial relationships which, when made clear, compelled the conclusion that Crispina was the baby's "natural" mother. The court enforced the contractual arrangement entered into by the parties only incidentally in actualizing *the intent* that that contract revealed.

In declaring Crispina the "natural" mother because she had *intended* to be the mother, the court presumed her the better mother as well. Maternal intent, for the court, indicated even more completely than the biological components of motherhood in other cases, that the intending mother would be the *better* mother. "[T]he interests of children, particularly at the outset of their lives," declared the court, "are [un]likely to run contrary to those who choose to bring them into being."¹⁰⁵

The dissent argued, in response, that the court's approach would always prefer the genetic mother in cases such as *Johnson* because she is always the intending mother.¹⁰⁶ In certain cases, the dissent suggested, that preference would not serve the best interests of the child involved. The dissent explained:

It requires little imagination to foresee cases in which the genetic [and intending] mothers are, for example, unstable or substance abusers, or in which the genetic mothers' life circumstances change dramatically during the gestational mothers' pregnancies, while the gestational mothers, though of a less advantaged socioeconomic class, are stable, mature, capable and willing to provide a loving family environment in which the child will flourish. Under those circumstances, the majority's rigid reliance on the intent of the genetic mother will not serve the best interests of the child.¹⁰⁷

105. *Id.* at 783 (quoting Shultz, *supra* note 31, at 397).

106. As indicated, *supra* notes 91-93 and accompanying text, the court's decision does not, in fact, always prefer genetic mothers in gestational surrogacy cases. The court asserted explicitly that in a "true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law." 851 P.2d at 782 n.10. Thus, the decision does not automatically and always prefer genetic to gestational mothers.

However, the decision may create at least a statistical preference for middle-class mothers (and fathers) over poorer parents. In fact, behind the court's identification and definition of Crispina's maternity in *Johnson* lie significant class concerns. Analysis of the importance to courts of class differences among the parties in *Johnson* and in other cases involving disputes occasioned by reproductive technology is beyond the scope of this paper but would provide valuable information about the choices the law is making in such cases.

107. *Id.* at 799 (Kennard, J., dissenting).

Yet, courts generally prefer a biological parent to anyone else in disputes involving a child's parentage or custody without assuming that that parent will necessarily be the wisest or most impressive parent among those seeking the role. Rather, courts stress the importance of the biological connection, *per se*.¹⁰⁸

In fact, under *Johnson*, the argument presuming that an intending parent will be a good parent may be stronger than the argument presuming that a biological parent will be a good parent in cases in which biological parentage can be determined according to traditional criteria.¹⁰⁹ The claim presuming that biological parents are better parents relies on the correlates of status alone. The comparable claim for an intending parent relies on the correlates of status along with those of contract. This is so, under *Johnson*, because an intending parent is connected to the child through the world of "nature" and through the world of contract. In addition to being the "natural" mother, the intending mother is a rational parent. She *chose* to be a parent and actualized that choice as an autonomous actor negotiating an agreement to produce her child. Thus, Crispina, in the court's view, became Christopher's mother even before the child's birth as a matter of nature (signified by her gamete donation along with her intent)¹¹⁰ and as a matter of culture (signified by her contractual agreement that demonstrated her intent).¹¹¹

108. A parent may be declared unfit, thereby obviating the strength of the biological connection in disputes over the child. That is understood to be the extreme case—the exception that demonstrates the wisdom of the rule. However, a few courts have granted custody to a nonparent, even in the presence of fit parents willing to assume custody, because the nonparent may be a significantly better parent to the child in question. See, e.g., *In re Marriage of Allen*, 626 P.2d 16, 23 (Wash. Ct. App. 1981) (declaring that in any case "[p]recisely what might outweigh parental rights must be determined on a case-by-case basis. But unfitness of the parent need not be shown").

109. The presumption favoring biological parents is found in cases involving disputes over parentage as well as in cases involving disputes over custody. In one of the very few cases in which a court granted custody to a non-parent even though a parent was anxious to care for her child and had not been found unfit, the Court of Appeals of New York declared: "The nature of human relationships suggests over-all the natural workings of the child-rearing process as the most desirable alternative." *Bennett v. Jeffreys*, 356 N.E.2d 277, 285 (N.Y. 1976).

110. Crispina's maternity could have been signified by any biological claim to motherhood along with the appropriate intent. The court explained that a gestational mother (gestating an embryo produced through use of a donated ovum) who had the requisite intent would be the "natural" mother under state law. 851 P.2d at 782 n.10.

111. The court did not, of course, expressly separate Crispina's maternity into a natural and a cultural aspect. Rather, the court described each aspect so that it strengthened the reality and legitimacy of the other.

4. The Illusions of Intent

Curiously, the court in *Johnson* never addressed, and appears not to have recognized, the difficult but inevitable problems presented by shifting or confused intent. Yet, if the law is to predicate parentage on intent in cases involving disputes occasioned by reproductive technology, courts that rely on intent to determine parentage must be able to identify the parties' *real* intentions. In fact, however, people's intentions are rarely uni-dimensional or everlasting, and it is rarely possible to identify a person's one, true intent.

The court in *Johnson* avoided addressing the difficulties posed by changing intent and uncertain intent and almost certainly did so because recognizing these difficulties would have likely entailed an analysis more clearly embedded in the world of contract than that which the court provided. Instead of delineating expressly a procedure available to future courts involved in identifying a party's intent in such cases, the *Johnson* court imagined implicitly an almost primordial moment during which the parties' intentions were rendered unalterable at least for purposes of judicial determinations and conclusions. By locating that moment at the baby's creation, the court presumed a moment of clear, eternal intention and thereby avoided the reality of changing intent. The court explained:

But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child [I]t is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. *No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.*¹¹²

The court thereby posited an initial, inviolable intent that would determine all future interactions and connections. Changes of heart may occur and be unfortunate for the parties involved, but they cannot challenge the force of the original intent, or the law's readiness to ensure the actualization of that intent. The court justified its preference for that initial, almost mystical, intent through reference to the contractual arrangement between the parties, but the court did not enforce that con-

112. 851 P.2d at 782 (emphasis added).

tract.

Courts or legislatures could, of course, decide to enforce such contracts. That is not what the *Johnson* court did. Had the court simply enforced the contract into which the parties had entered, the court would have avoided the need to presume intentions. But the court would, as well, have definitively defined the family in market terms, as a collection of free, essentially unconnected, uncommitted individuals. Had the case been decided on the basis of ordinary contract principles, it would not have been necessary—or even possible—to infer Crispina's "natural," and thus exclusive, maternity from the agreement into which she had entered. In fact, the court neither enforced nor dismissed the gestational surrogacy contract. It acknowledged that contract, and then used its message to safeguard status.

