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# Suffer the Children: Nostalgia, Contradiction, and the New Reproductive Technologies

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# ARTICLES

## Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies

Janet L. Dolgin\*

### INTRODUCTION

To human conduct, the fabricated image of how things were—the myth of history, not history itself—is often crucial, because that image reflects what people desire and is therefore the standard by which conduct is fashioned. As people, however, desire many things, all too often, contradictory things, the image—the myth—must be studied with care, with a cautious regard for ambiguity and confusion.

In American culture, the myth of the family and, within that, the myth of the child, reflect what Americans want their families and their children to be. As, however, Americans want both family and children to be many things—all too often, contradictory things—they manipulate, often to their own confusion, and in complex ways, the myths that they have constructed.

Nostalgic images of children have shaped and justified the law's understanding and regulation of family matters since the nineteenth century. By the middle of the twentieth century, such images had become indispensable to the ideology<sup>1</sup> of the American family, and therefore perhaps

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Parts of this article will appear in JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* (forthcoming January 1997).

1. By "ideology" this Article does not mean a set of false beliefs, but rather the system of underlying, pervasive, and often unarticulated beliefs, in terms of which people think about themselves and their world. This meaning of ideology follows that of the French anthropologist and Indologist Louis Dumont. Dumont wrote:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that

the most fundamental, and apparently unassailable, tenet of American family law had become the best interests of children.

The law's apparent concern for children developed as vast changes in the scope and meaning of family were effectuated during the early years of the Industrial Revolution. Focusing on children as the essential, and most valued, component of family life served family law well. During a century of great transformation, the law, consistently presuming to serve the interests of children (and thus of decency), was able to accommodate startling changes under the rubric of one essential concern: the welfare of children in families.

The law's real concern with children in the past century and a half, however, has also proved a pretext, a mask for other concerns. Not only have children often been badly served by rules centered around the children's interests, but these rules have consistently concealed other interests, including the diverse interests of adult society in both preserving and transforming patterns of traditional family life. Associating these other interests with images of children and childhood has protected the underlying interests by suggesting that, in the association, their proponents also support, or at least acknowledge, a moral order. Children have not been well served by the same association. As children's interests are proclaimed—even apparently investigated and analyzed in detail—in case after case, they are subsumed by larger agendas, often unacknowledged—and almost as often, unrecognized.

At the same time that the best-interest standard developed in law as the operating principle through which to resolve disputes involving children, families became increasingly individualistic. Additionally, society increasingly has adopted a rule of choice that provides for no-fault divorce, the enforcement of pre-marital contracts, and the legal recognition of non-married cohabitants. Nostalgic images of children, recalling a valued, if highly romanticized past, eased the law's response to disputes reflecting these changes. Troublesome and unsettling implications of viewing family life as founded on contingent connections between individuals who *choose* to bond were mitigated and displaced by emphasizing the law's central concern: children. Clearly, lawmakers therein suggested, a legal system dedicated to the welfare of children protected the very best aspects of traditional family life, even while the legal system participated in the transformation of that life.

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it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, FROM MANDEVILLE TO MARX 22 (1977).

By the end of the twentieth century, changes in the family and in our understanding of the family that have evolved since the start of the Industrial Revolution<sup>2</sup> exploded with new force. The law recognized these changes expressly by defining "family" as a collection of individuals, joined through their choice to associate in familial form.<sup>3</sup> And the law implicitly acknowledged these changes through pervasive legislative enactments and judicial decisions that provided for, and regulated, new choices in the creation and operation of family life.<sup>4</sup> By the late 1970s, these remarkable changes were joined by those incident to the development of reproductive technology.

Reproductive technology brought a new order of challenge that questioned the biological, as well as the social, correlates of family relationships and thus magnified the earlier disruptions of changing familiar assumptions about family. With the advent of the new reproductive technologies, the processes of change accelerated at a rate almost, if not actually, beyond society's capacity to adapt.

In attempting to accommodate changes in the meaning and form of family engendered by the new reproductive technologies,<sup>5</sup> society has turned to the law.<sup>6</sup> Compelled to respond to difficult real-life disputes arising as a result of these new technologies, courts flounder in confusion. They continue to invoke and rely on images of children, but less often and less successfully than in earlier cases. Moreover, in such cases, judicial invocations of the child's interests mask other concerns more now than ever before. Thus, courts refer to children's (and embryos') interests to justify decisions that

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2. These nineteenth and early twentieth century changes clearly had their roots in earlier times. The broad historic changes that resulted in the demise of feudalism and permitted the development of the Industrial Revolution also affected understandings of family life. Moreover, the family that developed with the Industrial Revolution found its specific intellectual roots in the Enlightenment. See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L. J. 1519 (1994).

3. See *infra* notes 63-64 and accompanying text (discussing United States Supreme Court's recognition of family as collectivities of autonomous individuals).

4. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (describing changes in family law system in past several decades).

5. The term "new reproductive technologies" describes forms of assisted reproduction made accessible since the late 1970s, including *in vitro* fertilization, embryo transfer, gamete and embryo cryopreservation, and in the last several years, intracytoplasmic sperm injection. These technologies are described *infra* part IV. In general, artificial insemination, available for hundreds of years, is not classified as a new reproductive technology. This Article uses the terms "reproductive technology" and "assisted reproduction" interchangeably.

6. The call of judges for legislative action is found again and again in opinions resolving disputes occasioned by reproductive technology. But legislatures have been slow to react and regulate the new reproductive technologies. Moreover, the speed of technology change is so rapid that legislative responses almost invariably become incomplete within short periods of time.

validate and invalidate surrogacy contracts;<sup>7</sup> to establish the ontological status of frozen embryos as people, or as something special but not quite human;<sup>8</sup> and to confirm the biological essence of the parent-child bond and demonstrate its motivational and intentional essence.<sup>9</sup>

In these cases, children represent tradition as well as modernity. They are used to demonstrate the moral inexorability of biological truth as well as the advantageous consequences of challenging that truth. And they symbolize the victory of culture over nature as well as that of nature over culture. In short, children "say" too much. In consequence, images of children are now less useful to courts in accommodating change. In addition, the real interests of children often evaporate completely, almost visibly, as the law attempts to render sensible, regulatory changes that upset society's most fundamental expectations and assumptions about the meaning of familial relationships.

Section I of this Article discusses a historical process, dating from the late medieval period, which necessitated the creation of the American myths of family and children. Section II explains why the myths were created when they were, and describes them. Section III shows how, for the past century and a half, American culture, as reflected in American law, has invoked the myths in support of contradictory social impulses. This contradiction is illustrated by examining the creation and application of the family law principle that asks courts that resolve disputes involving children to effect the best interests of those children. Sections IV and V show how society and law, over the past two decades, have invoked, transformed, and sometimes even ignored, familiar myths about family and children in confronting a sudden and startling revolution in human reproduction.

## I. THE TRANSFORMATION OF THE FAMILY

Once deeply embedded in a world that valued hierarchy and determined worth as an inevitable correlate of social position, the family survived the destruction of the feudal order and emerged in the modern world as a lonely vestige of a social order that valued hierarchy and holism. As such, the family has become a symbol, as well perhaps, a historic repository, for a world that contrasts with the marketplace. In this sense, the family in the modern world represents an older universe in which social relations were

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7. See *infra* part V.B.

8. See *infra* part V.A.

9. See *infra* part V.C.

hierarchical and holistic and reflected equality and individuality only fleetingly and incidentally.

For much of the past two centuries, the family was understood as a unique domain of interaction that contrasted with interactions in the marketplace. Society and law understood the family as a universe of private interactions grounded in natural and supernatural truths. On those truths were predicated the hierarchical structure of the family unit as well as the enduring inevitability of family relationships. The family was almost unique within society. However, other, older societies have functioned, and far more broadly, with hierarchy and holism as governing principles—not distinctively in the restricted domain of family life, but in almost all domains of life.<sup>10</sup> The feudal world was, and assumed that society *should be*, a hierarchical whole, anchored in religious and natural truth.

At the end of the nineteenth century, the English anthropologist Sir Henry Maine contrasted his own world with that of an earlier time in which birth-determined status organized social relations, and in which bargained negotiations between putatively equal contract partners, defined through the notion of autonomous individuality, governed almost no aspects of social interaction.<sup>11</sup> 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 toward a phase of social order in which all these relations arise from the free agreement of individuals.<sup>12</sup>

In a world such as our own in which the predicates of contract predominate, the individual is the smallest unit of social value. Maine

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10. See generally LOUIS DUMONT, *HOMO HIERARCHICUS* (1970).

11. As Louis Dumont has persuasively argued, many, if not all, societies find some place for social forms that seem, in general, to contract the society's predominant patterns of understanding human interaction. DUMONT, *supra* note 10, at 231-38. Dumont provided the example of renouncer sects in traditional caste India. These sects depend on notions of individualism almost entirely foreign to the larger society. DUMONT, *supra* note 10.

12. HENRY MAINE, *ANCIENT LAW* 99 (J.M. Dent & Sons, Ltd. 1917) (1861).

suggests an earlier world in which the smallest unit of value was the hierarchically organized whole. Within that holistic society, rights and duties flowed inevitably from one's position in the larger hierarchy. Maine describes this as a world of status and contrasts it with a world of contract. He wrote:

All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still colored by, the power and privileges anciently residing in the Family. If then we employ Status . . . 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*.<sup>13</sup>

In a world of status, as Maine described it, rights and duties are fixed at birth and are understood as unchanging because they are connected to relations understood as natural. So, for example, the relations between a master and serf or between a *pater familias* and the members of his household follow set forms that are assumed by the very fact of the relationship. In such a world, position cannot be negotiated but follows from the very nature of things. Moreover, in a world reflecting a hierarchical, holistic view of reality, laws are not formulated for application to the abstract, and putatively equal, individual. Rather, laws flow from the perceived order of things.<sup>14</sup> The rules of human discourse follow inevitably from the essential nature of the relationship.

The anthropologists Louis Dumont<sup>15</sup> and Steven A. Barnett<sup>16</sup> characterize the ideology of traditional caste India in terms similar to those that Maine associates with a world of status. The analyses of Dumont and Barnett illuminate the differences between a world (such as our own) that values equality and autonomy and a world (such as feudal Europe or caste India) that values hierarchy and holism. Barnett and Dumont argue that in caste India, inequalities reflected the dominant system of belief—the way people thought their world was and should be.<sup>17</sup> Comparatively, in the West, inequalities such as racism and patriarchy conflict with an egalitarian ideology and are thus constantly being explained away (often the response to

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13. *Id.* at 100.

14. *Id.* at 98-99.

15. See generally DUMONT, *supra* note 10.

16. Steven A. Barnett, *Identity Choice and Caste Ideology in Contemporary South India*, in THE NEW WIND, CHANGING IDENTITIES IN SOUTH ASIA 393 (Kenneth David ed., 1977).

17. See generally DUMONT, *supra* note 10; Barnett, *supra* note 16.

racism) or justified as appropriate within, though only within, a particular domain of interaction (the family).

Thus, hierarchy in the medieval world must be distinguished from inequality in contemporary society. Medieval hierarchy reflected society's understanding of what should be; contemporary inequality contravenes an ideology of equality. So, for instance, Americans may describe a racial or gender group as inferior and then disclaim the implications of that description. In contrast, in medieval Europe and caste India, the value of hierarchy was not debated or debatable. Inequalities were taken to reflect an inexorable reality and therefore did not require justification.

During the feudal era, the family was securely moored within, and clearly reflected, the wider social order. Families were not clearly set off from the rest of society as social units of particular value. Indeed, in the medieval world, families, largely understood as necessary to the "transmission of life, property and names, . . . did not penetrate very far into human sensibility."<sup>18</sup> Rank and duty, within families and without, were understood as the inevitable consequences of birth. Choice, in determining the scope and meaning of familial obligations, although never entirely absent, was neither prevalent nor prized.

## II. MYTHS OF FAMILY AND OF CHILDREN

Maine's distinction between a world of status and a world of contract reflects contemporary, contrasting visions of family.<sup>19</sup> The solidity and enduring loyalty associated with traditional families can be, and often are, understood as the consequence of generally hierarchical, non-negotiable, and inexorable relationships. In contrast, families created and organized through principles of contract can be, and often are, understood to be loving collectivities of autonomous individuals, connected by choice and therefore equally free to terminate their connections. These distinctions have become central, as ideological positions, to the contemporary world in which the "politics of family" have come to define what is valuable.

The notion that families can be categorized into two broad sorts, one reflecting the parameters of status and the other, the parameters of contract—

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18. PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 411 (Robert Baldick trans., 1962).

19. The historic aspects of Maine's work have been criticized widely. See Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 519 n.12 (1990) (considering place of Maine's work in anthropological and legal scholarship).



as if to suggest that some families have retained traditional forms of interaction and others have evolved with the modern world—is belied by a far more complicated and far more illusive sociological reality.<sup>20</sup> Most, if not all, families reflect both images. Social consciousness of the apparent choice, however, allows traditional families to become more “traditional” and modern families more “modern” by express comparison, each with the other. Each identity depends on, and develops in response to, the other. As the English anthropologist, Marilyn Strathern, has observed, at times our society wants to entertain tradition and modernity at once.<sup>21</sup> She writes:

[F]or contemporary Euro-American culture, we could say that there is both more status and more contract around—more appeal to genetic essentialism and more openness to optive kinship. And if there seems to be ‘more’, it is because Euro-Americans imagine they are able to do more things with their ideas, implement them in more situations. We can point to one source of enablement, ‘technology’. . . . In truth, the new reproductive technologies enable moderns to choose between ‘traditional’ and ‘modern’ forms of relating, or to choose to facilitate both at the same time for that matter. . . .<sup>22</sup>

#### A. *The Development of the Ideology of Family*

The conflation of images of family suggested by Strathern’s description indicates a broad social interest in preserving that aspect of traditional families that promises enduring commitment and responsibility and at the same time joins with the presumptions of autonomous individuality and equality that encourage choice in all matters. The obvious confusions engendered by these essentially contradictory impulses are fundamental to the scope and meaning of the family today. These confusions reflect older and broader patterns of change in the family that are rooted philosophically in the Enlightenment. These patterns of change, although unacknowledged and unappreciated for many decades, became more obvious by the early years of the Industrial Revolution. The myths of family created in the late

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20. Some of my earlier articles, e.g., Janet L. Dolgin, *The “Intent” of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261 (1994), tended to reify the ideological distinction between contract and status. This Article should correct that tendency. I am grateful to Professor Jana B. Singer for her insightful comments on *The “Intent” of Reproduction*.

21. Marilyn Strathern, *New Knowledge for Old? Reflections Following Fox’s Reproduction and Succession* 22 (1993) (draft, on file with author).

22. *Id.* (citations omitted).

eighteenth and early nineteenth century, when the Industrial Revolution seemed to assure the utter triumph of contract, depended heavily on romanticized understandings of the feudal order. These myths were the fabricated images of an earlier society that virtually sanctified the family in general, and children in particular.

Although the past several decades have witnessed a remarkable elaboration in the notion of choice in the creation and maintenance of family life, the contrast between a world defined in terms of status and one defined in terms of contract was clearly developing in Western culture by the nineteenth century. It was not an accident that Maine, affected by the concerns and confusions of his own world, described the development of Western society as a movement from status to contract and associated status firmly with the family.<sup>23</sup>

Indeed, in the nineteenth century a new awareness of family developed. Society, and especially the middle classes, valued tradition but constructed conceptions of traditional families to suit contemporary needs rather than to reflect accurately what had been.<sup>24</sup> Moreover, at the same time, the American family faced real changes in patterns of family life. During the late eighteenth and nineteenth centuries, paternal authority weakened and marriage increasingly became a matter of individual choice.<sup>25</sup> The family, no longer alone in providing for the educational and welfare needs of its members, was more often expected to "provide romance, sexual fulfillment, companionship, and emotional satisfaction."<sup>26</sup> Moreover, the divorce rate rose noticeably by the late nineteenth century,<sup>27</sup> birthrates decreased, especially within middle class families, and women, in large numbers, began to work for wages.<sup>28</sup>

During the nineteenth century, relations among adult family members began to resemble relations within the market: relations built on free choice rather than on bonds of inexorable truth. At the time, the change, although momentous, was generally disapproved. Countervailing images of the family developed that depended on, and elaborated, a contrast between home and work. The family constructed in contrast to, and as a refuge from, the

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23. See note 12 and accompanying text (quoting Maine on the connection between status and family).

24. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE* (1992).

25. STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC RELATIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 19, 20 (1988).

26. *Id.* at 108.

27. *Id.* at 108. For example, in San Francisco in 1916, 25% of all marriages terminated in divorce. At the same time, 20% of marriages in Los Angeles and 14% in Chicago ended in divorce.

28. *Id.* at 108-09.

demands of the working world, was represented by images of nurturing women and their treasured children. The image of home, populated by women and children, rejoined in the evening by working men, provided a comforting ideological counterpoint to the vast technological and economic changes of the nineteenth century market.

In this developing view of family, hierarchy was preserved, with women and children understood, socially and biologically, as subservient to men.<sup>29</sup> But at the same time, society's conception of the family was infused with romanticism. Perhaps for the first time in history, the family began to be seen as a product of history and nature, and therefore, potentially subject to unexpected and unlimited change.

Thus, in responding initially to the astonishing changes in culture and family that coincided with the full development of the Industrial Revolution, society constructed a vision of old-fashioned, decent families that perpetuated, but did not accurately reflect, the perception of families as they existed before the early nineteenth century. This conception provided a reference point for connecting the past to the future and a model for living that preserved the illusion of stability in the midst of wide-scale transformation.

This ideology<sup>30</sup> of family, centered around the differences between relationships at home and relationships at work, was fully developed and widely, almost universally, embraced in the United States in the middle of the twentieth century. At this time, the widely projected images of the family reflected the notion that the world of home and love was, and should remain, separate from the world of work and money. In contrast to the universe of home, the universe of work, with money as the medium of exchange, was understood to value autonomous individuals viewed as free to design and negotiate the terms of their own interactions.

In the marketplace, relationships were not expected to last beyond the bargains that effected them. They sometimes did, of course. But then they were re-categorized as friendship or family relations. In contrast, at home, with love understood as the medium of interaction, relationships were not defined in light of specific goals, and were understood as loyal and enduring.<sup>31</sup> Within the family, relationships and their attendant rights and

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29. See generally BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD* 5-29 (1978).

30. See *supra* note 1 (explaining use of term "ideology").

31. The American anthropologist David M. Schneider described the American family in the mid-1960s as a universe of "enduring, diffuse solidarity." DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 51 (1980). Schneider wrote:

duties were understood as anchored in the "nature of things" and therefore not open to negotiation.

This conception of family was embraced with remarkable consistency in the fifteen years following World War II, but soon thereafter was increasingly subject to criticism and even contempt. Betty Friedan's *The Feminine Mystique*,<sup>32</sup> which described housewives as intellectually and spiritually arrested, became a symbol of a new self-consciousness about, and criticism of, family relationships. This new self-consciousness and the critiques it engendered followed inevitably as the gap between images of family and the reality became almost impossible to ignore.

To some extent, the ideology of family that seemed to reign unopposed during the middle years of the twentieth century, and presently is challenged by an alternative vision, continues to inform legal and social choices. To a remarkable extent, however, the family has been and is being redefined in terms much closer to those that only three or four decades ago were associated almost exclusively with the marketplace.

Within the past few decades, an alternative vision of family, clearly but quietly present since the nineteenth century, has been elaborated and has begun to emerge as an increasingly real possibility. As a result, visions of old-fashioned families compete with visions of "families through choice."<sup>33</sup>

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The set of features which distinguishes home and work is one expression of the general paradigm for how kinship relations should be conducted and to what end. These features form a closely interconnected cluster.

The contrast between love and money in American culture summarizes this cluster of distinctive features. Money is material, it is power, it is impersonal and unqualified by considerations of sentiment or morality. Relations of work, centering on money, are of a temporary, transitory sort. They are contingent, depending entirely on the specific goal—money. . . .

. . . [T]he opposition between money and love is not simply that money is material and love is not. Money is material, but love is *spiritual*. The spiritual quality of love is closely linked with the fact that in love it is personal considerations which are the crucial ones. Personal considerations are a question of who it is, not of how well they perform their task or how efficient they are. Love is a relationship between persons. Morality and sentiment in turn are the essence of the spiritual quality of love, for they transcend small and petty considerations of private gain or advantage or mere gratification.

*Id.* at 48-49.

32. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

33. See, e.g., KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991). Weston argues firmly that families by choice should not be imagined in absolute opposition to traditional families. Rather, she claims, families by choice "undercut procreation's status as a default term imagined to provide the template for all possible kinship relations." *Id.* at 213.

This Article also refers to families-through-choice as "modern" families.

*B. The Centrality of Children to the Ideology of Family*

Children were central to the myth of family that developed during the nineteenth century and flowered in the first half of the twentieth century. In the myth, the family associated itself with tradition—understood as inherently decent and proper—through increasingly romanticized conceptions of childhood and children. Ironically, however, images of childhood, connected to good, old-fashioned traditional family life, are products of the modern, not the ancient, world.

The view of children and childhood as a distinct stage of life between infancy and maturity seems itself to have developed as a historic product of the sixteenth and seventeenth centuries.<sup>34</sup> Medieval families lacked a coherent notion of childhood beyond infancy.<sup>35</sup> Soon after weaning, at about age seven, children entered the adult world of work, dress, and play. The development of the notion of childhood beyond infancy as a special stage in human development, during which young people require specific forms of socialization and education, permitted the emergence during the nineteenth century of families understood as moral units. These moral units focused on bonds of responsibility that connected parents to their children.<sup>36</sup>

Even in the history of the United States, children were not always valued, and the idea of childhood was not always central to conceptions of family life. In colonial America, children seem to have been loved<sup>37</sup> but were not valued as “unique individuals” and did not form an essential part of their

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34. ARIES, *supra* note 18, at 15-25.

35. See generally *id.* (describing the development of the modern notion of childhood during the sixteenth and seventeenth centuries).

36. *Id.* at 411-15. Aries described the conception of childhood that began to develop after the demise of feudalism as having allowed society to view families as having “a moral and spiritual function” right at their core. *Id.* at 412.

37. The English preacher, Benjamin Wadsworth, admonished parents to love and provide for their children and to “restrain, reprove, correct them, as there is occasion.” Benjamin Wadsworth, *The Well-Ordered Family* (1719), reprinted in part in 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 34-36 (Robert H. Bremner ed., 1970). Wadsworth wrote:

A Christian householder should rule well his own house. . . . Children should not be left to themselves, to loose end, to do as they please; but should be under tutors and governors, *not being fit to govern* themselves. . . . Children being bid to obey their parents in all things . . . plainly implies that parents should give suitable precepts to, and maintain a wise government over their children; so carry it, as their children may both fear and love them.

*Id.* at 35.

parents' identity.<sup>38</sup> Young children were routinely hired out as servants,<sup>39</sup> and many children came to America forcibly as indentured servants.<sup>40</sup> This pattern survived even into the nineteenth century, when parents were still able to indenture<sup>41</sup> their children through contractual arrangements that gave no rights to the indentured children and only contractually delineated rights to the parents. Today such arrangements would be invalid as violating a public policy of protecting children and their families.<sup>42</sup>

Somewhere between the colonial period and the end of the nineteenth century, dramatically altered views of children were cemented in the law and in larger society.<sup>43</sup> As Ann Mason has suggested: "The colonial view of children as helping hands in a labor-scarce economy gave way [by the mid-to late-nineteenth century] to a romantic, emotional view of children."<sup>44</sup> Subsequently, that view became almost unassailable.

So, around the notions of children and childhood, nineteenth century society erected a nostalgia for a familial world in which choice was only incidental and in which hierarchy, valued as a reflection of nature itself, was

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38. STEPHANIE COONTZ, *THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES 1600-1900* 87 (1988).

39. *Id.*

40. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1-2* (1994). In the mid-seventeenth century, the English Privy Council gave permission to the Virginia Company to force children onto ships headed for the colonies. *Id.* at 1.

And if any of [the children] shall be found obstinate to resist or otherwise to disobey such directions as shall be given in this behalf, we do likewise hereby authorize such as shall have the charge of this service to imprison, punish, and dispose any of those children . . . and so to ship them out for Virginia with as much expedition as may stand with conveniency.

*Id.* at 2 (quoting *Act of the Privy Council of England, 1619-1621* (London, 1930), cited in 2 *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 8 (Robert H. Bremner ed., 1970)).

41. I am grateful to Professor Katherine Stone for calling my attention to the importance of indenture agreements involving children.

42. The comparison between such contracts and surrogacy contracts is obvious, although the differences are equally clear. Much of the opposition to surrogacy stems from the sense that it resembles contracts-of-indenture (or even slavery). See, e.g., Nancy W. Machinton, Comment, *Surrogate Motherhood: Boon or Baby Selling—The Unresolved Question*, 71 MARQ. L. REV. 115, 126 (1987).

43. In 1869, a New York court invalidated a contract by which a mother had indentured her nine-year old daughter on the grounds that "[t]he laws of nature have given her an attachment for her infant offspring which no relative will be likely to possess in an equal degree." *People v. Gates*, 57 Barb. 291, 298 (N.Y. App. Div. 1869) (quoting *People v. Mercein*, 8 Paige Ch. 47, 70 (N.Y. 1839)); see also MASON, *supra* note 40, at 49-50 (discussing *People v. Gates*).

44. MASON, *supra* note 40, at 50.

central.<sup>45</sup> Ironically, of course, children held only a minor place in the world to which the nineteenth century looked back with nostalgia.

By the middle of the twentieth century, the notion of family in American society centered definitively around children. Newly married couples were referred to as “not yet family,” and children, once understood primarily as obligations until they reached their productive years, had become “treasures”—at least to middle-class parents.<sup>46</sup> As adults became freer to design the terms of their relationships, children increasingly cemented families together, in conception, if not in fact. Even into the second half of the twentieth century, as the law increasingly sanctioned changes in the actual structure and pattern of family life, the law continued to define images of children as special and unchanging, and to depend on those images in regulating family matters.

Twentieth century psychological literature accurately reflects the view of childhood and child-centered families that flowered in the early twentieth century. Neil Postman, describing a wide group of twentieth-century psychologists, including Jean Piaget, Harry Stack Sullivan, Karen Horney, Jerome Bruner, and Lawrence Kohlberg, attributes a consistent view of childhood to them all. Postman writes:

No one [of these psychological theorists] has disputed that children are different from adults. No one has disputed that children must *achieve* adulthood. No one has disputed that the responsibility for the growth of children lies with adults. In fact, no one has disputed that there is a sense in which adults are at their best, their most civilized, when tending to the nurture of children. For we must remember that the modern paradigm of childhood is also the modern paradigm of adulthood.<sup>47</sup>

Postman provides this description while asserting that the view of childhood assumed by psychologists is disappearing.<sup>48</sup> However that may be, people continue, as Postman easily acknowledges, to hold images of childhood dear.<sup>49</sup>

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45. Generally today, though not always, this nostalgia minimizes the hierarchical components of traditional family life.

46. MASON, *supra* note 40, at 50.

47. NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 63 (1982).

48. Neil Postman argues that the notion of childhood that probably developed in the sixteenth and seventeenth centuries, and that he connects to the invention of the printing press, is threatened by, and will in all likelihood not survive, the development and widespread use of electronic media (including, in particular, television). *Id.* at 20-36, 120-42.

49. Neil Postman argues convincingly that the notion of childhood may be disappearing from the modern world. *Id.* Postman notes that just now, when in his view childhood as a notion is

### C. *The Response of the Law to Changing Images of Families and Children*

Images of children and of the value of childhood play an essential role in the law's treatment and definition of families and have done so for over a century. A deep nostalgia for a world that protected children continues to be reflected in the decisions of courts reenforcing, or more self-consciously advocating, the development of non-traditional family structures.<sup>50</sup>

In the nineteenth century and the first decades of the twentieth century, American law widely and expressly opposed the shifts that were transforming family life. In fact, the development of family law as a discrete area of American civil law was encouraged by an interest in stemming social changes that were profoundly altering patterns of domestic life. So, beginning in the mid-nineteenth century, the law reacted against changes affecting the American family by imposing harsh new definitions and prohibitions. For instance, acknowledging and responding to the rise in divorce by the late-nineteenth century, state legislatures widely reduced the grounds and toughened the procedures through which people could divorce.<sup>51</sup> For similar reasons, states widely restricted the availability of contraception and forbade abortion for the first time.<sup>52</sup>

Thus, for many decades, legislatures, and the courts to a lesser extent, failed to endorse the new realities of social and domestic life.<sup>53</sup> Ultimately, however, the legal restrictions failed to contain the processes of change. For example, despite the promulgation of laws that prohibited contraception and

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disappearing, childhood has become a popular subject for historical analysis. He explains the apparent oddness of that fact:

As if to confirm Marshall McLuhan's observation that when a social artifact becomes obsolete, it is turned into an object of nostalgia and contemplation, historians and social critics have produced, with the past two decades, scores of major works on childhood's history, whereas very few were written between say, 1800 and 1960. . . . Historians usually come not to praise but to bury.

*Id.* at 5 (footnote omitted).

50. See *infra* notes 258-66 and accompanying text (discussing use of best interest standard by court validating surrogacy contract); see also Dolgin, *supra* note 19, at 535-45.

51. MINTZ & KELLOGG, *supra* note 25, at 109.

52. ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* 66-70 (1992). In 1873, the U.S. Congress passed a bill called the Comstock Law (after New York's "purity campaigner," Anthony Comstock) that punished the transmission or importation of materials that provided information about conception or abortion with up to ten years at hard labor and/or a \$5,000 fine. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 176-77 (1985). Abortion was made a statutory crime in the United States about fifty years earlier. But the early anti-abortion statutes generally preserved the common law rule that tolerated termination of a pregnancy before "quickening" (the mother's first recognition of fetal movement). *Id.* at 160.

53. Courts were often reluctant to enforce the stringent new statutory laws in particular cases. MINTZ & KELLOGG, *supra* note 25, at 109.



abortion, family size continued to decline;<sup>54</sup> husbands and wives noted the new, strict laws that expressly prohibited contraception and abortion, and opposed those laws through "silent practice."<sup>55</sup>

Eventually, the law relented, and by the second half of the twentieth century, the law began to tolerate, and then actively endorse, changes in the family.<sup>56</sup> By this time, more than half of American marriages ended in divorce, and approximately only one-third of families consisted of two parents and their minor children.<sup>57</sup>

Indeed, once state legislatures began expressly to recognize and to provide for comparatively easy divorce, every state reacted quickly and with minimal hesitation to amend its divorce laws in the same direction.<sup>58</sup> Other changes in the 1970s reflect a similar acceptance by the law of negotiation and choice in family matters, at least insofar as adults are concerned. For example, courts began to accept cohabitation contracts<sup>59</sup> and began to enforce ante-nuptial agreements in contemplation of divorce.<sup>60</sup>

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54. Divorce rates continued to rise and birthrates to fall. *Id.* at 109-10.

55. *Id.* at 170.

56. A similar social controversy about shifts in the family that favor increased individuality and choice is reflected in the contemporary debate about the proper form for, and ultimate fate of, the family. Thus, for instance, same-sex relationships have been approved by a number of municipal ordinances providing for the registration of domestic partnerships regardless of a couple's gender. Similarly, the Supreme Court of Hawaii declared Hawaii's marriage statute to be presumptively unconstitutional for limiting marriage to opposite-gender couples. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). However, reactions against these changes have been forceful. *See, e.g., Bottoms v. Bottoms*, No. 94-1166, 1995 LEXIS 43 (Va. Apr. 21, 1995) (deciding child's best interests served by award of custody to grandmother rather than to lesbian mother).

57. Elaine Tyler May, *Myths and Realities of the American Family*, in 5 A HISTORY OF PRIVATE LIFE 583 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer trans., 1991).

58. In the United States, California became the first state to eliminate fault grounds for divorce in 1969. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 67 (1987). In 1985, when South Dakota adopted mixed grounds for divorce, no state failed to provide for some sort of no-fault divorce. *Id.* at 69. Many states combined the new no-fault grounds with the traditional rule that predicated divorce upon the faulted conduct of one spouse. *Id.* at 69, 78.

59. *See, e.g., Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (enforcing nonmeretricious contracts between unmarried cohabitants); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (sustaining express contract between unmarried cohabitants).

60. Such agreements, when entered in contemplation of divorce, were unenforceable on the grounds that they violated a public policy that favored marriage. In 1970, Florida recognized such a contract. *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970). The court in *Posner* took judicial notice of the increase in the number of divorces as compared to marriages in the society. *Id.* at 384; *see also Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981).

During the same period, the United States Supreme Court decided that some laws restricting contraception and abortion were unconstitutional.<sup>61</sup> These decisions definitively unraveled the harsh, earlier responses of state legislatures to the changes that had begun to alter the family during the nineteenth century. More importantly, however, the Supreme Court, in declaring prohibitions on contraception and abortion unconstitutional, appropriated a new vision of family that replaced the notion of family autonomy with the notion of individual autonomy.<sup>62</sup>

The Court was explicit. In *Eisenstadt v. Baird*,<sup>63</sup> for instance, the Court considered and declared unconstitutional a Massachusetts statute that prohibited the distribution of contraceptives to unmarried adults. The Court explicitly disclaimed a view of family as anything other than a collection of separate, autonomous individuals:

[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 fundamentally affecting a person as the decision whether to bear or beget a child.<sup>64</sup>

Thus, increasingly with regard to adults, the law has endorsed, and now reflects widely, the changes that redefined family relationships as founded in individual choice and negotiation rather than as anchored on higher natural, or supernatural, truths.

With regard to children, however, the law is even now reluctant to abandon the notion that children occupy a special status within the universe of the family and within society more generally. To a significant extent, the law still views childhood as a status imposing limits not imposed on autonomous individuals and demanding protection not provided to adults within families. Thus, with regard to children, and children's relations to their parents, the law continues to endorse traditional views more firmly than elsewhere.<sup>65</sup> More importantly, images of children are invoked to support

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61. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (granting women limited right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (declaring unconstitutional Massachusetts statute that prohibited dissemination of birth control to unmarried adults); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating Connecticut birth control statute).

62. See Dolgin, *supra* note 2.

63. 405 U.S. 438 (1972).

64. *Id.* at 453.

65. Despite the law's continued understanding of childhood as a special status with important moral and legal implications, the law also has accepted an alternative vision of childhood within the

virtually every contemporary position about family. Every variety of family can be, and has been, both praised and condemned through references to its effects on children.

### III. CONTRADICTORY SOCIAL IMPULSES: THE EXAMPLE OF THE BEST-INTEREST STANDARD

The law's apparent concern with the welfare of children has been pervasively institutionalized in the United States during the past century in the form of the best-interest standard. That standard is widely applied to resolve disputes involving the custody, and to some extent the parentage, of children. That the interests of children should be considered in determining parentage and custody was almost unimaginable before the nineteenth century.<sup>66</sup>

When courts began to examine children's interests in deciding their fate, society already had adopted, and was fast elaborating, a view of family that centered around children and notions of childhood. The legal recognition of children developed along with, and as a part of, the widespread changes in social images of family that were elaborated during the Industrial Revolution. This process is reflected in the law's response to a number of matters involving children, including child abuse and neglect, foster parentage, the termination of parental rights, and custody decisions in cases of parental divorce. The last matter reflects with particular clarity the law's changing responses to children's interests.<sup>67</sup>

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past few decades. On the one hand, the law, reflecting the larger society, seeks to preserve an image of the family that places children and the parent-child bond directly at the family's center, as an inexorable connection that guarantees enduring commitment. From this perspective, the law understands its treatment of children to flow inevitably from the fact that children live in families, and are central to the very meaning of family. On the other hand, the law, also reflecting the larger society, has begun in the past several decades to view children as autonomous actors whose rights and obligations do not invariably depend on their status as children within families. See *In re Gregory Kingsley*, No. JU90-5245, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *rev'd*, 623 So.2d 780 (Fla. Dist. Ct. App. 1993). In *Gregory Kingsley*, the trial court gave a minor standing to begin proceedings to terminate his mother's parental rights. The appeals court denied this right to a minor.