In the end, the notion of intent cannot reflect and preserve autonomous individuality and, at the same time, provide proof (as a substitute for biological "facts" such as "blood" and genes) of the enduring essence of familial love and loyalty. Judicial reliance on intent in cases such as *Johnson* will prove impractical or will be expressly transformed into a more straightforward reliance on ordinary contract principles.

Moreover, the maternity defined by the court in *Johnson* is remarkably fragile. The court's efforts to ground its identification of the mother in "natural fact" notwithstanding, the identification and definition of "mother" do become matters of choice once the definition of "mother" is separated from connections (of "blood" and genes) *understood* by the larger society as inevitable. In consequence, the choice of mother, and the justification of that choice, in cases such as *Johnson* becomes as vulnerable as another court's alternative construction of maternity.

C. A Dead Sperm Donor's "Intent"

For several decades before *Johnson*, courts faced with conundrums posed by the use of artificial insemination¹¹³ invoked consent—though

113. Artificial insemination, generally not classified as one of the *new* reproductive technologies, was probably used for humans as early as the late eighteenth century. WILFRED J. FINEGOLD, *ARTIFICIAL INSEMINATION* 5-6 (2d ed. 1976). It is widely reported that the practice was used by Arabs to fertilize mares as early as the fourteenth century, *id.* at 5, but the account seems to be apocryphal. CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* 59 (1989).

Artificial insemination—also now referred to as alternative insemination—involves the insemination of a woman with a donor's sperm without intercourse between the two. Traditionally, artificial insemination using the sperm of a woman's husband was labelled AIH (artificial insemination).

not intent—in identifying a child's father. In none of those decisions, however, was a consenting father thereby designated a "natural" father as well. In several cases involving artificial insemination using donor sperm, courts determined a mother's husband to be her child's legal father, or at least to be responsible for child support, despite the absence of a biological connection between the man and the child. In those cases, the husband's paternity was premised on his consent to the artificial insemination of his wife with donor sperm.

For instance, in *People v. Sorensen*,¹¹⁴ the California Supreme Court decided in 1968 that a man who had agreed to the artificial insemination of his wife with donor sperm remained responsible for the child thereby produced after his divorce from the child's mother. Sorensen, having "consent[ed] to the production of a child," and having thereby made it "safe to assume that without [his] active participation and consent the child would not have been procreated," became the child's father and as a result became responsible for supporting the child.¹¹⁵ The court in *Sorensen* expressly and carefully differentiated such a father from a "natural" father.¹¹⁶ The court declared:

ination husband), and insemination using the sperm of a donor was labelled AID (artificial insemination donor). AID is generally used by women whose husbands are sterile, have a low sperm count or are deemed likely to produce children with genetic diseases, or by women choosing to become mothers without the active involvement of a male partner. Felicia R. Fashing, Note, *Artificial Conception: A Legislative Proposal*, 5 CARDOZO L. REV. 713, 714 (1984).

114. *People v. Sorensen*, 437 P.2d 495 (Cal. 1968). *Sorensen* involved a criminal prosecution for failure to support a child. Sorensen argued he had no duty of support. *Id.* at 497.

115. *Id.* at 499.

116. *Sorensen* is only one of a set of cases decided in the years after about 1960 in which courts predicated paternity on the "intent" or "consent" of the mother's husband or cohabitant. See, e.g., *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (N.Y. Sup. Ct. 1973) (allowing husband who consented to conception and pregnancy from donor artificial insemination to veto adoption of child by mother's new husband); *Gursky v. Gursky*, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (holding husband's consent to donor insemination child obliged him to support resulting offspring despite annulment of his marriage to mother because marriage was unconsummated).

An earlier set of cases involving donor insemination raised questions of adultery and illegitimacy. For instance, in *Doombos v. Doornbos*, 23 U.S.L.W. 2308 (Ill. Super. Ct. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 139 N.E.2d 844 (Ill. App. Ct. 1956), an Illinois court decided that donor insemination constituted adultery regardless of the consent of the mother's husband to the procedure. The *Doombos* court therefore declared the resulting child illegitimate. See also *People ex rel. Abajian v. Dennett*, 184 N.Y.S.2d 178, 183 (N.Y. Sup. Ct. 1958) (disallowing wife's claim that children were product of donor insemination in divorce action: "For to stigmatize them as children of an unknown father by means of artificial insemination of the mother is no more, in my view, than an attempt to make these innocents out as children of bastardy.").

The determinative factor is whether the legal relationship of father and child exists. A child conceived through heterologous artificial insemination [insemination using donor sperm] does not have a "natural father," as that terms [sic] is commonly used Since there is no "natural father," we can only look for a lawful father.¹¹⁷

In *Sorensen*, a consenting father was a clear alternative to, rather than a variant of, a "natural" parent. "In California," the court concluded, "legitimacy is a legal status that may exist despite the fact that the husband is not the natural father of the child."¹¹⁸

Thus, courts have been considering issues engendered by cases involving artificial insemination for many decades.¹¹⁹ For that reason, these cases invite contrast with more recent ones¹²⁰ involving the use of the new reproductive technologies.¹²¹ The earliest cases and commentaries involving the use of donor insemination, decided before mid-century, focused on dangers and advantages of artificial insemination using donor sperm¹²² for the character of the family and, more particu-

117. 437 P.2d at 498.

118. *Id.* at 501.

119. In one of the earliest cases involving artificial insemination, the Ontario Supreme Court declared by way of dicta that, under Ontario divorce law, a married woman allegedly artificially inseminated with donor sperm, without the knowledge of her husband, was guilty of adultery. *Orford v. Orford*, 49 O.L.R. 15, 19 (1921). In *Orford*, the court defined adultery to include the voluntary surrender by the guilty person of the reproductive powers or faculties to one other than the husband or wife. *Id.* at 22. Thus, the court treated marriage as a status relationship, not the negotiated association of two separate individuals. The court made the point clearly: "[I]n the case of the woman [adultery] involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous." *Id.* at 23.

For the *Orford* court, family relations, including the relation between spouses, were anchored decisively and exclusively in the "natural" order of things. Anything perceived to deviate from that order had to be condemned.

More than thirty years after *Orford*, an American court echoed the position taken by the Ontario Supreme Court in the earlier case. See *supra* note 116.