66. See *infra* notes 71-84 and accompanying text.

67. Parallel explorations of the complicated and contradictory uses that the law makes of the best-interest standard in other contexts, although beyond the scope of this Article, could provide a useful elaboration of the conclusions reached here.

*A. Custody Decisions Before the Best-Interest Standard*

Custody disputes arise in a variety of contexts including divorce, the death of a child's parents, and a determination by the state that parents have failed to fulfill minimally their parental role. In all of these contexts, today, the state is compelled to consider the best interests of the children involved in deciding what action to take. However, as often as not, those interests are in fact ignored or displaced by other interests, generally by the interests of the adults involved.

Today, most custody disputes originate in divorce.<sup>68</sup> Divorce was rare before the nineteenth century,<sup>69</sup> but when it did occur, the law had to determine custody for the children involved.<sup>70</sup> In doing so, English common law virtually ignored the "welfare" of children. This was not a self-conscious attempt to subvert the interests of children. No inquiries into children's interests were considered and then rejected. Rather, almost no one imagined that a child's interests could be relevant to determinations of custody. In the colonial period, children were generally not even mentioned in divorce petitions, and when they were, it was not to invoke the children's interests but to indicate that the marriage of their parents was longstanding.<sup>71</sup>

Traditionally, the common law, reflecting Roman law, viewed children as belonging to their fathers who had a moral, but not a legal, obligation to support their children. A father, in this view, had "the perfect legal right . . . to the possession and control of his child."<sup>72</sup> Thus, the father almost invariably gained custody, even in cases in which the child's welfare would obviously be ill-served by paternal custody. In *Rex v. De Manneville*,<sup>73</sup> often noted to show the tenacity of that rule,<sup>74</sup> an English court gave custody of a nursing baby to its father in spite of the uncontested claim by the mother that her separation from the father was caused by his extreme cruelty.<sup>75</sup>

By the mid-nineteenth century, changes in the law's treatment and understanding of children began to appear in England. At this time, mothers

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68. MASON, *supra* note 40, at 121.

69. See MINTZ & KELLOGG, *supra* note 25, at 108.

70. Today, the best-interests standard is applied in custody cases occasioned by divorce as well as in cases involving parental abuse or neglect. This article focuses on the development and use of the standard in the divorce context. However, a similar analysis could be provided with regard to the consideration of children's best interests in cases that involve abuse or neglect.

71. MASON, *supra* note 40, at 16.

72. *In re Kottman*, 20 S.C.L. (2 Hill) 363, 364 (1834).

73. 5 East. 221, 102 Eng. Rep. 1054 (K.B. 1804).

74. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 492 (2d ed. 1991).

75. 102 Eng. Rep. at 1054.

were given a statutory right to seek custody of young children.<sup>76</sup> Similarly, at the same time in the United States, courts began to question rigid adherence to a rule that virtually always granted custody to fathers.<sup>77</sup> Although fathers' custodial rights generally remained paramount in American courts during the nineteenth century, such rights were increasingly predicated on a father's obligation, both moral and legal, to support and educate his children.<sup>78</sup> Although many American courts preferred fathers in custody cases as late as the early twentieth century, the courts' findings were changing. Preference for fathers was no longer automatic. Rather, the courts began to limit their preference for fathers as a result of the courts' attention to the welfare of the children involved. By this time, courts in the United States were willing to grant custody to mothers in cases in which the father had been proven unfit.<sup>79</sup>

As early as the middle of the nineteenth century, some courts in the United States began to embrace the welfare of the child as the crucial principle in determining a child's custody. Even before the Civil War, a few American courts focused on the interests of children involved in custody disputes rather than on the rights of the disputing adults.<sup>80</sup> In 1840, a New York court, granting custody to a divorcing mother with a two-year-old child, stated clearly that "[t]he interest of the infant is deemed paramount to the claims of both parents."<sup>81</sup> Further, the court explained that the interest of the child lay with maternal, rather than paternal, custody because "the law of nature" attached mothers, more strongly than fathers, to their young children.<sup>82</sup> Thus, the court, although justifying its decision by reference to natural truth, suggested that natural truth was itself fungible—or at least

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76. Infants Custody Act, 1873, 36 & 37 Vict., ch. 12.

77. See Lewis Hochheimer, *The Law in its Relation to the Child*, 67 CENT. L.J. 395, 395 (1908).

78. Note, *Reciprocity of Rights and Duties Between Parent and Child*, 42 HARV. L. REV. 112, 113 (1928).

79. Comment, *Custody and Control of Children*, 5 FORDHAM L. REV. 460, 462 (1936) (citing *Schnuck v. Schnuck*, 173 S.W. 347 (Ky. 1915); *Jones v. Jones*, 91 S.E. 960 (N.C. 1917); *Regenvetter v. Regenvetter*, 213 P. 917 (Wash. 1923); *In re Knoll Guardianship*, 167 N.W. 744 (Wis. 1918)).

80. See, e.g., *Foster v. Alston*, 7 Miss. (6 Howard) 406 (1842); *Lindsey v. Lindsey*, 14 Ga. 657 (1853).

81. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 102 (N.Y. 1840). Two years later, the father obtained custody. The child, whose earlier physical frailty had convinced the court to place custody with the mother, was now healthy and was thus given to the father whose claims, all else being equal, were still considered "superior to those of the mother." *People ex rel. Barry v. Mercein*, 3 Hill 399, 422 (N.Y. Sup. Ct. 1842).

82. *Mercein*, 25 Wend. at 106.

debatable. After all, other courts had long assumed that custody belonged to fathers as a matter of natural—or supernatural—truth.<sup>83</sup>

### *B. The Institutionalization of the Best-Interest Standard*

By the second half of the nineteenth century, the old rules for resolving family disputes, including those relevant to the determination of custody in cases of parental divorce or separation, were clearly being challenged by new, and not yet fully developed, understandings of family. New rules appeared as old assumptions about familial relationships became less secure. More frequently in this context, courts deciding custody matters appeared to ignore the interests and rights, both natural and historic, of mothers and fathers and to invoke instead the welfare of the children involved. This new standard provided remarkable flexibility to a legal system uncertain about what sorts of families and what kinds of parents the social order endorsed or would soon endorse.

#### 1. Changing Presumptions

The best-interest standard's apparent focus on the welfare of children seemed to provide a moral frame within which to determine custody. However, the changing set of presumptions through which the standard has been applied to actual children suggests that that moral frame was not itself anchored to a larger moral order.

For example, at first, the new standard was used to prefer divorcing mothers to fathers as their children's custodians. That preference was a product of broader changes in images of the family that were, in large part, romanticized adaptations of disconcerting aspects of the nineteenth century marketplace. As men left home each day to work in the marketplace, the task of socializing and educating children was transferred from fathers to mothers.<sup>84</sup> As a consequence, a reaffirming cult of motherhood developed.<sup>85</sup>

At the same time, the economic value that children had brought to rural families diminished, thereby eliminating at least one incentive for fathers to seek custody. Courts justified the new preference for maternal custody

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83. In *Blisset's Case*, decided in 1774 and generally cited as the first in which the best interests of a child proved determinative, Lord Mansfield gave custody of a six-year-old child to the mother because the father had abused both the child and the mother. However, Lord Mansfield understood the father's right to the child as "natural."

84. MASON, *supra* note 40, at 51.

85. *Id.* at 50-54.

through reference to the presumption that mothers make better parents, especially to young children.<sup>86</sup> That presumption, so obviously a product of recent social history, was invoked, like earlier presumptions about the inevitability of paternal custody, as an obvious truth. This truth, unlike those of earlier decades, however, followed from at least relatively self-conscious interpretations rather than from unmediated assumptions about the natural processes through which families come to be.

The best-interest standard, initially linked with, and used in support of, a new reverence for motherhood in the nineteenth century, soon widened to support other interests and other understandings of family and its relationships. In subsequent decades, judicial reliance on this best-interest standard resulted in different courts reaching entirely different conclusions about children's best interests. And these divergent interpretations were presented and justified by almost every court as products of objective reasoning rather than as the subjective choices that they were.<sup>87</sup>

Courts relying on the best-interest standard to determine custody disputes<sup>88</sup> have depended in the past one hundred years upon a wide and shifting set of presumptions about families and how they should operate. Among the presumptions associated with, and actualized through, reliance on the best-interest standard are the following: a presumption favoring paternal custody for boys, especially for older boys; a presumption favoring a parent to whom a child seemed most strongly attached in the view of psychiatric experts; and a presumption favoring a parent chosen by a child deemed old enough to exercise "reasonable discretion."<sup>89</sup>

Recently, commentators,<sup>90</sup> courts,<sup>91</sup> and legislatures<sup>92</sup> have presumed that shared custody arrangements ("joint custody") best serve the interests of a

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86. See Comment, *supra* note 79. During the course of the subsequent century and a half, many additional presumptions about children and their best interests informed courts making custody determinations in the name of children and their interests.

87. See Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 56 (1994) (asserting that in determining children's best interests, "[p]sychological evidence appears to courts as objective and unassailable, vastly simplifying courts' Solomonic custody decisions and permitting reliance on a class of seemingly disinterested experts") (footnote omitted).

88. Assumptions about children's best interests, as they began to emerge in the nineteenth century, are delineated and described in Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1072-74 (1979).

89. *Id.* at 1074.

90. See, e.g., Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985).

91. See, e.g., *Taylor v. Taylor*, 508 A.2d 964 (Md. 1986); *Beck v. Beck*, 432 A.2d 63 (N.J. 1981).

divorcing couple's children. Others, however, have criticized joint custody and have suggested that the arrangement may serve the interests of certain parents but fails in general to provide for the children's best interests.<sup>93</sup> Thus, this presumption, even more expressly than most of those that preceded it in the name of children's best interests, has been supported and elaborated exclusively on the basis of competing sociological and psychological theories, the subjectivity of which has become increasingly clear. At present, even the pretense that consequent custody decisions reflect unchanging truth has evaporated.<sup>94</sup>

Other courts have relied on the best-interest standard to effect more implicit presumptions, reflecting particular judges' visions of what families are and what they should be.<sup>95</sup> Clearly, the standard does not suggest these shifting, even opposing, conclusions about the welfare of children whose parents divorce. The wide variety of presumptions and preferences on behalf of which the best-interest standard has been invoked suggest a broader truth. Application of the standard does not, and probably cannot, serve the best interests of children in custody cases, because particular custody decisions under the best-interest standard depend on the insight and wisdom, and thus the world-view, of individual judges. As a result, widespread disagreements about how to imagine and apply the standard are inevitable.

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92. See, e.g., CAL. CIV. CODE, § 4600.5 (West 1983); N.Y. DOM. REL. LAW § 240 (McKinney 1986).

93. See, e.g., Joanne Shulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538 (1982); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 116-17.

94. See Fitzgerald, *supra* note 87, at 57.

95. In *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), the Supreme Court of Iowa granted custody of a young boy to his maternal grandparents (the Bannisters) rather than his father (Harold Painter). The child's mother and sister had been killed in an automobile accident, and at that time, the father had asked his deceased wife's parents to care for the child. *Id.* at 153. A year later and newly remarried, the father asked for his child back. *Id.* The grandparents refused to give up their grandson. *Id.* The court based its decision on a comparison of the two households. *Id.* at 154-56. The court compared the "dependable, conventional, middle-class, middlewest background" of the grandparents with the "more exciting and challenging" but "impractical and unstable" home of the father and determined that, on the basis of this comparison, the "best interest" of the child would be served by grandparental custody. *Id.* at 155-56, 158.

More recently, a Virginia court took custody of a young boy from a mother who lived in an openly lesbian relationship and gave custody to the child's grandmother. *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). The court found the mother an "unfit custodian at this time" because of "the moral climate in which the child is to be raised," among other things. *Id.* at 107.



## 2. Preferring Adults to Children

A wider irony is evident in judicial applications of the best-interest standard. In theory, at least, the standard demands that some vision of children and their interests stand at the heart of every custody decision. In fact, many—perhaps most—courts that have relied on this standard have made the interests of children secondary to those of the adults seeking custody. The standard's remarkable flexibility has allowed courts to place the interests of contending adults above those of children while masking that preference by proclaiming, in the very application of the standard, that the law is guided by the children's interests.

In some part, any effort to decide which of two or more competing adult custodians will best serve a child's interests demands that attention be given to the lives and beliefs of the adults. However, the need in actual decisions to focus on and compare, at least preliminarily, the conduct and situation of potential custodians often becomes a judicial preference for one or the other which seems to encompass, but effectively erodes, the children's interests.<sup>96</sup>

One recent commentator described judicial applications of the standard to involve "balancing the positive and negative characteristics of one party against those of all opposing parties and placing the child with the party best able to serve the child's needs."<sup>97</sup> Although judicial attention to the conduct of adults seeking custody is almost always essential to the process of evaluating the child's available options, conclusions about the moral, psychological, or social traits of adults can easily become conclusions about custody rather than information that a court uses to discern a child's best interests. As a result, courts, not always fully conscious of the implications of their own procedures, frequently substitute the interests of the adults involved for those of the children.

The best interests of a child can be subverted by a judge who simply fails to understand the complicated personalities and relationships involved in a custody case, as well as by a judge who assumes, without analysis, that middle-class, comparatively mainstream custodians will better serve a child's interests than poorer or more socially marginal custodians.<sup>98</sup> Thus, the

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96. See Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213 (1991) [hereinafter *Parental Alcohol and "Crack" Abuse*] (analyzing the tendency for courts and legislatures to focus on interests of parents rather than of children in regulating and effecting custody and parentage determinations).

97. Julie A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*, 59 MO. L. REV. 775, 775 (1994).

98. Courts, for instance, continue to make custody decisions on the basis of a custodian's gender orientation. See, e.g., *Bottoms*, 457 S.E.2d at 102 (granting custody to grandmother rather than mother on grounds that the child's best interests would not be served by residence with lesbian

interests of the adults may supersede those of children in custody cases through unarticulated, even unintentional, shifts in a judge's focus and concern.<sup>99</sup>

Moreover, once courts mistake the identification of parental misconduct for a more comprehensive analysis of a child's best interests, the misperception can become widespread and can even become institutionalized.<sup>100</sup> When this occurs, courts focusing on parental misconduct assume, often expressly, that single parental behaviors, particularly behaviors viewed as socially marginal, are significant enough to determine a child's interests regardless of any other factors that may characterize the familial situation and the parent-child relationship, and regardless of the options available for the child.<sup>101</sup>

The interests of children in custody cases are sometimes displaced by the interests of adults on more express grounds. In certain cases, the rights of parents predominate, as a matter of constitutional law,<sup>102</sup> over the best interests of children. Professor Wendy Fitzgerald has asserted that "[w]here the parents wield a well-recognized constitutional right, such as the general right to custody or right to freedom from racial discrimination, the statutory 'best interests' mandate for the child is doomed."<sup>103</sup>

That best-interest standard, developed during a century that identified children as the center of family life, encourages courts to focus on, select among, and then affect the interests of adult parties. At the same time, the replacement of children's interests with those of adults is disguised, or negated morally, by the name and apparent goal of that same standard.

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mother). See also Fitzgerald, *supra* note 87, at 57 (analyzing *Kelly v. Kelly*, 524 A.2d 1330 (N.J. Super. Ct. Ch. Div. 1986), in which case the New Jersey trial court based custody determination on preference of secularism over mother's strict Catholicism).

99. Other consequences follow. Once courts focus on parental behavior rather than on the consequences of that behavior for children, parental behaviors that deviate from mainstream images of proper parenting become more likely to result in a loss of custody. Thus for instance, courts have made custody decisions on the basis of one parent's religious views, *see, e.g.*, Donald L. Beschle, *God Bless the Child? The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383 (1989), or sexual orientation, *see, e.g.*, Cox, *supra* note 97, at 786, and have assumed, rather than explored, the effects of the parent's views or behavior for the children involved.

100. See *Parental Alcohol and "Crack" Abuse*, *supra* note 96 (describing institutionalization of focus on parental misconduct).

101. *Id.* at 1235-54.

102. See, *e.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984) (overturning a state court decision that granted custody of child to father because mother had re-married to a man of different race).

103. Fitzgerald, *supra* note 87, at 61.

*C. Flexibility and Illusion: The Survival of the Best-Interest Standard*

At best, a standard that asks courts to focus on children's interests in determining their custodial arrangement provides little concrete guidance to courts. At worst, the standard is hopelessly vague. Moreover, although the standard is expressly geared to focus on and protect children and their welfare, the standard often focuses on and serves the parents and potential custodians. Why then has such a standard not only endured but flourished?

In fact, the best-interest standard has been invaluable to the evolution of family law in the past century for reasons essentially unrelated to children and ultimately far more essential to adult society than to children and their welfare. First, the standard has provided an illusion of sanity and stability in a society undergoing rapid, almost chaotic, change. In this regard, the standard's most apparent limitation (its failure to provide concrete guidance) has also been its most consistent advantage (its flexibility). More basic and more important, the standard consistently has been successful in suggesting, at least momentarily, that the families it helped construct were more moral and more decent than apparent alternatives *because* moral, decent families and the best-interest standard are presumed to place children at the center.

### 1. The Flexibility of the Best-Interest Standard

Clearly, a standard that asks courts to effect a child's best interests cannot offer either uniform or precise guidance. Even statutory formulations are inevitably open-ended.<sup>104</sup> As a result, judicial applications are highly

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104. An example is provided by the statutory definition of a child's best interests currently in effect in Minnesota. In that state a child's best interests is defined to mean:

... all relevant factors to be considered and evaluated by the court including:

1. the wishes of the child's parent or parents as to custody;
2. the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
3. the child's primary caretaker;
4. the intimacy of the relationship between each parent and the child;
5. the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
6. the child's adjustment to his home, school, and community;
7. the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
8. the permanence, as a family unit, of the existing or proposed custodial home;
9. the mental and physical health of all individuals involved;

subjective.<sup>105</sup> Yet, the factors on the basis of which the standard is routinely criticized indicate the standard's usefulness. The standard, because astonishingly flexible, can further a judicial preference for almost any sort of family and, within the perceived limits of social and cultural acceptability, can justify almost any judicial decision. This flexibility has been invaluable to a legal system constantly adjusting itself to altered visions of the family and, at the same time, anxious to assure itself and the society within which it operates that it fosters stability, continuity, and decency.

The best-interest standard tolerates, and can be harmonized with, almost any theory of childhood and familial connection that refrains from denying expressly the importance of children to families. The consequent ability of the principle to champion almost any sort of choice regarding children's custody explains the endurance of the best-interest standard as the central tenet of American custody law during a century that has witnessed vast changes in the form and meaning of family. The standard's perseverance has depended largely on its ability to reflect indiscriminately, and then to justify, an almost unending series of different, even contradictory, views about children and their welfare.

By relying consistently on one central principle in making custody determinations,<sup>106</sup> the law has accommodated change, while providing the illusion of historic continuity. Precisely because the best-interest standard

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10. the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
  11. the child's cultural background;
  12. the effect on the child of the actions of an abuser, if related to domestic abuse . . .

MINN. STAT. ANN. § 518.17 (West Supp. 1991).

105. Little sociological research has carried out with regard to the actual reasons that trial judges make the custody decisions they make in light of existing precedent and statutory law. However, one study of judicial determinations of change of support obligations in the context of parental divorce found that the primary fact that correlated with the sort of support award ordered was the identity of the judge who issued the order. Kenneth R. White and R. Thomas Stone, Jr., *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75 (1976).

106. Even by statutory law or by judicial precedent, judges in all states seek the best interests of the children involved in custody disputes. HOMER J. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 19.4 (1988).

At least three-fifths of the states provide by statute that custody determinations should be based on conclusions about the best interests of the children involved. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 734 n.45 (2d ed. 1989). These statutes vary with regard to their use of presumptions and their willingness to allow considerations of parental fault as part of the best interests determination. *Id.*

lacks specificity, it can facilitate a broad spectrum of ideological and practical ends.

## 2. Nostalgia in the Service of the Old and the New

However, no other comparatively amorphous principle able to serve the ends of flexibility could have served the same end. The best-interest standard not only seemed flexible, but eminently reasonable—and even morally superior—to a society conditioned for several hundred years to understand the protection of childhood as essential to individual and social well-being.<sup>107</sup>

More particularly, the wide-scale disruptions in family life during the nineteenth century encouraged the elaboration of a nostalgia for traditional families. That nostalgia encouraged, and continues to encourage, the evidentiary use of children and their interests, both real and symbolic. Additionally, the nostalgia shows that images connected with old-fashioned, decent American families are still valued.

The invocation of children to serve the ends of nostalgia bears its own irony in that children and childhood were not valued especially in the centuries to which the nineteenth century turned back for appealing images of family models. But in large part, the strength of the nineteenth century's yearning for tradition, consistently identified with children's centrality in family life, is demonstrated by its survival (although in a weakened form)<sup>108</sup> in the face of the vast transformations in family life and family law during the past several decades.

The best-interest standard, at least as much as any principle in family law today, stands for tradition. But it serves the interests of those who, whether consciously or not, favor modernity and the creation of familial ties on the model of those between autonomous individuals. The standard can be associated with almost any positive vision of children and childhood, and can support almost any tradition or change in tradition.

Without exception, the standard presumes to serve and to protect children. It has survived for that reason. Yet, as it has been applied, the standard should convince almost no one that in relying on the standard, the law and society have, in fact, achieved the best results for children. In a society for which children and the parent-child bond have come to be

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107. See *supra* notes 34-36 and accompanying text (discussing development of notion of childhood in about sixteenth and seventeenth centuries).

108. See *infra* parts IV and V (analyzing failure of old models and images to provide frame for comprehending present changes).

understood as the surviving vestige and lasting representation of old-fashioned families, the best-interest standard has come to affirm the continuing significance of traditional families within the social order. At the same time, the standard has masked, and thus provided a certain comfort to, the departure from tradition.

Ironically, custodial determinations in divorce cases involving children affirm the continuing value of families in society while marking the dissolution of specific families; similarly, the best-interest standard is extended and preserved not so much because it serves children as because it gives the illusion of reality to society's continuing nostalgia for the way families are thought once to have been.

#### IV. VISIONS OF CHILDREN: RESPONSES TO BIOTECHNOLOGICAL CHILDREN<sup>109</sup>

A similar nostalgia, and a similar attempt to accommodate changes in the present through comparison with constructed images of a valued past, marks society's response to the new reproductive technologies. These technologies, however, present society with remarkable possibilities for manipulating practically every aspect of human reproduction and, as a result, disrupt deeply embedded expectations about the ordering of familial relationships. The effort to assimilate these changes to familiar images of family life continues, but is increasingly marked by greater contradiction and confusion.

The array of choices available to people having children and forming families has exploded within the past two decades. It is now possible to decide not only whether and when to have children, but how to conceive them and even how to design them. Reproduction can be disassociated from sexuality;<sup>110</sup> biological maternity can be separated into discrete genetic and

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109. I am grateful to Professor Larry I. Palmer of Cornell Law School for the term "biotechnological children." See Larry I. Palmer, *Who Are the Parents of Biotechnological Children?*, 35 JURIMETRICS J. 17, 19 (1994). Professor Palmer was not the first to use the term; however, his use is especially instructive because he suggests expressly the descriptive *and* ironic appeal of the term. *Id.* (describing "biotechnological children" as a "new implicit legal and social construct[ ]").

In fact, this Section concerns children produced through surrogacy arrangements as well as children produced from use of the new reproductive technologies.

110. Through *in vitro* fertilization, ova and sperm can be combined in a culture dish. See Howard W. Jones, Jr. & James P. Toner, *Current Concepts: The Infertile Couple*, 329 NEW ENG. J. MED. 1710, 1712 (1993).

gestational aspects;<sup>111</sup> the process of reproduction can be halted for extended periods by freezing gametic and embryonic material and can be resumed years and probably even decades later;<sup>112</sup> men with sperm counts that would previously have precluded biological fatherhood can now become genetic parents;<sup>113</sup> embryos and oocytes<sup>114</sup> can be tested for genetic flaws and can be discarded if found unacceptable.<sup>115</sup>

The social consequences of these technologies are equally startling. One woman can now give birth to identical twins years apart. Two different women can gestate twin fetuses that may or may not be genetically related to either of them. A woman may give birth to a baby produced from her parents' gametes (her genetic sibling) or her grandparents' gametes (her genetic aunt or uncle). Children can be conceived and born years after the deaths of their genetic parents. These are only a few of the novel possibilities for constructing familial and social relationships that are possible through reproductive technology.

#### *A. Reproductive Technology's Challenge: A New Order of Confusion*

The challenge that these technologies present to social understandings of family is of a new order. In the past century, vast changes in the terms and structure of family life were assimilated, even if sometimes fitfully, to familiar understandings of family. The history of the best-interest standard from the mid-nineteenth century into the second half of the twentieth century demonstrates that process. Now, however, the possibility, even the illusion,

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111. With gestational surrogacy, one woman gestates an embryo conceived from another woman's egg. Usually, gestational surrogacy depends on the use of *in vitro* fertilization. The gestator does not have a genetic link with the child she gestates and bears.

112. See Owen K. Davis & Zev Rosenwaks, *Assisted Reproductive Technology*, in TEXTBOOK OF REPRODUCTIVE MEDICINE 571, 583 (Bruce R. Carr & Richard E. Blackwell eds., 1993).

113. Single sperm can be injected into an ovum and result in fertilization. The procedure, called intracytoplasmic sperm injection, was developed in Belgium and was made known in the mid-1990s. See, e.g., Shari Roan, *A Singular Hope: The Injection of a Lone Sperm into an Egg Can Be a Boon for Many Infertile Couples*, L.A. TIMES, Feb. 15, 1994, at E1.

114. See Peter Gorner, *Pre-Conception Test for Down's Syndrome*, CHI. TRIB., June 21, 1995, at A4 (describing still-experimental technique for examining genetic structure of oocytes before conception).

115. Preimplantation diagnosis can be used to avoid the implantation of embryos with genetic defects. The procedure has been used to identify the sex of embryos conceived with the gametes of people whose families have sex-linked genetic disorders. Robert Winston, *Engineering Our Own Downfall*, THE TIMES (Eng.), Nov. 12, 1994; see also Jiaen Liu et al., *Birth After Preimplantation Diagnosis of the Cystic Fibrosis Delta-F508 Mutation by Polymerase Chain Reaction in Human Embryos Resulting from Intracytoplasmic Sperm Injection with Epididymal Sperm*, 272 JAMA 1858, 1858 (1994) (describing birth of healthy children despite infertility due to primarily genital form of cystic fibrosis in male parent).

of accommodating the changes presented by reproductive technology within familiar understandings of family vanish. These new changes outdistance society's ability to respond with even apparent equanimity.

Most startlingly, the social and biological dimensions of family are being challenged simultaneously.<sup>116</sup> As a result, society can no longer securely measure social changes in the operation and creation of families against comparatively unassailable assumptions about biological reproduction. Those assumptions are equally in disarray. Social and family history offer little guidance, and in consequence, the rate of change is overwhelming, and the culture's capacity to comprehend and channel these changes remains uncertain.

Not surprisingly, in the effort to make sense of such startling shifts in the family, society, as in the past, invokes familiar images of family life as it is understood to have existed before the current disruptions intervened. Central among those images are images of children. The new changes are approved and condemned in moral terms, even before they are understood, by measuring their apparent consequences for the welfare of children.

So, specifically, in public presentations, both opponents and proponents of the new reproductive technologies assess the use of those technologies against images of traditional family life and images of children within such families. Advocates and opponents of reproductive technology suggest that children and the parent-child bond represent the sacred continuing core of family life and, accordingly, praise or condemn the new technologies through reference to the consequences of reproductive technology for children.<sup>117</sup>

Underlying these varied claims lie other interests which serve adults far more than children, and which support the correlates of autonomous individuality more than those of holism and connection. But now, in marked contrast to the earlier interplay between the law's invocation of children and simultaneous focus on adult interests in applying the best-interest standard, the contradictions cannot be as easily masked or ignored. The semblance of ordered response to the changing family in earlier decades has yielded to obvious confusion. The depth of this confusion becomes quite clear when the law's responses to disputes involving reproductive technology are examined. Courts are compelled to make specific decisions in order to

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116. See Janet L. Dolgin, *The Law Debates the Family: Reproductive Transformations*, YALE J.L. & FEMINISM 37 (1995); see also Marilyn Strathern, *New Families for Old?*, in THE FAMILY IN THE AGE OF BIOTECHNOLOGY (Carole Ulanowsky ed., 1995) (analyzing with much insight possibilities that stem from simultaneous challenge posed by new reproductive technologies to social and biological dimensions of family).

117. See *infra* notes 118-24 and accompanying text.



resolve disputes. They must make those decisions quickly, without the benefits of prolonged debate. Confusion engendered by reproductive technology and society's inability to provide any broad, coherent response emerges transparently.

In society's wider debate, contradictions and confusions in social responses to reproductive technology can be more easily overlooked. The depth of the confusion is indicated in the general appeal by almost everyone considering the moral and social consequences of reproductive technology to the welfare of children. A panoply of contradictory voices responds to reproductive technology through a set of similar, and similarly nostalgic, references to the central role that children play in any decent understanding of home and family. As the social debate develops, general conclusions by society as a whole about the value that reproductive technology actually poses to children or to potential children seem more and more murky.

### *B. The Meaning of the Children*

Those favoring the development and use of reproductive technology and surrogacy<sup>118</sup> refer to the enabling capacity of this technology to create happy families for couples who would otherwise have remained childless. The children born to (or for) such couples are described as especially cared for and loved.<sup>119</sup> Proponents of reproductive technology focus on concrete images of normal, even privileged children, whose happy childhoods are attributed to their technological beginnings. The parents of such children are

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118. The use of both surrogacy and the new reproductive technologies appeared at about the same time, within the last two decades. In fact, so-called "traditional surrogacy" (as compared with gestational surrogacy) requires no sophisticated technology. It involves only artificial insemination which has been used with humans for over a century. Surrogacy, however, is often categorized and considered with the new reproductive technologies because it involves conception without sexual intercourse and, more importantly, because it disrupts social understandings of how the parent-child bond can, and should be, created.

This Article uses the term "assisted reproduction" to refer to both surrogacy and the new reproductive technologies.

119. See, e.g., Linda S. Williams, *Biology or Society? Parenthood Motivation in a Sample of Canadian Women Seeking In Vitro Fertilization*, in ISSUES IN REPRODUCTIVE TECHNOLOGY: AN ANTHOLOGY 261, 266-67 (Helen Bequaert Holmes ed., 1992) (referring to importance to childless couples of "having a family" or "starting a family"). Endless news articles about reproductive technology focus on and praise the families that technology creates. See, e.g., Carol Lawson, *Celebrated Birth Aside, Teen-Ager is Typical Now*, N.Y. TIMES, Oct. 4, 1993, at A18 (describing first child who resulted from use of *in vitro* fertilization as happy, "typical teen-ager"); Julio Laboy, *State-of-the-Art Stork*, NEWSDAY, Dec. 12, 1993, at 29 (reporting on reunion of joyful parents who received successful *in vitro* fertilization treatment at clinic in Brooklyn); Deborah Rissing Baurac, *On the Infertility Front, the Weapons are Many*, CHI. TRIB., May 3, 1992, at 1 (describing couple using *in vitro* fertilization successfully).

described as better, more caring parents because they yearned for children who were only produced after unusual expenditures of time, money, and emotional energy.<sup>120</sup>

For proponents, assisted reproduction is described as extending and magnifying, but not distorting, the joys of children and the sanctity of childhood. Assisted reproduction provides *more*—not just more children, as in the multiple births that so frequently result when reproductive technology is used, but happier, smarter, more secure children.<sup>121</sup> This focus on children, however, hardly disguises other interests at stake in the use and development of assisted reproduction—the interests of couples unable to have children without assistance, the interests of a medical fertility industry with annual profits of billions of dollars,<sup>122</sup> and, most generally, the interests of an entire society obsessed with choice.

Those opposing surrogacy reproductive technology also focus on children, and suggest that children assisted to birth by the new technologies or through surrogacy arrangements inevitably will suffer serious psychological, or even physical,<sup>123</sup> harm as a result of their beginnings. Those harms are then connected to a larger moral order. Opponents of assisted reproduction focus especially on self-identity problems such children may face.<sup>124</sup> The technology, in particular, is presented as having

120. See, e.g., Chris Mihill, *IVF couples: 'Better Parents'*, THE GUARDIAN, Jan. 10, 1994, at 8 ("Parents of test tube babies are better mothers and fathers than those of normally conceived children, and the children seem to suffer no emotional ill-effects. . . .").

121. See Peter Pallot, *Intelligence Test for the Time Warp Twins*, THE DAILY TELEGRAPH (Eng.), Jan. 2, 1993, at 3 (quoting Phil Wright, the father of children produced from cryopreserved embryos, involved in research on babies produced from such embryos who has described such children as "hardy and wanted"; "They could be especially bright and affectionate because of all the attention they get.").

122. See Diane M. Gianelli, *Fraud Scandal Closes California Fertility Clinic*, AM. MED. NEWS, June 19, 1995, at 1 (estimating that more than one million patients receive medical treatment for infertility each year and that the industry's profits are in the billions of dollars).

123. The most likely known physical harm to children produced through the use of reproductive technology results from the increased chance of multiple births to women taking fertility drugs. Terry Horne, *Couples Take the Risk to Conceive a Child*, INDIANAPOLIS NEWS, Sept. 6, 1994, at A1 (describing increased risk of prematurity with multiple fetuses); cf. Ron Winslow, *Trouble Plagues Premies Who Are Saved*, WALL ST. J., Sept. 22, 1994, at B1, (describing risks of prematurity).

124. See, e.g., *Moral Torpor Spawns Designer Babies*, THE OBSERVER (Eng.), Jan. 9, 1994, at 23 ("The confusion of personal identity that follows the use of donated eggs or sperm is not in the child's best interests."); see also *Donum Vitae: Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*, THE GIFT OF LIFE: THE PROCEEDINGS OF A NATIONAL CONFERENCE ON THE VATICAN INSTRUCTION ON REPRODUCTIVE ETHICS AND TECHNOLOGY app. at 216 (1990) [hereinafter *Vitae*] ("The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage."). The same document also asserted:

substituted for, and as thereby precluding the benefits of, familial connections for the children who result.

Again, the focus on children furthers, and disguises, other interests. Reproductive technology and surrogacy threaten the traditional order, not just with regard to the parent-child bond but with regard to almost every aspect of family life, including marriage. To accept reproductive technology, for instance, may be to accept divorce, abortion, and the sort of families within which such choices make sense. Images of children are still powerfully evocative of traditional families. Thus to the extent that reproductive technology and surrogacy are presented as harming children, these phenomena can be forcefully condemned in the name of a past that protected children and preserved their interests.