120. The early response of the society and the law to the use of artificial insemination using donor sperm will be examined in JANET L. DOLGIN, *REPRODUCTIVE TECHNOLOGY AND THE LAW* (manuscript on file with author).

121. Generally, the phrase "the new reproductive technologies" is used to refer to combinations and varieties of *in vitro* fertilization and embryo transfer. Artificial insemination, available for hundreds of years, cannot be called new. However, it is only in the last few decades that fertility centers have been able to successfully freeze sperm, thaw it later, and then use it to fertilize an egg.

122. From the beginning, the use of a woman's husband's sperm in artificial insemination was less controversial than the use of donor sperm. For instance, one commentator writing in 1949

larly, for the stability of marriage.¹²³

At about mid-century, courts in the United States began to recognize the legitimacy of children produced from donor insemination in cases in which the mother's husband had given his consent.¹²⁴ *People v. Sorensen*,¹²⁵ with language previewing that of much more contemporary decisions, was such a case. At about the same time, states began to provide by statute for the recognition of families created through artificial insemination using donor sperm. In 1964, the first statute regulating artificial insemination was promulgated in Georgia,¹²⁶ and at present about three-fifths of the states¹²⁷ permit artificial insemination and regulate it by statute.¹²⁸

declared: "AIH [artificial insemination using husband's sperm] excites no particular legal problems, since it is impossible to use unless both husband and wife have consented, and since the resulting child is actually their biological offspring." Note, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457, 459 (1949).

123. See, e.g., Note, *Artificial Insemination Versus Adoption*, 34 VA. L. REV. 822, 827, 824 (1948) (arguing that a child "not of the father's blood" would upset the design of the family as a unit "growing from the marriage of one man and one woman for life to the exclusion of all others").

But see Alfred Koerner, *Medicolegal Consideration in Artificial Insemination*, 8 LA. L. REV. 484 (1948) (justifying use of artificial insemination as an avenue for preserving marriages that lacked children). Koerner explained:

Since responsibility for and care of the offspring is the backbone of marriage, and since divorce is granted only in some jurisdictions simply by proving sterility, that physician would indeed be, not only immoral and inhumane, but medically unethical who would deny to a barren couple on the grounds of his own subjective reactions the benefits of a procedure that might be of help to them.

Id. at 488.

124. See, e.g., *People v. Dennett*, 184 N.Y.S.2d 178 (N.Y. Sup. Ct. 1958) (court upheld divorced husband's right to visitation of children produced through donor insemination of former wife); *Strnad v. Strnad*, 78 N.Y.S.2d 390, 391 (N.Y. Sup. Ct. 1948) (describing child produced through donor insemination as "semi-adopted" by mother's husband).

125. 437 P.2d 495 (Cal. 1968).

126. See Lindsey E. Harris, Comment, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 924 (1981) (citing GA. CODE ANN. § 101.1 (1964)).

127. Sheri L. Gilbert, *Fatherhood from the Grave: An Overview of Postmortem Insemination* 10 (Jan. 18, 1994) (unpublished student manuscript, on file with author).

128. At present, 35 states have statutes addressing issues raised by at least some aspect of artificial insemination. See, e.g., ALA. CODE § 26-17-21 (1992); ARIZ. REV. STAT. ANN. § 12-2451 (1982 & Supp. 1993); COLO. REV. STAT. ANN. § 19-4-106 (West 1993); CONN. GEN. STAT. ANN. §§ 45a-262, -771-779 (West 1993); N.Y. DOM. REL. LAW § 73 (McKinney 1988 & Supp. 1994); OR. REV. STAT. §§ 109.239, .243, .247, 677.355, .360, .365, .370, .990 (1989 & West Supp. 1994); WASH. REV. CODE ANN. § 26.26.050 (1986 & West Supp. 1994); WIS. STAT. ANN. § 891.40 (West Supp. 1993).

Section 5 of the Uniform Parentage Act provides that "[i]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with

With the first cases approving artificial insemination and legitimizing the children involved, the husband's consent became pivotal. However, that consent was not equated or confused with intent. Thus, a husband who consented to the donor insemination of his wife could not deny paternity by arguing that he had never in fact intended to effect the terms of his apparent consent.¹²⁹ Neither could a wife deny the paternity of her divorcing husband to children born during the marriage by donor insemination if the husband consented to the procedure.¹³⁰

To a significant extent, the developing rules governing the use and implications of artificial insemination have continued to reflect old-fashioned family values. Courts and legislatures have worked to ensure that artificial insemination would occur within the context of traditional families; the law accomplished this by allowing paternal consent to be substituted for biological paternity in determining the implications of artificial insemination using donor sperm. The relevant statutes routinely treat a mother's husband who consents to the insemination as they treat a "natural" father, but do not name him as such.¹³¹ The husband's consent—not his intent—is central to the existing rules.¹³² The aim has been to ensure that the husband's rights and responsibilities would be preserved with regard to any children resulting from donor insemination of his wife, and concomitantly that families produced through donor insemination would absolutely resemble traditional families.¹³³

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. The husband's consent must be in writing and signed by him and his wife." UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301-302 (1987).

129. See *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987); *Byers v. Byers*, 618 P.2d 930 (Okla. 1980).

130. See, e.g., *People v. Dennett*, 184 N.Y.S.2d 178 (N.Y. Sup. Ct. 1958).

131. In particular, artificial insemination statutes treat the mother's husband as the child's father, giving him the rights and holding him to the responsibilities of any father, without requiring that he adopt the child involved. See *Fashing*, *supra* note 113, at 734.

132. More recently, sperm donors have claimed paternity in cases involving unmarried mothers. Largely, in these cases courts have relied on existing statutes to determine the rights of the man involved. See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986). In *Jhordan*, the court declared the sperm donor to be the father of the child because a statute provided that 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." *Id.* at 531. In this case, however, the sperm had been inseminated without physician involvement.

133. Not surprisingly, the law has been slower to provide expressly for the rights of women seeking non-marital motherhood by choice. See Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-By-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193 (1982-83). The Uniform Parentage Act, enacted in 1973 by the National Conference of Commissioners on Uniform State Laws, provides no protection to unmarried women anxious to establish families with-

Very recently, the response that the law has developed over the last few decades in regulating artificial insemination is being tested anew. With the availability by the 1950s of cryopreservation to store sperm indefinitely in a frozen state,¹³⁴ new possibilities emerge. One possibility—the use of a man's sperm after his death—challenges the law's assumptions about the meaning of paternity and cannot be regulated through the use of existing rules.¹³⁵

Therefore, in cases that involve the use of a dead man's sperm and that question the meaning of "father" (just as cases involving gestational surrogacy question the meaning of "mother"), courts are confused. The posthumous use of sperm stretches the existing regulatory schemes beyond their limits. In particular, it becomes difficult to sustain an approach geared toward defining artificial insemination as an exception that can be fitted into traditional views of family.

Torn between the security of the old order and the pull of the new, courts are attempting to bypass both and to begin to construct new categories through which to think about, and govern, the creation of families. As with cases involving gestational surrogacy, courts faced with disputes about the control of a dead man's sperm have declared the intent of the parties determinative.

Two cases—one decided in France in 1984¹³⁶ and the other in California in 1992¹³⁷—have presented courts with just such a dispute. No laws directly addressed the questions presented.¹³⁸ Rather than infer an answer from related, existing rules, the courts fashioned their own

out legal fathers. *Id.* at 194, 216-22.

134. WILFRED J. FINEGOLD, *ARTIFICIAL INSEMINATION* 103-104 (2d ed. 1976); R.G. Bunge & J.K. Sherman, *Frozen Human Semen*, 5 *FERTILITY & STERILITY* 193, 194 (1954) (reporting several pregnancies produced from fertilization using thawed sperm that had been cryopreserved).

135. At present, no state comprehensively regulates the posthumous use of sperm. Matters that such statutes might regulate include the parentage and inheritance rights of children produced posthumously, as well as the control of frozen sperm before implantation.

136. Judgment of Aug. 1, 1984 (*Parpalaix c. CECOS*). Trib. gr. inst. Creteil, *Gazette du Palais* [G.P.], Sept. 15, 1984, at 11. This case is described and analyzed in E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 *J.L. & HEALTH* 229 (1986-87).

137. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

138. Recently, legislation has been proposed in France that would prohibit posthumous insemination. The bill, labeled a law on "life, medicine and biology," was approved by the French National Assembly in 1993 and was debated by the French Senate in early 1994. Among other things, the bill limits artificial fertilization to living couples of child-bearing age. Richard Saltus, *France Weighs Restrictive Biomedical Science Law*, *BOSTON GLOBE*, Oct. 23, 1993, at 6; Francois Raitberger, *Senate Debates Limiting Artificial Fertilisation*, *Reuters, Limited*, Jan. 13, 1994, available in *LEXIS, Nexis (News) Library*.

responses.¹³⁹

In *Hecht v. Superior Court*,¹⁴⁰ the California courts were asked, after William Kane's death, to determine the fate of his frozen sperm. In October 1991, Kane deposited fifteen vials of his sperm with California Cryobank, Inc., a Los Angeles sperm bank, and signed an agreement authorizing the bank to release his sperm to Deborah Hecht, the woman with whom he had lived for five years.¹⁴¹ A few weeks earlier, Kane executed a will that named Hecht as executor of his estate and that provided that "any specimens of my sperm stored with any sperm bank or similar facility for storage" were bequeathed to Hecht.¹⁴² Then, at the end of October, Kane committed suicide.¹⁴³

After Kane's death, Hecht asked that the sperm be released to her. Kane's two adult children from a former marriage, Katharine Kane and William Everett Kane, Jr., contested Kane's will and asked that Kane's sperm be destroyed.¹⁴⁴ Kane's children invoked traditional family values in urging the court to order destruction of their father's sperm. Even were Kane's will declared valid, his children asserted, public policy argued against both the artificial insemination of Hecht as an unmarried woman and the use of a dead man's sperm.¹⁴⁵ In their view, destruction of the sperm would "help guard the family unit" by precluding the creation of an untraditional family (one composed of Hecht, the child, and the memory of Kane) and would, equally, protect an existing family unit (their own) from invasion by a posthumous sibling and the "emotional, psychological and financial stress" that such a

139. In several regards the California court was able to, and did, rely on California statutes, but the central question in the case was not directly answered by the state's existing statutory rules.

140. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

141. Kane signed a "Specimen Storage Agreement" which provided that in the event of his death the bank should "[c]ontinue to store [the specimens] upon request of the executor of the estate [or] [r]elease the specimens to the executor of the estate." *Id.* at 276. In one provision, labelled "Authorization to Release Specimens," Kane authorized the bank: "[R]elease my semen specimens [vials] to Deborah Ellen Hecht. I am also authorizing specimens to be released to recipient's physician Dr. Kathryn Moyer." *Id.* (quoting the agreement between Kane and California Cryobank, Inc.). The record before the appeals court apparently failed to reveal whether the agreement was to be effective after Kane's death as well as during his life. Further, it was unclear whether reference to Kane's "executor" was a reference to Hecht. Hecht was, in fact, named as executor in Kane's will but was not so serving at the time the case was heard by the court. *Id.* at 276 n.1.

142. *Id.* at 276.

143. *Id.* at 277.

144. *Id.* at 279.

145. *Id.* at 284.

child's birth would create.¹⁴⁶ They described their father's interest in producing a posthumous child as "egotistic and irresponsible;"¹⁴⁷ that description may harmonize with views of the marketplace, but is strongly at odds with almost any account of a good father.

The trial court agreed with Kane's children and ordered the sperm destroyed.¹⁴⁸ The court of appeal vacated that order and remanded the case for determinations as to the validity of the will, the validity of the sperm bank contract, and the enforceability of settlement agreements that had been entered into by Hecht and Kane's two children.¹⁴⁹ Further, the court determined that Kane had an "ownership" interest in his sperm sufficient to permit inclusion of those sperm within Kane's probate estate.¹⁵⁰ The court concluded that decedent's interest in his sperm "falls within the broad definition of property in Probate Code section 62, as 'anything that may be the subject of ownership and includes both real and personal property and any interest therein.'"¹⁵¹ Kane's will, executed on September 27, 1991 provided: "I bequeath all right, title, and interest that I may have in any specimens of my sperm

146. *Id.* at 279.

147. *Id.*

148. *Id.* at 279-80.

149. *Id.* at 291.

When asked by Hecht's counsel to explain the legal bases of the trial court's order, the trial judge replied:

It really does not matter does it? If I am right, I am right and if I am wrong, I am wrong. As you know, I am persuaded by the arguments in the moving papers. This is something that is going to have to be decided by the appellate courts. Let's get a decision.

Id. at 279 n.3.

150. *Id.* at 283. The appeals court concluded that the character of Kane's ownership interest in his sperm made those sperm part of his probate estate but precluded the sperm from being the object of a gift (either *inter vivos* or *causa mortis*). The court's opinion left the distinction unexplained. The court wrote:

We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.