Society's developing visions of surrogacy and reproductive technology, and consequently, of the proper meaning of family, can be further delineated through exploration of concrete images of children presented in the debate about the value and fate of surrogacy and the new reproductive technologies. Further, fertility clinics depend on images of thriving children to support their work. In recent years, such clinics have attempted to gain publicity, approval, and thus presumably increased business and funding, by hosting "reunions" for children produced through reproductive technology and for those children's grateful parents.

Often, these reunions, held in parks and other public places, have welcomed the press. The stories that result<sup>125</sup> contrast miraculous conceptions and births with normal, everyday childhood behaviors. One such story, typical of the genre, reported on a "reunion," organized by a fertility clinic and held at a local park that brought together 200 children conceived through the clinic's assistance along with those children's parents.<sup>126</sup> The reunion-picnic was described as a celebration of the "medical advancement that, in the words of many, had miraculously changed

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A true and proper right to a child would be contrary to the child's dignity and nature. The child is not an object to which one has a right nor can he be considered as an object of ownership: Rather, a child is a gift, 'the supreme Gift'.... For this reason, the child has the right as already mentioned, to be the fruit of the specific act of the conjugal love of his parents; and he also has the right to be respected as a person from the moment of conception.

*Id.* at 223 (emphasis and footnote omitted).

125. See, e.g., Mary E. Hopkins, *Fertility Fanfare: In Vitro Program Celebrates Successes with Reunion*, SUAN-SENTINEL, Jan. 1, 1995, at 3; Michael Clancy & Dolores Tropiano, *Mom's the Word at Reunion with Fertility Doctor*, ARIZ. REPUBLIC, May 11, 1994, at B6.

126. Jacques Steinberg, *Gathering Shows Growing Acceptance of In Vitro Fertilization: Parents of 'Test-tube Babies' Hold Picnic to Celebrate Medical Advancement*, DALLAS MORNING NEWS, May 29, 1993, at A49.

their lives.”<sup>127</sup> The story reported: “While the children played ball, blew bubbles and hugged the life-size Disney characters who paraded through the park, many of their parents swapped war stories with one another, just as they had during similar picnics that have been held each of the past three years.”<sup>128</sup>

Certain specific children have been used to portray the value of reproductive technology.<sup>129</sup> The fifteenth and sixteenth birthdays of Louise Brown formed the focus of an array of news stories<sup>130</sup> about reproductive technology.<sup>131</sup> Louise, the first person conceived *in vitro*, was born in Oldham, England on July 25, 1978. The stories about Louise’s birth and development reflect the themes of the reunion stories. One such story began: “A miracle of technology brought Louise Brown into this world, but that was 15 years ago and now she’s just another teenager.”<sup>132</sup> Another began with a description of Louise: “In her jeans, floppy rugby shirt and overpriced running shoes, Louise Brown looks like a typical teen-ager. Her parents complain that she likes ‘loud music and stupid clothes’ and much prefers the company of friends to ‘us old codgers.’”<sup>133</sup> “But,” the story continued, “if life in the Brown household in Bristol, England, is rather routine, the world’s memory of Louise is anything but.”<sup>134</sup>

In each of these generally favorable stories about fertility clinic reunions and Louise Brown, the miracle, as reported, is supposed to be as much the unremarkable childhood of those produced through the use of reproductive technology as it is the technology itself. These stories can only proclaim that reproductive technology is impressive *because* it allows for the creation of typical, and therefore treasured, babies for their loving parents even more

127. *Id.*

128. *Id.*

129. Louise Brown is the most well-known of such children, but others have been featured in news stories as well. See, e.g., Kelly Pearce, ‘My Parents Tell Me I’m Special’: Test-Tube ‘Miracles’ Celebrate Life, ARIZ. REPUBLIC, Nov. 15, 1994, at B1 (telling story of 9-year-old gymnast, conceived through use of *in vitro* fertilization).

130. See, e.g., Sandra Ratcliffe, *Louise Brown Talks About Life Under the Microscope From Day 1*, SCOTTISH DAILY RECORD, Jan. 17, 1994, at 2/21; Paul Wells, *World’s First Test-Tube Baby—er, Teenager—Visits In-Vitro Clinic*, THE GAZETTE (Montreal), Oct. 10, 1993, at A3; Lawson, *supra* note 119, at A18; Carol Midgley, *The Bubbly Louise*, DAILY MAIL (Eng.), Mar. 27, 1993, at 3.

131. Louise Brown made the celebration of her 15th birthday a context for supporting the growth and development of infertility treatment. She agreed to have the day celebrated publicly and two months early in order to coincide with Britain’s first National Fertility Week. Midgley, *supra* note 130, at 3.

132. Wells, *supra* note 130, at A3.

133. Lawson, *supra* note 119, at A18.

134. *Id.*

certainly than traditional forms of human reproduction. Louise is described as being exactly what a teen-age girl should be *because* her technological origins ensured a propitious—and thus “normal”—childhood.

Other stories of the same sort focus less intently on children and more on the needs, frustrations, and successes or failures of parents and potential parents. These stories detail the anguish of infertile adults, especially women, who enter treatment for infertility.<sup>135</sup> One such story reported the pain that an infertile 35-year-old woman felt on occasions such as Mother’s Day, and upon seeing women with baby carriages.<sup>136</sup> After months of treatment, described in detail, the woman and her husband had a child (born after *in vitro* fertilization of thawed cryopreserved embryos). The story concludes with the woman proclaiming that “the good Lord knew He put us through such hell to have her [the baby], He figured He’d give us a perfect baby.”<sup>137</sup>

A contrasting position, that reproductive technology creates more harm than good and should be banned or strenuously regulated, can also be, and often is, justified by reference to the interests of children.<sup>138</sup> The Catholic Church, for instance, has explained its opposition to assisted reproduction by referring to the “right” of a child to be conceived only in traditional ways by a married couple.<sup>139</sup> Other opponents of assisted reproduction refer to identity confusions likely to plague babies produced from donated gametes and to the negative consequences that surrogate motherhood may have for

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135. See, e.g., Anne Rochell, *Four Bundles of Joy*, ATLANTA J. AND CONST., Apr. 25, 1995, at C3 (birth of quadruplets to couple who experienced infertility); Katherine Shaver, *Three Birthdays and an Anniversary*, ST. PETERSBURG TIMES, Mar. 4, 1995, at A1 (birth of triplets after 25 years of marriage); Ellen Lane & Liz Szabo, *Using Technology to Conceive*, GANNETT NEWS SERVICE, Aug. 18, 1992, available in WESTLAW, 1992 WL 9387463 (successful story of infertile couple); Patti Doten, *In Vitro: Testing the Limits*, BOSTON GLOBE, Nov. 26, 1991, at 25 (responses to *in vitro* treatments).

136. Cindy Loose, *A Holiday Comes to Life*, WASH. POST, May 9, 1993, at A1.

137. *Id.*

138. Feminists who oppose reproductive technology often justify that opposition through references to the physical and psychological harms that befall women as a result of being treated for infertility by the medical establishment. See, e.g., Michelle Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood*, in REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 10, 16 (Michelle Stanworth ed., 1987) (describing reproductive technology’s ability “to destroy the claim to reproduction that is the foundation of women’s identity”) (footnote omitted); Testimony of Gena Corea before the California Assembly Judiciary Committee (Apr. 5, 1988), in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 325, 326 (Larry Gostin ed., 1990) [hereinafter SURROGATE MOTHERHOOD] (condemning surrogacy as a “reproductive supermarket” that uses women as “living laboratories” and that will likely lead to an “expansion in the traffic in women internationally” to be “used as cheap breeders for white, Western men”).

139. *Vitae*, *supra* note 124, at 216.

children whose social mothers cannot develop a committed relationship to the fetus as a result of the biological processes of gestation.<sup>140</sup>

These stories suggest that, just as assisted reproduction disrupts society's understanding of family life, so it disrupts the ability of children produced through assisted reproduction to form secure personal identities. Such children are portrayed as rootless and unhappy—just as the society has been uprooted by, and should be unhappy about, the continued development and use of assisted reproduction.

One story about children produced through the use of anonymously donated semen several decades ago describes a group of angry, confused adults.<sup>141</sup> The author, acknowledging that “donor-inseminated child[ren]” who do “take up the hunt”<sup>142</sup> for their genetic fathers may be especially unhappy or the products of neglectful homes, describes adults obsessed with the need to discover their genetic fathers. One such woman, a 45-year-old legal assistant in California, broke off relations with her mother's husband (her legal father) after she learned following the death of her mother that her mother's husband was not her genetic parent. She explained her decision to drop his last name: “I couldn't spend the rest of my life writing my name as it was. It felt like a lie every time.”<sup>143</sup>

Opponents of assisted reproduction<sup>144</sup> also voice fears of broader social consequences. As a group, they fear especially the acceptance of choice, limited only by technology's own limits, in the construction of family bonds. That fear relates as directly to adults and the definition of marriage as it relates to children and the construction of the parent-child bond. The Catholic Church, in one statement on the moral status of assisted reproduction, declared expressly:

[M]arriage possesses specific goods and values in its union and in procreation which cannot be likened to those existing in lower forms of life. Such values and meanings are of the personal order and determine from the moral point of view the meaning and limits of artificial interventions on procreation and on the origin of human life.<sup>145</sup>

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140. *Moral Torpor Spawns Designer Babies*, THE OBSERVER (Eng.), Jan. 9, 1994, at 23.

141. Peggy Orenstein, *Are You My Father?*, N.Y. TIMES, June 18, 1995, § 6 (Magazine), at 28.

142. *Id.* at 31.

143. *Id.* at 50.

144. This discussion does not refer to feminist opponents of reproductive technology. See *supra* note 138.

145. *Vitae*, *supra* note 124, at 208.

Other contemporary theologians have similarly condemned assisted reproduction as morally objectionable because, in the words of one, assisted reproduction "insist[s] on free choice about human relations."<sup>146</sup>

Thus, for many, the matter of choice is more essential in assessing the consequences of assisted reproduction than is the matter of children. Yet, all invoke the children involved and proclaim the importance of the consequences of assisted reproduction for those children. The fact that advocates and opponents of assisted reproduction justify their assertions through references to children and childhood may itself suggest that those references, at least in part, serve other ends. Assisted reproduction is testing the meaning and the parameters of the family, and the debate occasioned by use of assisted reproduction is not only about the consequences for children. It broadens dramatically, yet continues, the older debate about the moral and social implications of the individualization and privatization<sup>147</sup> of family relationships—a debate that began to develop clearly in the mid-nineteenth century.<sup>148</sup> Now, as then, images of children provide the powerful focal point around which the shifting scope of family life can be understood.

Now, however, reliance on those images is becoming less and less successful in helping to shape and justify concrete social responses. This becomes obvious when examining the specific responses of the law to cases occasioned by assisted reproduction. In fact, society has turned to the law, largely by default, in seeking a stabilizing response to the confusions and disruptions presented by assisted reproduction.<sup>149</sup>

The response has come in large part from the judiciary,<sup>150</sup> often unaided by legislative direction.<sup>151</sup> As the law attempts to make sense of the

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146. Lisa Sowle Cahill, *The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation*, in *SURROGATE MOTHERHOOD*, *supra* note 138, at 151, 163 (writing specifically about surrogate motherhood arrangements).

147. See generally Singer, *supra* note 4 (discussing recent changes in family law's approach toward regulation of family relationships).

148. See *supra* notes 50-64 and accompanying text (describing and analyzing responses to shifts in American families in prior decades).

149. Other groups, such as ethicists, doctors, and philosophers have also, of course, attempted to provide direction. The law, however, has been especially important in society's effort to make sense of the families produced by reproductive technology because in the face of disputes between actual litigants, judges must, and have the authority to, respond concretely and definitively.

150. In the United States, judges, rather than legislatures, have been establishing society's response to the disruptions occasioned by reproductive technology.

151. Legislatures have slowly begun to respond to the charge. Courts, faced with actual disputes that demand resolution, have thus provided the first general response to the question of regulating reproductive technology and families formed through use of that technology. The continuing call of courts in such cases for an appropriate legislative response has become almost parodic. See, e.g., *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988) (noting absence of legislative guidance in handling traditional surrogacy case and suggesting development of such guidance could

conundrums presented by assisted reproduction, familiar legal responses seem inadequate or irrelevant. As the law responds, however, a new development in society's and the law's understanding of families and of children, so long invoked as the moral and spiritual center of family life, becomes apparent.

Images of children and of childhood are being invoked less often, less securely, and less successfully than they were in earlier cases that raised questions about custody and parentage.

## V. THE CASES: CONTRADICTORY MESSAGES ABOUT CHILDREN

Disputes over parentage or custody of children produced through reproductive technology as well as disputes about the legal status of frozen embryos illuminate starkly the pressures that encourage courts to invoke, and then ignore, children or to presume to protect the interests of children while actually doing something else.

The contradictions and confusions presented by these cases are not unique to cases occasioned by reproductive technology but are especially transparent there. Increasingly, and in a wide variety of cases certainly not limited to those involving assisted reproduction, courts, like the wider society, sanction choice and bargained negotiation in the construction of family relationships. Courts thereby increasingly substitute individuality for holism and permit the substitution of choice for reliance on notions of natural truth in envisioning the family.<sup>152</sup>

This is so in cases occasioned by reproductive technology and in other cases now facing courts that involve disputes about a host of family matters, including divorce, cohabitation, and children's "rights." In deciding these cases, courts are more and more often sanctioning choice as a central determinant of family relationships, but they are doing so only with ambivalence.<sup>153</sup> That ambivalence is often reflected in references to the continuing value of traditional family forms even in cases in which courts

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"provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology"); *Johnson v. Calvert*, No. X-63 3190, slip op. at 15-17 (Cal. App. Dep't Super. Ct. Oct. 22, 1990) (noting absence of legislative direction); *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 381 (Cal. Ct. App. 1991) (noting "urgent need for legislative action").

152. See, e.g., MITCHELL REGAN, *THE PURSUIT OF INTIMACY* (1994); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1096-1113 (1985) (analyzing judicial responses to cohabitation agreements). See *infra* notes 61-64 and accompanying text.

153. See, e.g., Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 637-40 (1993) (describing contradictory pulls of tradition and modernity on courts deciding family cases).



sanction the shift toward families formed through choice and contract. And among these references, those references to the continuing force and value of the parent-child bond remain central. However, these references, and other invocations of children and childhood, seem increasingly hollow or misplaced.

As family courts more and more often support agendas and principles that sanction the transformation of the family and of family relations on the model of the marketplace, these courts, often unwittingly, disguise that support. Invoking children, and presuming to support their interests in such cases, can disguise—or at least mitigate—the implications of the role of law in furthering the transformation of the family from a holistic, hierarchically organized unit of social life to a collection of autonomous individuals, connected only insofar as, and only as long as, they choose to be joined. However, as contradictions between images of traditional families and the reality of families being created through reproductive technology become harder to contain, even invocations of children fail to mediate between the apparent options. As a result, children become less and less central in the law's regulation of family matters.

The three cases to be considered next illustrate the complexities and contradictions that emerge as courts attempt to establish custody and parentage in cases occasioned by reproductive technology. *Davis v. Davis*<sup>154</sup> elaborates, to the point of derailing altogether, the judicial tendency in cases involving custody or parentage disputes to disguise one set of interests (those of the adults) by invoking another set of interests (those of the children). The New Jersey courts' decisions in *Baby "M,"*<sup>155</sup> a case presenting social, more than biological conundrums, show judicial reliance on the best-interest standard masking other agendas and show as well the complexities that arise from the use of that standard in cases in which familiar assumptions about the family have been disrupted. Finally, *Johnson v. Calvert*<sup>156</sup> shows the judiciary struggling to redefine old assumptions about children and parentage as it develops a vision of family that can encompass families that, in their origins at least, seem entirely unprecedented.

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154. 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. 14, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

155. *In re 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).

156. *Johnson v. Calvert*, No. X-63 3190 (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.), *cert. denied*, 114 S. Ct. 206 (1993).

A. *In the Interests of Embryos: Davis v. Davis*

Among the most vivid illustrations of the law's reliance on the best interests of children in order to effect agendas that have no real concern for children or their welfare is a case that did not involve children at all. The 1992 Tennessee case involved a dispute between a divorcing couple, Mary Sue and Junior Davis, over their respective rights to control seven frozen embryos produced from the couple's gametes.<sup>157</sup> The Tennessee Supreme Court invoked the interests of the embryos in a manner similar to other courts' invocations of the best interests of the children of divorcing couples.<sup>158</sup> In fact, however, the *Davis* courts were freed of the burden of considering the concerns, problems, and peculiarities of children because the court could imagine the embryos in any way at all—or in no way. In cases involving custody and parentage, United States courts almost universally rest their decisions on an assessment of the children's best interests. Yet, often, in these cases, the children are not well served by the decisions reached.<sup>159</sup> The same disharmony appears in *Davis*, but here—largely because actual children were not involved—the extent to which the state supreme court's reliance on the embryos' interests is a pretext emerges transparently.

*Davis v. Davis* began as a divorce action involving Mary Sue Davis and Junior Davis. While married, the Davises wanted to have children. After Mary Sue suffered a series of ectopic pregnancies, eventually resulting in the loss of her fallopian tubes, the couple began *in vitro* fertilization treatments in 1985 at a fertility clinic in Knoxville, Tennessee. That treatment involved the fertilization *in vitro* of Mary Sue's ova with Junior's sperm.<sup>160</sup> During the next few years, the *in vitro* procedure was tried several times, without success.<sup>161</sup> In 1988, the Davises' physician suggested that during the next treatment any fertilized ova not implanted at that time could be frozen for future use should Mary Sue not become pregnant during the planned treatment cycle. In December 1988, nine ova were retrieved. Two were

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157. *Davis*, 842 S.W.2d at 589.