In concluding that the sperm is properly part of decedent's estate, we do not address the issue of the validity or enforceability of any contract or will purporting to express decedent's intent with respect to the stored sperm. In view of the nature of sperm as reproductive material which is a unique type of "property," we also decline petitioner's invitation to apply to this case the general law relating to gifts of personal property or the statutory provisions for gifts in view of impending death.

Id.

151. *Id.* at 281.

stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht."¹⁵²

Kane's children questioned the validity of their father's will, claiming that Kane was "of unsound mind, subject to the undue influence of . . . Hecht and/or suffering from insane delusions" when he designed and executed the will.¹⁵³ That claim, if supported by the facts, would erode Hecht's right to receive the sperm *under* the will¹⁵⁴ and would preclude her referring to the will *as evidence of Kane's intent* regarding the sperm he had deposited with California Cryobank, Inc.

A finding on remand that Kane was competent when he executed the will, and in particular that he had not been unduly influenced by Hecht, would allow probate of the will and transmission of the sperm to Hecht; but in addition, such a finding would establish Kane's intent

152. *Id.* at 276.

153. Answer of Real Parties in Interest William Everett Kane, Jr., Katharine E. Kane And Robert L. Greene, Administrator CTA of the Estate of William E. Kane To Petition for Writ of Mandate/Prohibition in the First Instance and/or Other Extraordinary Relief at 9, *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993).

154. In fact, the court's reference to Kane's will to indicate his *intent* draws attention to a set of parallel developments in family law and wills law. As cases such as *Johnson and Hecht*, along with a host of others, suggest, family law increasingly recognizes the relevance of individual choice in the creation and operation of families. Similarly, wills law has moved in the past two hundred years from a system firmly embedded in the status universe of feudal Europe, a universe in which inheritance followed inevitably the course of birth and "blood," to a system in which people are permitted to select those who will inherit. 2 WILLIAM BLACKSTONE, COMMENTARIES *10-13. The Wills Act, enacted in England in 1837, clearly recognized individual choices in the creation and regulation of inheritance patterns. Even earlier, the English Statute of Frauds, enacted in 1677, permitted the inheritance of land through use of a written will. These statements by English law marked a slow, but dramatic, break with the central structure of the medieval social world—a structure which ensured and assumed the continuation of office, status, rights and duties from one generation to the next. Originally, the English Wills Act contained and channeled choice with a complicated set of rigid requirements and rituals that surrounded the execution and probate of wills. Within the past several decades, however, the system instituted in 1837 began to be replaced with one that placed the decedent's *intent* as central. Thus, courts and legislators began to allow for the probate of wills that did not reflect formal requirements for execution. See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 7 (1987) (preferring "dispensing power" to substantial compliance as approach to validating wills; dispensing power gives courts authority to validate wills that do not even comply substantially with statutory requirements in cases in which court is convinced that decedent intended document to be a will); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (proposing that courts allow probate of wills that comply substantially with statutory requirements). The 1991 version of the Uniform Probate Code permits courts to probate a will despite the failure of the document to reflect formal requirements in cases in which it is established "by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will" 1991 UNIF. PROBATE CODE § 2-503, 8 U.L.A. 114 (Supp. 1993).

that Hecht be inseminated with his sperm, thereby providing alternative grounds (not dependent on the ultimate fate of the will) for granting Kane's sperm to Hecht. The court explained that the will "evidences the decedent's intent that Hecht, should she so desire, is to receive his sperm stored in the sperm bank to bear his child posthumously."¹⁵⁵

The court *assumed*, for purposes of its decision, that Kane had intended that his sperm be used to inseminate Hecht¹⁵⁶ and proceeded to consider the public policy concerns raised by Kane's children. In doing that the court framed its recognition that families can be created and regulated in contract terms, with an extended discussion of families as units of status.

Katharine and William Everett, Jr. argued that single women, such as Hecht, should not be encouraged to have children and create families. They further described the posthumous use of their father's sperm as "in truth, the creation of orphaned children by artificial means with state authorization."¹⁵⁷ The court rejected both policy concerns raised by the Kane children, but did so without strongly denying or accepting the children's claim for status—the claim that the law should encourage traditional marriage and traditional families.

Instead of focusing on families in general, the court focused on *this* family. So, in denying that public policy would limit the use of artificial insemination to married women, the court concluded that the dispute over Kane's sperm carried no far-reaching implications for the "institutions of family and marriage"¹⁵⁸ because the case involved "no existing marriage relationship involving decedent at the time of his death and obviously there can be none after his death."¹⁵⁹

In addressing the children's argument that public policy precluded the use of a dead man's sperm to produce a posthumous child, the court turned to the one precedent of which it was aware—*Parpalaix c.*

155. *Hecht*, 20 Cal. Rptr. 2d at 283-84.

156. *Id.* at 284. The court wrote:

[W]e are not adjudicating the validity or invalidity of the will or any contract or settlement agreement at issue in this case; we also do not purport to adjudicate any claims of decedent's competence or Hecht's undue influence. For the purpose of addressing this rationale for the trial court's order, we *assume*, *arguendo*, a particular intention on the part of the decedent. Thus, the issues of decedent's actual intention and the right of any party to actual distribution or possession of the sperm are not before us and must await the resolution of other issues in this case.

Id.

157. *Id.* at 288.

158. *Id.* at 287.

159. *Id.*

CECOS,¹⁶⁰ decided in 1984 by a French trial court in the suburbs of Paris. The California court relied heavily on *Parpalaix* in describing the significance of a decedent's intent for determining the posthumous use of his sperm. On the basis of the *Parpalaix* precedent, the court developed a view of the concept of intent that reincorporated and invoked traditional family values—the values of a world of status.

Parpalaix involved the request of Corinne Richard Parpalaix, a young widow, for her dead husband's sperm. In that request she was supported by her husband's parents. In 1981, Alain Parpalaix, ill with testicular cancer, was told that chemotherapy, the only hope for a cure, might render him sterile. Alain, not yet married to, but living with, Corinne, deposited nine vials of sperm with the Centre d'Etude et de Conservation du Sperme (CECOS), a government-run sperm bank located outside of Paris.¹⁶¹ Alain left no directions with the sperm bank about the future use of his sperm. In December 1983 Alain died, two days after marrying Corinne.

CECOS refused Corinne's request for Alain's sperm. After the French Ministry of Health declined to rule swiftly on Corinne's request, she and Alain's parents went to court.¹⁶² There they argued that, as Alain's heirs, they succeeded to Alain's contractual rights as a sperm depositor with CECOS to receive his sperm upon request.¹⁶³ The court found inapplicable French civil law governing contracts of deposit and proceeded instead to consider Alain's intent. In fact, for the

160. Judgment of Aug. 1, 1984 (*Parpalaix c. CECOS*), Trib. gr. inst. Creteil, Gazette du Palais [G.P.], Sept. 15, 1984, at 11.

To date, *Hecht* and *Parpalaix* seem to be the only two reported cases that consider the use of a dead man's sperm by his widow or surviving cohabitant. Another case occurred in France in 1991. In that case the widow, Claire Gallon, wanted to use the sperm of her husband who had died of AIDS. The state-run sperm bank in which Michel Gallon had deposited semen in 1985 refused. The case differed from *Hecht* and *Parpalaix* because Michel had signed a clause with the sperm bank stipulating that the sperm should only be released in Michel's presence. A court in Toulouse rejected Claire Gallon's request. *French Court Rejects AIDS Widow's Insemination Plea*, The Reuters Library Report, March 26, 1991, available in LEXIS, Nexis (News) Library, Wires File.

A somewhat different issue regarding the post-mortem use of sperm was brought in Virginia and California by prisoners condemned to death who requested that their sperm be stored for possible post-mortem reproduction. John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027 (1994). The courts decided that such men have no right to reproduce. See *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) (denying right of federal prisoners to provide sperm for insemination of wives during prisoners' lives).

161. *Woman Fails to Conceive from Dead Husband's Sperm*, Reuters Northern Europe Service, Jan. 11, 1985, available in LEXIS, Nexis (News) Library, Wires File.

162. E. J. Dionne, Jr., *A French Widow Sues Over Sperm*, N.Y. TIMES, July 2, 1984, at A7.

163. *Parpalaix*, G.P., at 561.

Parpalaix court Alain's intent constituted the only important question in the case.¹⁶⁴

In language quoted and relied on by the California court in *Hecht*, the *Parpalaix* court described Alain's intent in terms that separated that intent absolutely from legal agreements and the world of contractual negotiations. The court defined "[s]perm [as] the seed of life; it is connected to the fundamental liberty of a person to conceive or not to conceive."¹⁶⁵ The court explained that as such, sperm cannot be subject to civil rules governing contracts of deposit but must be governed by "the intent of the man from whom it emanates."¹⁶⁶ The court concluded that for that reason Alain's intent about the use of his sperm constituted the sole issue presented.¹⁶⁷

In considering Alain's intent, the court clearly separated the analysis of that intent from a world of contract and embedded it firmly in a world of status. For the *Parpalaix* court, Alain's intent regarding his sperm was central to his sense of self and, therefore, the fate of those sperm could not be cavalierly regulated by the rules of contract. However, the court did not hesitate to assess and delineate Alain's intent about the posthumous use of his sperm despite the fact that Alain apparently never had made that intent clearly known. Indeed, the court required Alain's widow to prove Alain's intent was "unequivocal"¹⁶⁸—a proof that might seem unachievable in the absence of any clear statement left by the dead man. The court easily found the necessary intent on Alain's part by reference to Alain's familial connections (of enduring love and loyalty) to those anxious that Alain's sperm be made available to Corinne. The court explained that,

the testimony of Pierre and Danielle Richard, the parents of Corinne Parpalaix, the attitude of Alain Parpalaix, who in the middle of his illness, and with the agreement of [Corinne] desired to preserve his opportunity to procreate, an attitude impressively confirmed two days before his death by a religious and civil marriage, the value of the position in this proceeding of Alain Parpalaix's parents, who would have been able to know the deepest intentions of their son, provide a set of testi-

164. *Id.* at 561-62.

165. *Id.* at 561.

166. *Id.*

167. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 288 (Cal. Ct. App. 1993) (describing conclusions of the *Parpalaix* court).

168. *Parpalaix*, G.P., at 562.

mony and presumptions that establish, without equivocation, the express intent of Corinne Parpalaix's husband to make his wife the mother of a common child, either during his life or after his death.¹⁶⁹

For the *Parpalaix* court, Alain's intent about the fate of his sperm was not demonstrated by a contract, but by Alain's loving relations as son, husband, and potential father.¹⁷⁰ In effect, the intent that the court identified with Alain's "deep desire" was assumed, not demonstrated, to exist in light of Alain's familial connections. The court displaced the search for Alain's contractual intent with the desires of his survivors. Thus, the court identified Alain (as family) with his widow and parents, presumed to delineate *their* deep desires, and agreed to effect those desires as if they were (and assumed them to be) Alain's "deep desire." Thus, in relying on Alain's intent and ordering release of his cryopreserved sperm to Corinne,¹⁷¹ the court presumed the dictates of status at least as much as it presumed the dictates of contract.

The California court in *Hecht* relied heavily on *Parpalaix* in answering the claims of Kane's children's that public policy forbid the posthumous insemination of Hecht with their father's sperm.¹⁷² In doing so, the court suggested that Kane's intent, as *Parpalaix*'s, was to be understood as a "deep desire"¹⁷³ to create familial bonds at least as much as it was to be understood as the motive for contractual negotiations.

Both courts—*Parpalaix* explicitly and *Hecht* by implication—depicted intent as an emotional and moral matter more than as a matter of contractual motivation. Each court began by considering the decedent's choice in terms resembling those typically used in interpretations of disputed and ambiguous contracts. But, each court switched its

169. *Id.* at 562.

170. Paul Lombard, Corinne Parpalaix's attorney, told the court that it could "decide to consecrate a new legal precedent where a deceased man would have the right to implant life in a woman's womb, and prove that love is more powerful than death." *Court Awards Young Widow Sperm of Late Husband*, UPI, Aug. 1, 1984, available in LEXIS, Nexis (News) Library, Wires File. The statement suggests the continuing significance of Alain Parpalaix's autonomy but, at the same time, defines Alain through his enduring connections of familial love to his spouse and (potential) child.

171. Actually, the court ordered CECOS to release Alain's sperm to Corinne's doctor. Corinne was inseminated with the sperm in November 1984. She did not become pregnant. Of the nine vials of sperm that Alain had deposited with CECOS, seven were used in the insemination and two were used in tests. *See supra* note 161.

172. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 288-89 (Cal. Ct. App. 1993).

173. *Id.* at 288.

ideological bearings and sought, instead, to identify the decedent's (familial) desires, thereby presuming to effect for the decedent the emotional future and family constellation he would have established for himself had he lived to do so.