158. The trial court in *Davis* actually defined the embryos as "human life" and therefore expressly treated them as other courts deciding custody cases handle children and their interests. *Davis*, 1989 Tenn. App. LEXIS 641, at \*30, \*34; see *infra* notes 165-72 and accompanying text (analyzing trial court decision in *Davis*).

159. See *supra* notes 80-103 and accompanying text.

160. *Davis*, 842 S.W.2d at 591-92.

161. Embryo cryopreservation involves freezing fertilized eggs. Eggs in the early stages after fertilization (often called preembryos or zygotes) can be cooled in various cryoprotectants and then stored in liquid nitrogen. Robert M. L. Winston & Alan H. Handyside, *New Challenges in Human In Vitro Fertilization*, 260 SCIENCE 932, 933 (1993). Cryopreserved embryos can be thawed through a reverse procedure that involves decreasing the concentration of cryoprotectant. *Davis & Rosenwaks*, *supra* note 112, at 583.

implanted in Mary Sue's uterus, but a pregnancy did not result. Seven were cryopreserved and stored for future use. A few months later, Junior Davis filed for divorce.<sup>162</sup>

The couple agreed about all aspects of the divorce except the fate of the seven frozen embryos. Initially, Mary Sue wanted the embryos preserved for eventual implantation in her uterus.<sup>163</sup> Junior wanted them stored, but never used.<sup>164</sup>

Three Tennessee courts heard the case. Each reached a different conclusion about the ontological status of the Davises' frozen embryos. To the trial court, the embryos were children, deserving virtually the same protection afforded other children in other custody cases. Concluding "that the seven cryopreserved embryos are human,"<sup>165</sup> Judge Young, for the trial court, determined that "the age-old common law doctrine of *parens patriae* controls these children, *in vitro*, as it has always supervised and controlled children of a marriage at live birth in domestic relations cases in Tennessee."<sup>166</sup> The court thus proceeded to analyze the embryos' best interests; since Mary Sue, but not Junior, seemed ready to "assure [the embryos'] opportunity for live birth,"<sup>167</sup> the court granted custody to her.<sup>168</sup>

The trial court, self-consciously concerned with defining the embryos as humans<sup>169</sup> and with treating the Davises' divorce as involving a run-of-the-mill custody battle,<sup>170</sup> relied on the best-interest standard to "achieve justice for the child."<sup>171</sup> Of course, the court was unable to rely on the best-interest standard because there was no actual child. Rather, the court was forced to consider the best interests of frozen embryos, and that consideration differed significantly from any consideration of a child's best interests. The court concluded that the embryos were better off in the hands of the party (Mary

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162. *Davis*, 842 S.W.2d at 592.

163. *Id.* at 589. Later, after Mary Sue remarried, she asked that the embryos be donated to an infertile couple. *Id.* at 590.

164. *Id.* at 592. At the time, indefinite storage was considered no different than destruction because it was not believed that cryopreserved embryos would remain viable for more than a couple of years. *Davis*, 1989 Tenn. App. LEXIS 641, at \*36. Later in the proceedings, Junior Davis expressly asked that the embryos be destroyed. *Davis*, 842 S.W.2d at 590.

165. *Davis*, 1989 Tenn. App. LEXIS 641, at \*13.

166. *Id.* at \*34.

167. *Id.* at \*37.

168. *Id.* The court further declared 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 preserved human embryos are the product of live birth." *Id.*

169. *Id.* at \*30.

170. *Id.* at \*34-35.

171. *Id.* at \*35 (citing *In re Baby "M,"* 525 A.2d 1128 (N.J. 1987)).

Sue) who hoped for their eventual implantation, gestation, and birth than in the hands of the party (Junior) who did not hope for a birth. But granting temporary custody to Mary Sue Davis, the court expressly delayed decisions about visitation, support, and final custody until "one or more of the . . . human embryos are the product of a live birth."<sup>172</sup>

The court's reliance on the best-interest standard in this case was far more important in delineating the court's understanding of the scope of the dispute than in protecting the interests of, or securing justice for, the frozen embryos. Whether the court appropriated the best-interest standard because it actually viewed frozen embryos as essentially indistinguishable from children, or whether the court self-consciously applied the standard in order to define the dispute without believing that it could actually discern the best interests of seven cryopreserved embryos, is hard to know. In either case, by presuming to resolve the dispute through application of the best-interest standard, the court defined as irrelevant the real conflicts that reproductive technology and the cryopreservation of human gametic material present to the protection of traditional families, and to the safeguarding of traditional assumptions about familial relationships.

In the trial court's construction of this case, the best-interest standard did little more than reinforce a view of family that reflected traditional understandings of familial relationships. By presuming to apply the best-interest standard to this case, the court tried to mask the contradictions that separated its traditional view of family from the view of family implied by a world in which people can choose to create embryos outside a human body, to freeze and store them, and then, later, to choose whether to discard the embryos, or to use them to create children or for research.

The Court of Appeals of Tennessee reversed the trial court's order that Mary Sue be given temporary custody of the embryos and instead granted "joint control" to Mary Sue and Junior.<sup>173</sup> More importantly, the court's decision had the effect of replacing the image presented by the trial court of a typical divorcing couple involved in a custody dispute with the more contractual image of two adults arguing over the right to control something of value. "Jointly," concluded the appeals court, "the parties share an interest in the seven fertilized ova."<sup>174</sup>

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172. *Id.* at \*37.

173. *Davis v. Davis*, 1990 Tenn. App. LEXIS 642 (Tenn Ct. App. 1990).

174. *Id.* at \*8 (citing Tennessee statutory law and *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989)). In *York v. Jones*, the court concluded that the Cryopreservation Agreement created a bailor-bailee relationship between the infertile couple and the infertility clinic. The contract at issue in *York* provided: "In the event of divorce, we understand legal ownership of any stored prezygotes must be determined in a property settlement and will be released as directed by order of a

The Supreme Court of Tennessee affirmed and ruled that the Knoxville Fertility Clinic, storing the Davis embryos, was "free to follow its normal procedure in dealing with unused preembryos."<sup>175</sup> However, the supreme court disagreed with the trial court's and the appellate court's respective statements of the embryos' ontological status. In the view of Justice Daughtrey, writing for the supreme court, the trial court erred in defining the embryos as "children *in vitro*."<sup>176</sup> On the other hand, the appellate court "may have swung too far in the opposite direction."<sup>177</sup> The court was especially troubled by the appellate court's reliance on *York v. Jones*,<sup>178</sup> because that case stated expressly that frozen embryos can be property.

Equally unhappy to view the embryos as people and to view them as property, the court found a third, intermediate option. Justice Daughtrey relied on the ethical standards of the American Fertility Society for its understanding of the embryos' ontological status. That society, like Justice Daughtrey, rejected the view that embryos are "human subjects" as well as the view that they are no different than "any other human tissue."<sup>179</sup>

The Society suggested an alternative vision:

A third view—one that is most widely held—takes an intermediate position between the other two. It holds that the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as

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court of competent jurisdiction." 717 F. Supp. at 424. The court expressly treated the embryo at issue in the case as property, finding that the infertility clinic had "fully recognize[d] plaintiffs' property rights in the pre-zygote and . . . limited [its] rights as bailee to exercise dominion and control over the pre-zygote." *Id.* at 427.

175. *Davis*, 842 S.W.2d at 604-05. The supreme court explained its decision to use the term "preembryo" rather than "embryo," *id.* at 594, to refer to fertilized eggs in the few days immediately following fertilization. The trial court, as Justice Daughtrey for the supreme court recognized, was careful to refer to this entity as an embryo because that label supported the trial court's position that personhood begins at conception. *Id.*

176. *Id.* at 594. The supreme court reviewed Tennessee and United States law relating to the status of fetuses and concluded that "[l]eft undisturbed, the trial court's ruling would have afforded preembryos the legal status of 'persons' and vested them with legally cognizable interests separate from those of their progenitors." *Id.* at 595.

177. *Id.*

178. *Id.* at 595-96. See *supra* note 174 (considering the holding in *York*).

179. *Id.* at 596 (quoting American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 53 FERT. & STERIL. 34S-35S (Supp. 1990)).

developmentally individual, and may never realize its biologic potential.<sup>180</sup>

Following the lead of the American Fertility Society, the court concluded that early embryos<sup>181</sup> "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."<sup>182</sup> The conclusion that embryos are owed "special respect" projected a third image of the parties and the case, an image which seemed to share aspects of the trial court's view of the embryos as children and of the appellate court's suggestion that the embryos should be seen as commodities.

Indicatively, however, none of the three courts' pronouncements about the embryos' ontological status provided clear instruction as to the proper result in the case. Under any of the courts' characterizations of the embryos, they could have been given to either of the parties, to both of them, or to neither of them.<sup>183</sup> Thus, the supreme court's focus on the embryos' ontological status, and its consideration and rejection of the options upon which the two lower courts relied, did not guide the court in reaching a determination about the embryos' fate, but rather established the *court's* essential understanding of the drama involving the Davises and the seven embryos.

More specifically, by declaring expressly that the embryos were to be given "special respect" and were not to be viewed as commodities, the supreme court established that its ideological sympathies lay, at least in significant part, with status, and with the preservation of traditional family relationships. The trial court had obviously voiced this position unambiguously, but that opinion often seemed more parodic<sup>184</sup> than forceful

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180. *Id.* at 596 (citing and quoting 53 FERT. & STERIL. 34S-35S (*see supra* note 179)).

181. Newly created embryos are variously labeled embryos, preembryos, fertilized ova, blastocysts, and zygotes. The different terminological uses often carry moral implications. *See* Dolgin, *supra* note 116, at Section IV.

182. *Davis*, 842 S.W.2d at 597.

183. This point was recognized by George J. Annas after the trial court and appellate court rendered decisions in the case before the supreme court reached a decision. Annas declared:

For reasons he never explains . . . , the [trial] judge framed the central issue not as who should get the embryos, but rather whether the embryos were people or products. This, of course, is *not* an outcome-determining categorization (since either way, the question of who gets them remains).

George J. Annas, *A French Homunculus in a Tennessee Court*, HAST. CTR. REP., Nov.-Dec. 1989, at 20, 20.

184. The trial court relied on the testimony of a French geneticist, Dr. Jerome Lejeune, in concluding that the "seven cryopreserved embryos are human." *Davis*, 1989 Tenn. App. LEXIS 641, at \*13. The court described Dr. Lejeune's testimony as follows:

in its support for old-fashioned families. In addition, the opinion of the trial court allowed for no compromises. The supreme court voiced support for status and tradition but, despite that support, did not confine its efforts to determine the embryos' fate within the parameters provided by traditional understandings of family.

Without any apparent notice of the transparent contradictions between its recommended theoretical approach and its actual holding, the court in its determination in *Davis*—that the embryos be discarded<sup>185</sup>—ignored almost entirely its own insistence on the respect that should be afforded to cryopreserved embryos.

Indeed, the court's clarification of the embryos' ontological status bore virtually no relevance to its holding in the case. The decision to allow the embryos to be destroyed contrasts obviously with the notion that those embryos were owed "special respect." Moreover, the court announced that the embryos were owed "special respect," but never explained or examined the implications of that pronouncement. The court hardly focused on the embryos at all. Rather, the court decided the case on the basis of the comparative strength of the rights claimed respectively by Junior and Mary Sue. In summarizing its deliberations in the case, the court clearly approved of the use of contracts and contract principles in future cases involving cryopreserved embryos. Justice Daughtrey wrote for the court:

In summary, we hold that disputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their 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

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Assuming the embryos are early human beings, Dr. Lejeune offered the opinion that those early human beings constituted Mrs. Davis' own flesh (and are also Mr. Davis' flesh) and that the hospitality of her body is the best place in the world for them to be. He asserted that "the early human beings in the concentration can . . . are not spare parts. . . . An early human being inside the suspended time which is the can cannot be the property of anybody because it's the only one in the world to have the property of building himself. . . . As soon as he has been conceived, a man is a man."

*Id.* at \*82-83 (Appendix B).

185. The court actually handed control of the embryos back to the Knoxville Fertility Clinic where the embryos were being stored. *Davis*, 842 S.W.2d at 604-05. However, Dr. I. Ray King of the Knoxville clinic refused to discard or to continue storing the embryos. Eventually, the embryos were handed over to Junior Davis. *For the Record*, NAT'L L.J., June 28, 1993, at 8.

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.<sup>186</sup>

Thus the court invoked the embryos, and defined them as worthy of special respect, just as other courts faced with disputes involving custody or parentage invoke children and their best interests. But, almost immediately, the court reached a decision that overlooked the embryos, their status, and the respect due them because of their status, and—not unlike many other courts handling more routine custody cases—focused on the interests of the disputing adults.

Perhaps, if questioned, the court would have responded that its decision respected the embryos by invoking the constitutional rights—rather than the property interests—of the disputing adults. But, such an explanation is unconvincing for two reasons. First, the court, which did focus on the parties' constitutional rights, explained that it would have preferred to focus on their interests as defined through contract law and that it would have done so had the parties entered into an appropriate contract.<sup>187</sup> Second, the constitutional rights to which the court looked, rights concerning individuals' intimate relationships such as the right to autonomy in procreation matters,<sup>188</sup> are defined explicitly as protection afforded the *individual* in intimate relationships and not as rights afforded the family as such.<sup>189</sup> Thus, the court's focus on Junior and Mary Sue's respective constitutional rights does not demonstrate that the court respected the embryos, as its analysis implies it should have. Rather, within the court's actual analysis, there was no place for consideration of the embryos, and no respect was paid them.

The *Davis* court's contradictory positions with regard to the frozen embryos—its invocation of their special status and then its complete disregard for them in its holding—is more transparent than similar contradictions in other cases involving children. The court in *Davis*, by detailing its special concern for the embryos, presumed to align itself with the interests of caring traditional families, with families created through connections associated with home and love, rather than with connections

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186. *Davis*, 842 S.W.2d at 604.

187. *Id.* at 597-604.

188. *Id.* at 600-02.

189. See Dolgin, *supra* note 2 (describing transition from *Griswold* to *Eisenstadt* as transformation from constitutional jurisprudence concerned with family as a unit of status to constitutional jurisprudence concerned with individuals involved in familial relationships).



associated with the marketplace. But that concern, however real, was also a pretext, and one which the court was able to bypass without comment because, in fact, there were no children to protect. The court's asserted concern for the embryos served to temper the implications of its actual ruling, in which it ignored the embryos and considered exclusively the comparative interests of the gamete donors.

Largely because its contradictions are comparatively clear, *Davis* provides an illuminating model through which to consider the implications of the strategies adopted by other courts deciding custody and parentage questions. The stark contradiction in *Davis* between the court's stated view of the embryos and its treatment of them is reflected, although more opaquely, in other courts' decisions determining the custody or parentage of children. And, as in *Davis*, the apparent concern with children is often belied in those cases by the treatment paid to children.

*B. The Best Interests of Children: Baby "M"*<sup>190</sup>

*Baby "M"*, probably the best-known surrogacy case in the United States, involved a dispute over the parentage and custody of a child produced from a "traditional"<sup>191</sup> surrogacy agreement. The case arose after Mary Beth Whitehead, the surrogate, entered into a contract with William Stern, the biological father. Whitehead agreed that she would be artificially inseminated with Stern's sperm, gestate the resulting fetus, and, at the baby's birth, terminate all parental rights in favor of Stern and his wife, Elizabeth.<sup>192</sup>

After the birth of the child, however, Whitehead, unwilling to surrender the baby, fled to Florida.<sup>193</sup> Several months later, the child, named Melissa by William and Betsy Stern, and Sara by Mary Beth Whitehead, was forcibly

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190. *In re 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).

191. Somewhat startlingly, surrogacy arrangements in which the surrogate bears a genetic and gestational relation to the child have come to be called "traditional" surrogacy arrangements; the designation differentiates these arrangements from others in which the surrogate gestates a fetus to which she has no genetic connection. This second sort of surrogacy is usually called "gestational surrogacy."

192. *In re Baby "M"*, 537 A.2d 1227, 1235 (N.J. 1988). The contract, signed by Stern and Whitehead, was also signed by Whitehead's husband at the time, Richard Whitehead. Whitehead's participation was necessary in order for him to deny paternity of a child conceived by his wife during the marriage. Elizabeth Stern did not enter into the contract in order to avoid violating state rules against purchasing a child. *Id.* The contract entered into among the parties can be found at 537 A.2d at 1265-73.

193. *In re Baby "M"*, 525 A.2d at 1146.

returned to the Sterns as the result of a court order.<sup>194</sup> At trial, the validity of the contract entered into among the parties, as well as the parentage and custody of the baby, were at issue.<sup>195</sup>

This case, unlike those involving more complicated reproductive technology, disrupted familiar social understandings of maternity and paternity, but did not disrupt established biological understandings. The attempt to create a parent-child bond in contractual terms proved troubling, but did not challenge traditional notions about biological reproduction. The only technology involved was that employed to accomplish the artificial insemination of Whitehead with Stern's sperm.<sup>196</sup> In fact, none of the parties questioned Mary Beth Whitehead's maternity, or William Stern's paternity, as a biological matter.

Thus, in this case, more than in others<sup>197</sup> that challenge understandings of biological reproduction as well as expectations about the social dimensions of family, the law attempted to rely, at least in large part, on concepts embedded firmly within family law. Judge Sorkow, who presided in the trial court, upheld the surrogacy contract but defined the case to depend primarily on the best interests of the child.<sup>198</sup> The court seemed to uphold the contract largely as an expedient to establish the Sterns' parentage.