The choice that proves conclusive in these cases is an over-determined¹⁷⁴ choice—a choice of the market and a choice of the home. For each court, though more clearly for the court in *Hecht*, the decision to recognize the dead man's intent included recognition of that man's autonomous individuality (and his ability to design his own future contractually) as well as recognition of his connected status within the context of familial relationships. For the courts, the dead men's choice to procreate posthumously had to be effected both because the rules of the market demand that freely bargained choices be effected by the law; and alternatively because, as a moral matter, the choice actualized each man's loving commitment and enduring connections to family, and thus preserved each man's "deep desire."

As models for future cases, *Parpalaix* and *Hecht* offer little real guidance. Both courts justified their conclusions as compelled by the dead sperm donor's intent. Neither court seriously considered how to determine the relevant intent, however. The two courts either rejected expressly, or avoided implicitly, exclusive reliance on principles of contract law. As a result neither court provided for a sperm donor's changing or conflicting intentions, or for a sperm donor with no conscious intentions about the posthumous use of his sperm. In the effort to preserve status and to invoke contract, to safeguard traditional families, and to respect the rights of the individual to design and effect unique families, the courts failed to address the confusions underlying the cases—confusions about the meaning and future of mothers and fathers and families.

IV. "INTENT" BECOMES CONTRACT

Cases such as *Davis*, *Johnson*, and *Hecht* demonstrate the allure that the dictates of the marketplace hold for the law in resolving complicated disputes about the meaning and scope of family and familial relationships. Those cases demonstrate as well the continuing grip on the society and the law of the traditional family, understood as a world

174. Freud used the term "over-determined" to refer to a dream symbol that actually appeared in the dream because it carried a heavy load (an overload from the perspective of the unconscious) of meanings. Thus, an over-determined dream-symbol referred to many dream-thoughts. SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 342-43 (A.A. Brill trans., 1950).

of enduring, stable commitment. The law is ambivalent about abandoning the dictates of status and defining family relationships as it defines relationships in the marketplace. Particularly with regard to the tie that binds parents to children, the law is ambivalent about forsaking a view that grounds those ties in inexorable biological truths and replacing it with one that permits the connection between parents and their children to be created through open-ended negotiations.

With regard to adults in families, the transition is nearly complete. With regard to children, the law moves more slowly and more uncertainly; at present, the law seeks to preserve status but to permit contract in defining the relationship between parents and their children. In that search, courts are attempting to modulate the consequences of unlimited choice in the creation and definition of families. That aim has led, among other things, to judicial reliance on intent in cases asking courts to determine parentage or the fate of gametic material. In this, courts have reconstructed the meaning of intent so that the term might become a mediator between the dictates of status and the dictates of contract. But, in the end, the mediator becomes instead an aspect of the debate. Thus, decisions such as *Davis*, *Johnson*, and *Hecht* appear to acknowledge the world of contract but to safeguard the world of status. In fact, in each decision, intent remains inevitably the associate of choice and contract, not status. Traditional families, understood as the inevitable products of natural processes, cannot be created as the consequence of intention. Their basic form is *not* open to choice. Thus, allowing the family to be defined through choice and intention is the transition to families defined through contract rather than through status. That this is so is suggested by the history of contract law itself.

Two hundred years ago, contract law refused to recognize idiosyncratic bargains. The fledgling law of contracts, seeking to preserve the last vestiges of status in the marketplace, enforced only those contracts that reflected the traditions of the old order. Only with the start of the Industrial Revolution did the law of contracts recognize agreements that failed to reflect expected customs and traditions. Jay M. Feinman and Peter Gabel, analyzing the history of contract law, describe this transition:

Eighteenth-century contract law would be barely recognizable to the modern lawyer. The core of eighteenth-century contract law was not the enforcement of private agreements but the implementation of customary practices and traditional norms. . . .

In part, contracts was that portion of the law of property

concerning the transfer of title to specific things from one person to another—the process by which “my horse” became “your horse”. . . . Contract law also concerned customary obligations between people related to status, occupation, or social responsibilities. For example, a patient was “contractually” obligated by custom to pay for a physician’s services whether or not he actually had promised to pay prior to the rendering of the services. In all types of contracts cases, the substantive fairness of the agreement or relation was subject to scrutiny by a lay jury applying community standards of justice. If a physician sued for his fee or a seller of goods for her price, the jury could decide that even an amount agreed to by the parties was excessive and inequitable, and so award a smaller sum instead.

Thus, eighteenth-century contract law did not encourage commercial exchange. The traditional image of the world presented by contract law regarded the enforcement of market transactions as often illegitimate, so a seller could never be guaranteed the price he or she had bargained for, and liability might be imposed in the absence of agreement when required by popular notions of fairness.¹⁷⁵

With the burgeoning of capitalism at the end of the eighteenth and early part of the nineteenth centuries, courts increasingly referred to, and enforced, the will of the parties to a contract. In addition, at this time law-makers began to define contract law itself as an instrument for realizing the will of free, putatively equal, individuals.¹⁷⁶ By the middle of the nineteenth century the understanding that courts were obliged to respect, and enforce, bargains among negotiating parties stood at the center of contract law, replacing a view of contracts as a documentation that reflected some aspect of the enduring order of things.¹⁷⁷

The transition toward the world of contract, as described by Sir

175. Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 373, 375 (David Kairys ed., rev. ed. 1990) (footnote omitted).

I thank my colleague Professor Wendy Rogovin for referring me to Feinman & Gabel’s article.

176. *Id.* at 378.

177. Feinman and Gabel argue that the ideological underpinnings of contract law shifted yet again by the middle of the twentieth century, and again in response to shifts in the larger society. By this time, they note, courts began to explore the fairness of a bargain and refused to enforce those that seemed seriously unfair (*e.g.*, unconscionable). *Id.* at 381 (describing twentieth century contract law to reflect vision of state “as active enforcer of the newly conceived notion of the general welfare”).

Henry Maine in 1884, occurred over several hundred years and is reflected in the shifting ideological underpinnings of contract law itself. A similar transition is now evident in the society's and the law's response to the family. Thus, the traditional family, one of the few vestiges of the feudal order in modern times, continues to erode.¹⁷⁸

The process is intensified by the particular challenges that reproductive technology poses to traditional understandings of the family. In responding to these cases, courts rely variously, and without clear pattern, on the dictates of status and the dictates of contract. Thus, at present, status and contract often appear as options rather than as points in an historic transformation. So, courts resolve disputes occasioned by reproductive technology by invoking three contrasting aspects in the transition from status to contract: the importance of preserving traditional families,¹⁷⁹ a blend of factors that assume contract and status while being firmly grounded in neither,¹⁸⁰ and express agreements among the parties.¹⁸¹

The courts in *Davis*, *Johnson*, and *Hecht* all attempted to acknowledge contractual definitions of the family while preserving traditional forms of family. Each did that through the conceptual instrument of intent. The temptation of the procedure is clear. The consequences may be less so. But among them is, first, the recognition of contract; and

178. See Dolgin, *supra* note 4 (describing transition of family from feudal times to present).

179. See, e.g., *In re Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988) (declaring a surrogacy contract unenforceable and describing the payment of money to a surrogate as "illegal, perhaps criminal, and potentially degrading to women").

180. To some extent, almost all the cases involving such disputes fit into this category, but some courts expressly invoked status and contract together. The California Supreme Court decision in *Johnson v. Calvert* illustrates that response. *Davis v. Davis*, involving the fate of the seven embryos stored in frozen form by the Davises before they decided to divorce, provides another good illustration. See *supra* text accompanying notes 28-36. In fact, the Tennessee Supreme Court in *Davis* relied on contract law and on traditional family law in fashioning its response to future cases such as that represented in *Davis*. The court determined that in such cases, other state courts should look first to "the preferences of the progenitors"; if that should prove impossible, courts should look next to any relevant "prior agreement"; and, finally, if no prior agreement exists, courts should balance the "relative interests of the parties." 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

181. See, e.g., *In re Baby M.*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *modified*, 537 A.2d 1227 (N.J. 1988). The trial court in *Baby M.* relied on the contract among the parties in order to by-pass statutory rules such as those that prevented the involuntary termination of parental rights absent a showing of unfitness. However, even that court relied on the contract in order to preserve a family (the family composed of the baby's genetic and contracting father, his wife, and the baby but excluding the surrogate mother) that the court viewed as reflecting absolutely the values of traditional, old-fashioned families. See *Surrogate Motherhood*, *supra* note 11, at 535-45 (analyzing status and contract components of *Baby M.* decisions).

second, the replacement of a world organized through the dictates of status with the illusion that the family of tradition can survive the change. It cannot, and already has not.

Less clear is the sort of family that will replace the family of old. Certainly, the law moves toward the recognition of families established and organized through contractual negotiations. Contract principles could, for instance, determine the law's response to changed intentions. One commentator suggests expressly that the "[e]nforcement of promises occurs precisely because people change their minds about performing obligations they have assumed. Indeed, a subset of contract doctrine governs when changed circumstances should excuse non-performance."¹⁸²

An unambivalent appropriation of contract principles in governing the creation and operation of families would sacrifice completely the attempt to preserve the old order; it would definitively reject traditional families—families defined through inexorable truths as non-negotiable, hierarchical communities of enduring relationships. People may still *choose* to establish and sustain families that resemble those of yore, but such families, because *understood as* products of culture, not nature, can always be challenged, and replaced, by alternative choices.

V. CONCLUSION

Irony depends upon failure of insight, and the tone of the response directed at its object depends upon the motivation of the object. In proportion as the motive is praiseworthy, the response will be shadowed, more or less subtly, by compassion, respect, and perhaps even by regret. But, to the observer, whatever the tone, the failure itself—the failure to see—will be, as it should, the essential fact.

In the present case, the essential fact has been, and continues to be,

182. Shultz, *supra* note 31, at 349 (citing to RESTATEMENT (SECOND) OF CONTRACTS §§ 261-72 (1979) and to U.C.C. §§ 2-613 to -615, 1 B. U.L.A. 190-95 (1989), for proposition that contract principles provide for changes of mind).

Even Shultz, who expressly recommends the use of contract principles in the resolution of disputes occasioned by reproductive technology, justifies that recommendation with a vision of better families. She writes:

Rules that would determine legal parenthood on the basis of individual intentions about procreation and parenting—at least in the context of reproductive technology—would recognize, encourage and reinforce men's choices to nurture children. By adopting a sex-neutral criterion such as intention, the law would partially offset the biological disadvantages men experience in accessing child-nurturing opportunities.

Id. at 303.

the failure of contemporary American jurisprudence to see that its response to the challenges posed by developments in reproductive technology has produced, and continues to produce, an effect opposite to what it intends. Committed, without for the most part quite knowing it, to an ideology rooted in immutable truth, courts have struggled to preserve its tenets by invoking concepts and arguments almost certain, in the long run, to undermine them. Thus, unwittingly, courts have been working and continue to work at cross-purposes to themselves. The universe of status, they know, or—perhaps more accurately—sense, must be preserved. The family, they know, as traditionally defined, must be preserved. Moreover, in this view, a hierarchical realm of loyalty, love, and commitment rooted in the very nature of things—a realm literally priceless—a realm whose values are beyond price, beyond negotiation—a realm metaphysically superior to negotiation, to contract—must be preserved. The imperative is, at whatever level of consciousness, clear. The means, however, unfortunately are not. The challenge presented to the family as a universe of status is considerable, and deepens exponentially in a split second of historical time. So, understandably, the arguments marshaled against it are tentative, poorly thought-out, and ill-suited to their task. In the short run, they deflect the challenge, or part of it; or seem to. In the long run, however, they seem almost certainly doomed.

Reproductive technology unfolds. What a moment ago was unimaginable is now real, and the new reality threatens the old. Suddenly, at a gesture of science, embryos, children, gametes, the process of maternity itself, are the subjects of negotiation, of self-interest, of contract; commodities to be bought and sold, but commodities of exquisite, of irresistible allure. As a result, traditional understandings of the family as a universe grounded in inexorable truth begin to fall apart. As a consequence, some profoundly conservative impulse at the center of culture asserts itself in opposition.

Ironically, in the present case, it does so in a manner almost certainly, in the long run, self-defeating. Under the most extraordinary pressure, a concept is invoked; but a concept perhaps uniquely suited to the needs of the new, and inimical to the needs of the old. Its basic impulse is, however, barely noticed at all. Of its nature, the concept—choice—supports the universe of contract, and undermines the universe of status and is, somehow or other, almost inexplicably overlooked. Thus the ideological opposition arises, not only from without, but from within. Not surprisingly, it seems likely to prove successful. At that point, the law's reliance on intent in cases occasioned by repro-

ductive technology expressly will have become reliance on principles of contract.

How one feels about the irony depends, of course, upon how one feels about the views of family themselves in conflict. Which ironic tone is wisest, no one yet knows. Time will tell, for better, or for worse.