The judge, compelled to rely on the contract to terminate Whitehead's maternal rights and thereby facilitate the adoption of the child by Betsy Stern,<sup>199</sup> favored an old-fashioned vision of family life.<sup>200</sup> He attempted to mitigate the implications of his clear reliance on contract in establishing the child's parentage by defining the contract as secondary to the court's decision. Judge Sorkow declared: "The primary issue to be determined by

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194. *Id.*

195. *Id.* at 1156-72.

196. Artificial insemination has been available for over a century. WILFRED J. FINEGOLD, *ARTIFICIAL INSEMINATION* 3-6 (2d ed. 1976); *see also* CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* 59 (1989) (asserting that first use of artificial insemination for human reproduction was in the late eighteenth century). Nothing more than a turkey baster is needed to perform an insemination. The procedure can be, though in the Whitehead-Stern case was not, performed at home by non-medical people. *Id.* at 58.

197. *See infra* notes 235-78 and accompanying text (analyzing response of case law to dispute occasioned by gestational surrogacy).

198. 525 A.2d at 1132.

199. New Jersey law provided for the involuntary termination of parental rights only upon a finding of parental unfitness. Moreover, under state adoption law, no child could be made available for adoption until that child's biological parents' rights had been terminated, either voluntarily or involuntarily. *See* Janet L. Dolgin, *Family Law and the Facts of Family*, in *NATURALIZING POWER* 47, 56-57 (Sylvia Yanagisako & Carol Delaney eds., 1995).

200. *See* Dolgin, *supra* note 19, at 536-39 (analyzing Judge Sorkow's vision of family presented in the case).

this litigation is what are the best interests of a child until now called 'Baby M.' All other concerns raised by counsel constitute commentary."<sup>201</sup> Those "concerns" clearly included the court's extensive analysis, and apparent validation, of the surrogacy contract.<sup>202</sup>

The trial court concluded that the child's best interests in fact reflected the terms of the contract, and as a result of the contractual and best-interest analyses combined, established the Sterns' parentage.<sup>203</sup> The court's reliance on the child's best interests to determine parentage, not custody, was itself unusual, but not unprecedented,<sup>204</sup> and would probably have been impossible under existing New Jersey statutory law, had the court been unwilling to rely on the contract as well as on its analysis of the child's best interests. For the trial court, the validation of the contract became a sort of technical necessity for providing the child with a stable, loving home. But, in fact, the court's reliance on the contract was essential to its holding, and so a contradiction between the correlates of tradition and the correlates of modernity sits at the center of the court's decision.

The trial court granted full custody to William Stern, terminated Mary Beth Whitehead's parental rights, and ordered the adoption of the child by Betsy Stern.<sup>205</sup> The New Jersey Supreme Court, in almost complete contrast, invalidated the surrogacy contract, found the payment of money to a surrogate "illegal, perhaps criminal, and potentially degrading to women,"<sup>206</sup> and voided both the termination of Mary Beth Whitehead's parental rights and the adoption of the baby by Elizabeth Stern. The supreme court left custody with Stern, but in declaring Whitehead the child's mother, provided for her continued association with the child.<sup>207</sup>

Judicial opinions more clearly at odds are hard to imagine. Yet, behind the differences in the two courts' holdings is a similar outlook, represented by a shared vision of the family as a universe of enduring, loving relationships.<sup>208</sup> That vision is suggested most vividly by the reliance placed by each court on the best interests of Baby M. Despite the differing conclusions of the two courts about the contract and about the scope of Baby

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201. *In re Baby "M"*, 525 A.2d at 1132.

202. *Id.* at 1156-72.

203. *Id.* at 1171.

204. *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 799 n.4 (Cal. 1993) (Kennard, J., dissenting) (noting provision in California statute for deciding parentage on basis of best-interest analysis).

205. *In re Baby "M"*, 525 A.2d at 1175.

206. *In re Baby "M"*, 537 A.2d 1227, 1234 (N.J. 1988).

207. *Id.* at 1234-35.

208. *See Dolgin, supra* note 19, at 535-45 (analyzing ideological similarities in positions of courts and parties in *Baby "M"* case).

M's family, each court justified its conclusions with reference to the child's interests.<sup>209</sup> The trial court explicitly delineated those interests as the "primary issue"<sup>210</sup> in the case.<sup>211</sup> The court heard twenty-three witnesses, at least eleven of whom were experts testifying about the child's interests<sup>212</sup> and devoted almost half of its lengthy opinion to considering the child's interests. The state supreme court, despite a mild disclaimer,<sup>213</sup> handled the case as courts typically handle custody disputes between divorcing parents and, in doing that, made dozens of references to Baby M's best interests.<sup>214</sup>

However, despite each court's apparently well-intentioned effort to protect the child, the results for the child are far less certain than the two courts' stated aims and suggest that each court's reliance on the best interest standard also served ends unrelated to the specific child and her welfare. The trial court's focus on Baby M's interests contrasted with its reliance on the presumptions of contract in establishing Baby M's parentage and served to mitigate the implications of creating a parent-child bond on the basis of a contract.

The trial court seriously entertained the child's best interests. However, perhaps without full consciousness, it also *used* that analysis to deflect the implications that follow inevitably from its validation of the surrogacy agreement—especially the implication that traditional families can be successfully created through the use of money, bargain, and choice—that people in families created through contract can live out relationships as traditional as any.

The best-interest analysis of the state supreme court is more telling still. The supreme court proclaimed again and again that the child's best interests were to be determinative, but gave relatively little attention to concrete consideration of those interests. On initial examination, that might be excused in light of the trial court's extensive best-interest analysis, and the supreme court's stated respect for that analysis.<sup>215</sup> However, the trial court's best-interest analysis assumed that, were the Sterns found to be good parents, they would be the legal parents and sole custodians of the child. The trial

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209. 525 A.2d at 1176; 537 A.2d at 1234.

210. *See supra* notes 199-204 and accompanying text (considering significance of court's validation of surrogacy contract in light of its interest in preservation of old-fashioned family).

211. 525 A.2d at 1132.

212. 537 A.2d at 1237.

213. *Id.* at 1263 (noting case was "not a divorce case").

214. *See, e.g., id.* at 1234, 1237, 1238, 1239, 1242, 1243, 1244, 1246, 1252, 1256, 1257, 1258, 1259, 1260, 1262.

215. *Id.* at 1238. Judge Wilentz, writing for the higher court, described the trial court's analysis of the child's interests as "perceptive, demonstrating both [the trial court's] understanding of the case and its considerable experience in these matters." *Id.*

court, in granting custody to William and Betsy Stern, had already concluded, as a result of its analysis of the surrogacy contract, that it was prepared to terminate Whitehead's parental rights absolutely.

The supreme court, in contrast, recognized William Stern and Mary Beth Whitehead as the child's biological and legal parents, thereby giving each of them, if not found unfit, the right to continued association with the child. Thus, inevitably, the essential consequence of the supreme court's, but not of the trial court's, opinion was the creation of a "family" quite unlike families reconstructed following divorce or following the separation of unmarried parents.

Whitehead and Stern intended quite certainly to produce a child together. Yet they had never lived together or had sexual relations together; they had never intended to share a life together, and had not intended, and never desired, to share the parental role. Were the interests of the child to have been seriously entertained in this case, these facts would have been at the center of the judicial inquiry.

The court ignored the real choices that followed from its invalidation of the surrogacy contract and instead defined the issue to be resolved by its best-interest analysis as a simple choice between "life . . . for Baby M . . . with primary custody in the Whiteheads or one with primary custody in the Sterns."<sup>216</sup> In making that choice, the court gave custody to William Stern and remanded the case for a determination of the details of Whitehead's visitation right. The remanding mandated<sup>217</sup> that some sort of visitation be provided to Whitehead.<sup>218</sup>

In reaching its conclusions, the court failed completely to consider the possibility that its basic determination—that Stern remain the child's father and Whitehead her mother—might not serve the interests of the child. To some extent, the court understood state statutory law as giving it no alternative in this regard. However, the court did not relate the relevance of that fact to its best-interest analysis, and, more importantly, did not instruct the trial court on remand to consider the particular and unique aspects of the dispute in determining the details of Whitehead's visitation right.

In fact, the court remarked, although almost incidentally, that the case was unlike most custody disputes following divorce, and resembled other

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216. *In re Baby "M"*, 537 A.2d 1227, 1257 (N.J. 1988) (alteration in original).

217. The supreme court expressly ordered that Judge Sorkow, who had presided in the trial court, be precluded from considering the visitation issue on remand. The supreme court found that his previous involvement in the case might render him unable to reach a just resolution of the visitation question. *Id.* at 1261 n.19.

218. *Id.* at 1263. The court "decided that Mrs. Whitehead is entitled to visitation at some point, and that question is not open to the trial court on this remand." *Id.*

cases in which “the non-custodial spouse has had practically no relationship with the child.”<sup>219</sup> By implication, the child’s best interests would not likely be served by assuming the facts of a custody dispute. But that, of course, is just what the state supreme court did, and so the court had to justify its approach. In doing so, the court referred to Whitehead’s early custody of Baby M, especially the four-month period in which she lived with the child in Florida after having evaded the Sterns and state law<sup>220</sup> with the baby. Far more telling, the court dismissed as inconsequential the implications of the dispute’s unique history by asserting the right of the biological mother, rather than the interests of the child. The court explained:

[Mrs. Whitehead] is not only the natural mother, but also the legal mother, and is not to be penalized one iota because of the surrogacy contract. Mrs. Whitehead, as the mother (indeed, as a mother who nurtured her child for its first four months— unquestionably a relevant consideration), is entitled to have her own interest in visitation considered. Visitation cannot be determined without considering the parents’ interests along with those of the child.<sup>221</sup>

Thus, at this crucial moment in its analysis of the case, the court substituted the interests of the mother for those of the child and therefore, despite its apparent focus on the child’s best interests, made it impossible to decipher the actual interests of that child. That task would have required analysis of the consequences for the child of moving between two significantly different homes, between three parents and two mothers originally joined together as contract partners, and between parents whose intense animosity toward each other was expressly a consequence of the child’s birth. Those determinative facts are unique to Baby M and should have been central to the court’s consideration of the child’s interests.

On remand, the trial court was directed to decide the terms, but not the fact, of Whitehead’s right to visit the child. In response, the trial court provided for “unsupervised, uninterrupted, liberal visitation” between the

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219. *Id.*

220. Immediately after her birth, Baby M went home with the Sterns. Soon thereafter, however, the Sterns agreed to let Whitehead bring the baby home with her for a short time. When Whitehead did not return the baby to the Sterns, William Stern filed a complaint seeking enforcement of the surrogacy contract. As a result, an ex parte order was issued ordering that Whitehead return the baby to Stern. The Whiteheads fled with the baby to Florida when the process server and police attempted to execute the court’s order. *Id.* at 1236-37.

221. *Id.* at 1263.

mother and child.<sup>222</sup> That determination, of course, was based on the assumption, which followed from the supreme court's direction, that Whitehead was entitled to visitation, and the supreme court's suggestion that such visitation not be delayed.<sup>223</sup>

Some of the complications that follow, even in theory, from the supreme court's best-interest determination were vividly suggested in a 1994 story in *Redbook* magazine<sup>224</sup> that featured Baby M and her family. The story included small, familiar pictures of Baby M, the Sterns, and Mary Beth Whitehead taken at the time of trial and other, larger pictures showing seven-year-old Baby M, at the beach, in the park, and at home<sup>225</sup> with Mary Beth Whitehead (now known as Mary Gould) and her other four children. At the time, Whitehead's immediate family featured in the story included her two children with Richard Whitehead, whom she divorced before the *Baby M* litigation ended, and two younger children, born to Whitehead before and during a subsequent marriage to her second husband, Richard Gould.

The story did not include pictures of the child with the Sterns, who were not interviewed by the magazine, and who apparently played no part in the preparation of the story.<sup>226</sup> However, the contrast, especially in Whitehead's<sup>227</sup> view, between her home and that of the Sterns, is central. Whitehead compared her own health with what "her spies" in the Stern's community described as Betsy Stern's worsening physical state as a result of multiple sclerosis.<sup>228</sup> She angrily contrasted the eating, conversational, and

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222. *In re Baby M*, 542 A.2d 52, 53 (N.J. Super. Ct. 1988). The court provided for increasing visitation rights, beginning with one day a week and increasing within a few months to include two days every other week and within a year to include weekly overnight visits and significant holiday visitation. *Id.* at 55.

223. The supreme court asserted that delaying Whitehead's visitation with the child for five years, as the guardian ad litem in the case had suggested, "begins to border on termination." 537 A.2d at 1263. The court also directed the trial court, on remand, to "recall the touchstones of visitation: that it is desirable for the child to have contact with both parents; that besides the child's interests, the parents' interests also must be considered; but that when all is said and done, the best interests of the child are paramount." *Id.*

224. Susan Squire, *Whatever Happened to Baby M?*, REDBOOK, Jan. 1994, at 60.

225. The house actually pictured in the story was not that of Whitehead, but her parents' home in Florida. Whitehead, her other four children, and Baby M (known as "Sassy") were visiting with Whitehead's parents at the time of the interview.

226. The *Redbook* story was subtitled, "An Exclusive Interview with America's Most Famous Surrogate Mother About the Daughter She Fought So Hard to Keep, But Couldn't." Squire, *supra* note 224, at 60.

227. Mary Beth Whitehead now uses that name when appearing publicly, often in support of other surrogate mothers. *Id.* at 63.

228. The Sterns' original decision to conceive a child through surrogacy was attributed to Betsy Stern's fear that a mild case of multiple sclerosis from which she suffered could be seriously exacerbated as the result of a pregnancy. 537 A.2d at 1235.

recreational patterns in the two homes, finding the Sterns seriously wanting. And she complained about the child following the "frumpy, old" model set by Betsy Stern.<sup>229</sup>

Parts of the story seem to resemble consequences common after an unfriendly divorce, but in Baby M's case her mother's antagonism is directed at a second mother, even more than at a father. And, far more consequentially, the child here knows clearly, and apparently hears frequently, at least from Whitehead,<sup>230</sup> that her birth brought and continues to bring great sadness to her parents. Whitehead's mother, Eileen Messer,<sup>231</sup> told the *Redbook* reporter, out of Whitehead's hearing: "This whole business has destroyed our family, and it's changed her."<sup>232</sup>

If the supreme court had affirmed the lower court's holding and sanctioned the termination of Whitehead's maternity or granted maternity and full custody to Whitehead, similarly discordant consequences might have followed. The aim here is not to determine the child's best interests in light of the situation of her birth to a surrogate mother and the subsequent dispute between that surrogate and the biological father and his wife. Rather, it is to suggest how remiss the supreme court was for requiring that the child's best interests be determined anew in light of the supreme court's recognition of Stern as the child's father and of Whitehead as her mother.

After the New Jersey Supreme Court declared that the child's best interests, not parental choice, should be determinative, the court proceeded as if the adult participants had not made the choices they had already made, choices responsible for creating the situation that did exist. The court, in determining the child's interests, failed almost completely to recognize that best interests are actualized, or are not actualized, in concrete settings and in particular relationships.

For the trial court and the supreme court that rendered decisions in *Baby M*, the best-interest analysis on which each court seemed so securely to rely served interests beyond those of the particular child. For each court, the best-interest analysis served to endorse a particular vision of family. That vision, similar for both courts and predicated on the centrality of children and the parent-child bond, became particularly crucial to each court in

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229. Squire, *supra* note 224, at 64.

230. *Id.* The fact that a popular magazine, sold in supermarkets and other well-frequented places, has starred Baby M in one of its issues makes it even more likely that the child will be continually exposed to recognition of the pain her birth has brought all her parents.

231. During the trial to determine Baby M's parentage and custody, Eileen Messer, together with her husband Joseph Messer, petitioned the court for grandparental visitation rights. *In re Baby "M"*, 525 A.2d 1128, 1172-75 (N.J. Super. Ct. Ch. Div. 1987).

232. Squire, *supra* note 224, at 102.



mitigating the discordant implication, present in each decision, that family relationships could be established in contractual terms.<sup>233</sup>

These decisions, taken together, illustrate how the judiciary's invocation of children, generally, and reliance on the best-interest standard, particularly, further the illusion that the law and society favor, and can ensure the survival of, traditional families even as the law provides for the construction of family relationships in the terms of the marketplace. Similarly, the decisions illustrate how easily the interests of children can be overlooked in such cases unless the contours and social implications of families created through non-traditional arrangements are acknowledged and carefully considered.

### C. *Biological, Legal, and Intending Parents: Johnson v. Calvert*

Even more than *Baby M*, *Johnson v. Calvert*,<sup>234</sup> the product of a gestational surrogacy agreement, defies the easy application of traditional approaches to disputes about parentage and custody. *Johnson* arose as the result of an agreement by which Anna Johnson would gestate and give birth to a child produced from the gametes of Crispina Calvert and her husband, Mark Calvert.<sup>235</sup> In exchange, and for her commitment to surrender all parental rights to the Calverts at the baby's birth, Johnson was to be paid \$10,000 in a series of installments. In January 1990 a zygote produced from the Calverts' gametes was inserted in Anna's uterus. A pregnancy followed. Before the birth of the baby—a boy, named Christopher—the parties were in court disputing the child's parentage.<sup>236</sup>

The case posed a dramatic challenge to the law's ability to sort out the strands of legal parentage when the social *and* biological implications of the

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233. The trial court validated the surrogacy contract and thus provided for the termination of Whitehead's parental rights and for the adoption of the child by Betsy Stern. *Baby "M"*, 525 A.2d at 1175-76. The state supreme court also allowed for the possibility that families might be constructed in contractual terms when it recognized that "the legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints." *In re Baby "M"*, 537 A.2d 1227, 1264 (N.J. 1988).

234. *Johnson v. Calvert*, No. X-633190, 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.), *cert. denied*, 114 S. Ct. 206, *and cert. dismissed sub nom.* Baby Boy J. v. Johnson, 114 S. Ct. 374 (1993).

235. *Johnson*, No. X-633190, slip op. at 5.

236. See Dolgin, *supra* note 153, at 684-89 (analyzing lower court opinions in *Johnson*); Janet L. Dolgin, *The 'Intent' of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1279-95 (1994) [hereinafter '*Intent*' of Reproduction] (analyzing implications of the California Supreme Court's reliance on intent in *Johnson*).

child's birth were both murky.<sup>237</sup> All three levels of the California court system determined that the Calverts were the baby's parents.<sup>238</sup> But the reasoning behind each court's holding differed completely from that of the other two courts. Each court at least noted the child and his welfare and declared that its holding served his advantage. Yet, none of the three courts focused directly on those interests.<sup>239</sup>

The three cases, taken as a set, illustrate how severely the disruptions posed by reproductive technology test traditional responses to parentage and custody issues. More specifically, differences in understandings of what constitutes "natural" parentage and custody between the state supreme court's majority and dissenting opinions suggest new levels of confusion about the essence of the parent-child bond.

### 1. Three Courts' Decisions

The trial court, describing Johnson as a "gestational carrier," but a "genetic hereditary stranger[]"<sup>240</sup> to the child, identified the baby's family on a basis of "shared genes" among Christopher and the Calverts. This court grounded its decision on the understanding that the parent-child bond, at least from a biological perspective, is a genetic bond. The court acknowledged the likelihood of an "attachment"<sup>241</sup> between a woman gestating a fetus and the baby to which she gives birth, but rejected the suggestion that the gestational role leads to "emotional bonding" suggestive of biological maternity.<sup>242</sup>

Although the court expressed no conclusions about the welfare of the child involved in the case, the opinion contained a number of references to children and to the best interests of children in general. For instance, the

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237. See Dolgin, *supra* note 116 (analyzing complications arising from simultaneous challenge to social and biological correlates of family).

238. The racial and class aspects of this case, though not discussed by the courts, were likely relevant to their conclusions. Anna Johnson, a black, unmarried mother of a three-year-old and a sometime-welfare recipient, worked as a vocational nurse in the same hospital in which Crispina Calvert, a Filipina, was employed as a registered nurse. Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back into the Bottle*, 18 L. MED. & HEALTH CARE 345, 345 (1990). Crispina's husband, Mark, was white and an insurance salesman. Katha Pollitt, *When Is a Mother Not a Mother?*, 251 NATION 825, 842 (1990).

239. The dissent in the California Supreme Court suggested that the baby's interests be determinative in establishing his parentage but provided no guidance for the determination of those interests. *Johnson v. Calvert*, 851 P.2d 776, 797-800 (Cal. 1993) (Kennard, J., dissenting).

240. *Johnson*, No. X-633190, slip op. at 5.

241. *Id.* at 9.

242. *Id.*

court rejected the suggestion that it find "three natural parents." That suggestion, asserted the court, "is really not in the best interests of the child, and that's true I think in any in vitro fertilization case."<sup>243</sup> The court elaborated:

Dr. Call [an expert witness] testified that with regard to having three natural parents or two natural mothers, you can have problems raising a child in this situation. We are talking about starting out in infancy, identity problems, confusion, conflicts between how a child is going to be raised, and this is confusing to a child.<sup>244</sup>

Later, the trial court judge, Judge Parslow, was even more explicit about justifying the court's determination that the genetic parents, not the gestational mother, were the biological and legal parents, through reference to the child's welfare. Judge Parslow asserted that "in an increasingly anti-child, I'm for me first society, I think the decision I'm making in this case is definitely pro child."<sup>245</sup> In explaining *that* assertion, however, the judge concluded by referring not to the interests of the child but to those of the Calverts. The child, declared the court, "should be raised exclusively by the Calverts as natural parents. They shouldn't have to spend the next 18 years waiting for the other shoe to drop."<sup>246</sup>

In short, the trial court decided the case based on its understanding of the biological correlates of kinship. On this ground, in Judge Parslow's view, genetics, not gestation, constitutes the maternal connection. In anchoring the court's holding in a biological, rather than a sociological, reality, the judge assumed, without any apparent examination of the question, that this approach would best serve the child's interests.

The California Court of Appeal affirmed the lower court's decision.<sup>247</sup> Declaring its concern with avoiding public policy considerations,<sup>248</sup> the court based its decision on the genetic relation between the Calverts and the child, but unlike the trial court, the higher court reached that decision as a result of its reading of statutory law, rather than its understanding of the biological reality. The court relied on sections of the Uniform Parentage Act, enacted

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243. *Id.*

244. *Id.* at 10.

245. *Id.* at 14.

246. *Id.*

247. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Ct. App. 1991).

248. *Id.* at 382. "Our system of government," the court declared, "does not make the courts de facto 'philosopher-kings.'" *Id.* (footnote omitted).

in California in 1975, which defined a child's mother as the woman identifiable through blood-genetic marker tests.<sup>249</sup>

However, the court dismissed other sections of the same statute which allowed the mother-child relation to be established on the basis of a woman's having given birth to a child.<sup>250</sup> The court determined that because the legislature had asserted that the mother-child relation *may* be established through proof of a woman's having given birth to a child, it was legitimate to ignore the provision and declare the egg donor the mother. However, as the court clearly knew, the Uniform Parentage Act was written and promulgated in California before embryo transfer and gestational surrogacy were possible. At that time, the legislators assumed that the woman who gave birth to a child was necessarily the child's genetic mother.

The court of appeal, seemingly anxious to rely on legislative direction at almost any cost to avoid independent consideration of the implications of gestational surrogacy,<sup>251</sup> had no need to justify its holding through invocation of children and their welfare, or in any other way, because it presented that holding as compelled by statutory law. The court, certainly aware that, whatever its decision, an appeal would likely follow, refrained almost completely from justifying its decision by references to children's welfare or to any other public policy concerns. The court, by relying on contemporary statutory provisions about parentage, framed the inapplicability of those statutes to cases such as *Johnson* and, therefore, indicated the extent to which the law flounders in interpreting and resolving disruptions engendered by reproductive technology.

The California Supreme Court, re-affirming the decision to name the Calverts as the baby's parents, recognized that neither biology nor statutory law provided direction in resolving the dispute. Each could be read to prefer Crispina Calvert or Anna Johnson as the baby's mother.<sup>252</sup> The court

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249. *Id.* at 373-75. The court rejected another statutory provision under which a woman who gives birth to a child "may be established" as the child's mother. *Id.* at 377. The court stressed the legislature's use of the word "may" in this provision and asserted that "[t]he statute is silent on whether the woman who gives birth is *automatically* the 'natural mother.'" *Id.*

250. *Id.*

251. The court concluded its decision with a plea for further legislative guidance. *Id.* at 381-82. The court wrote:

Thorny questions about the rights of a "gestational surrogate," remedies in the event of breach of a surrogacy agreement, terms of payment and termination of pregnancy cry out for legislative guidelines. To the extent these issues present questions of law, they are matters for legislative resolution subject to constitutional restraint. They should not be settled by the judiciary applying its own ideas of what is good "public policy."

*Id.* at 382.

252. *Johnson v. Calvert*, 851 P.2d 776, 781-82 (Cal. 1993).

constructed an alternative approach that relied on "the parties' intentions as manifested in the surrogacy agreement."<sup>253</sup> The court explained:

[A]lthough 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.<sup>254</sup>

By relying on intention as the determinant of parentage, the court approached the case in terms resembling the world of contract far more closely than the world of traditional family. Intent implies choice and negotiation, and suggests bargained interactions rather than enduring commitments, understood as grounded in the inexorable facts of human reproduction.

Yet, in a remarkable twist, the court reconstructed the meaning of intent so that it reflected the world of the marketplace as well as that of old-fashioned families.<sup>255</sup> The opinion is remarkable for transparently determining parenthood in contractual terms while connecting those terms with the central prerogatives of family relationships understood in traditional terms. For instance, the court suggested that "the mental concept of the child," because essential to its creation, establishes a special relation between the people conceiving of the child and the child: "the originators of that concept merit full credit as conceivers."<sup>256</sup> Thus, the intending parents resemble biological parents in having conceived the child in a unique, determinative act. Moreover, the court determined that "the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.'"<sup>257</sup>

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253. *Id.* at 782.

254. *Id.*

255. See 'Intent' of Reproduction, *supra* note 236, at 279-95 (analyzing the California Supreme Court's use and understanding of "intent" as the determinant of parenthood in *Johnson*).

256. *Johnson*, 851 P.2d at 783 (quoting and citing Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986)).

257. *Id.* at 783 (quoting and citing Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397).

## 2. Should Parentage be Founded on 'Intent' or on Best Interests?

Justice Kennard, in dissent, declared that, in the absence of appropriate legislation,<sup>258</sup> parentage disputes engendered by gestational surrogacy arrangements should be resolved through examination of the best interests of the child involved.<sup>259</sup> Justice Kennard, although viewing the majority's reliance on intent as worthy of serious consideration, rejected that approach largely because the contractual premises on which it relied suggest that children can, and should be, treated as property.<sup>260</sup>

In contrast, Justice Kennard proposed that the case be remanded to the trial court for examination of the best interests of the child, and that the parents be determined as a result of that examination. Like the majority, Justice Kennard suggested that the approach she recommended could be used to determine the child's "natural," not just legal, parents (and in particular, his "natural," not just legal, mother) under California law.<sup>261</sup> Justice Kennard's approach was aimed clearly at establishing parentage, not custody, and as a result, resembles that of the majority in grounding parentage exclusively on cultural, rather than natural, parameters.<sup>262</sup> The determinant selected by Justice Kennard—the best interests of the child—like the determinant selected by the majority—parental intent—grounds "natural" parentage on examination, analysis, and choice, and does not anchor consequential decisions about parentage in even the illusion of inexorable truth.

Thus, both the majority and the dissent, faced in *Johnson* with a dispute whose dimensions dramatically challenge traditional notions of parentage, opted to forego an appeal to biological fact,<sup>263</sup> traditionally the exclusive determinant of "natural" parentage, and sought instead a definition of "natural" parentage as a matter of culture and law. Furthermore, in doing

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258. Justice Kennard agreed with the majority that the Uniform Parentage Act did not direct any choice between a genetic and a gestational mother. *Id.* at 794-95 (Kennard, J., dissenting).

259. *Id.* at 789 (Kennard, J., dissenting).

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

261. *Id.* at 798-99 (Kennard, J., dissenting) (acknowledging that the child's interest might be best "served by recognizing Crispina as the natural mother").

262. *Id.* at 799 (Kennard, J. dissenting). Justice Kennard justified this approach under existing California law by noting that the Uniform Parentage Act, promulgated in California, already allowed courts to consider a child's best interests in determining certain matters of parentage. *Id.*

263. Both the majority, 851 P.2d at 782, and the dissent, *id.* at 795, asserted that an appeal to biological fact was precluded by the Uniform Parentage Act, which provided for a finding that either the genetic or the gestational mother was the child's "natural" mother. In fact, of course, the court could have bypassed that statute on the ground that it was promulgated about a decade before a gestational surrogate was even possible and should, therefore, not be applicable to resolving disputes caused by the disintegration of gestational surrogacy arrangements.

this, the court's majority and Justice Kennard's dissent each connected their select determinant to traditional conceptions of family. For the court, which relied on the notion of intent, the task of establishing this connection required that the notion of intent be reconstructed to reflect a world of love and enduring connection as well as a world of choice and bargained negotiation. For the dissent, selection of the best-interest test as the determinant of natural parentage harmonized immediately with traditional notions of families.

Despite this important similarity, however, the two approaches differ significantly. The majority preserved a traditional model of family that presumes that parentage follows inevitably from the facts of the case, but substituted intent (and the world of contract implied therein) for biology as the central operating principle through which claims to parentage can be settled. The dissent, in contrast, relied on a principle taken directly from family law (the best-interest standard) but applied it so as to construct a new model of parentage. In this model, a child's interests do not follow from, but rather establish, "natural" parentage.<sup>264</sup> Thus, the dissent and the majority debated the respective merits of the determinants selected as those that would likely affect the interests of children.

The majority argued that the dissent had confused notions of parentage and custody, while the majority's resolution of the dispute allowed for continued understandings of parentage as the inevitable—if no longer necessarily natural—consequence of plain facts. The majority asserted:

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. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect all children irrespective of the manner of birth or conception. Moreover, the best interest standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as natural mother, results in a split of

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264. As the dissent noted, its procedure for determining the child's natural parents was not unprecedented but does challenge society's general understanding of "natural" parentage. *Id.* at 799 (Kennard, J., dissenting).

custody between the natural father and the gestator, an outcome not likely to benefit the child.<sup>265</sup>

Thus, in the court's view, the application of a best-interest test must, as has traditionally been the case, follow determinations of parentage. This view rests on the connected assumptions that children are best served by some guarantee of "natural" parentage apart from the fitness or comparative fitness of those parents, and that the best-interest standard cannot (or should not) be used to establish "natural" fact. The dissent, in short, is said to have proposed relying on the standard potentially to upset, rather than to affirm, the basic order of things—an order that inexorably provides "natural" parents for each child, apart from considerations of those parents' abilities to serve in the parental role. The claim, of course, as the dissent recognized at least in part,<sup>266</sup> is peculiar, given the majority's own recommendation that parentage be established through reliance on a standard (parental intent) far less often connected to the regulation of family matters than is the best-interest standard.

The majority blurred the contradiction between its own reliance on intent and traditional understandings of family by reconstructing the notion of intent to conform with, and suggest, those more traditional understandings. Ultimately, however, the contradictions underlying the majority's position cannot be so easily mediated. The majority redefined intent so convincingly for itself that it distinguished its own approach from that of the dissent by equating its approach, but not the dissent's, with traditional understandings of family as a social unit embedded in inexorable truth. The contradiction between the majority's actual reliance on the concept of intent and its characterization of its approach as traditional illustrates as starkly as any aspect of this complicated case the inability of society, including its courts of law, to interpret sensibly, and to adjust easily to, changes in the creation and operation of the family.

The dissent, in turn, expressly asserted that its best-interest proposal for setting parentage involved no confusion between parentage and custody.<sup>267</sup> But that is so only if parentage is not measured against models traditionally

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265. *Id.* at 782 n.10.

266. *See id.* at 798-99 (Kennard, J., dissenting). The dissent did not explicitly acknowledge that the majority's proposal and its own were similarly grounded in the substitution of social choices for biological truths in establishing family relationships. However, Justice Kennard criticized the majority for establishing parentage through reliance on a concept more appropriate to the world of the marketplace than to the home.

267. The dissent referred to a provision in California statutory law that provided for a determination of parentage on the basis of a best-interest analysis. *Johnson*, 851 P.2d at 799 (citing § 7017(d)(2) of the Uniform Parentage Act, as promulgated in California).



used for identifying the parent-child bond. Those traditional models assume parentage, as a matter of "natural" fact, to follow inexorably from biological connections. So, while the dissent criticized the majority for having created an "inflexible rule" for establishing parentage, the rule embodied in traditional understandings of parentage is similarly inflexible.

However, in another criticism of the majority, the dissent tied its position more firmly to tradition than the position of the majority. The dissent ultimately rejected the majority's reliance on intent because the concept of intent is "grounded in principles of tort, intellectual property and commercial contract law."<sup>268</sup> Family law, not commercial law, the dissent argued, should govern the regulation of family matters.<sup>269</sup> Yet, despite its apparent connection to traditional family law principles, the resolution that the dissent would have affected unsettles traditional assumptions about parentage as decisively as the majority's reliance on the notion of intent.

Although the majority and the dissent depart significantly from traditional understandings of family and parentage, the two opinions focus on a long-standing, central assumption about parentage in general, and in particular, about application of the best-interest standard. This assumption—reflected in the majority's decision, but in a new form, and questioned directly in the dissent's decision—directs courts to conclude that parents almost always serve their children's interests in the nature of the case—that parents "naturally" care, and provide, for their children. The assumption encouraged courts applying the best-interest standard to focus on, and serve, the interests of parents as well as of children.

The assumption was made startlingly clear more than a decade before *Johnson*, in *Parham v. J.R.*<sup>270</sup> In that case, the United States Supreme Court validated a Georgia statute that provided for the commitment of children to mental institutions upon application by a parent or guardian and authorization by the superintendent of the hospital.<sup>271</sup> The Court justified its holding through reference to "natural bonds" that guide parents to act in their children's best interests. The Court wrote:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of

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268. 851 P.2d at 799 (Kennard, J., dissenting).

269. *Id.*

270. 442 U.S. 584 (1979).

271. See generally *id.*

affection lead parents to act in the best interests of their children.<sup>272</sup>

More specifically, the assumption expressed in *Parham*—that parents naturally act to serve their children's interests—generally informs courts applying the best-interest standard, and even more often precludes the need for application of the standard altogether. The assumption obviously does not help courts select between two fit parents as are often found in divorce cases involving custody disputes, but it has routinely served the interests of parents, in disputes against other potential custodians.<sup>273</sup>

The assumption that parents serve their children's interests *because* they are parents is reflected in *Johnson* in the majority's express claim that parents—here established through intent rather than through biological connections—will serve their children well because the interests of children likely will not “run contrary to those of adults who choose to bring them into being.”<sup>274</sup> Thus, after defining the Calverts as “natural” parents, the court concluded that, as such, the Calverts would be “good” parents.

Moreover, in considering Johnson's claims to maternity, the court concluded that the very act that defined Johnson as a non-parent—her initial denial of parental intent—demonstrated her lack of fitness to be a mother. “[B]y voluntarily contracting away any rights to the child,” wrote the court, “[Johnson] has, in effect, conceded the best interest of the child is not with her.”<sup>275</sup> Thus, the majority assumed a best-interest analysis as part of its reconstruction of parentage through reliance on the notion of intent. So formulated, the approach to family that underlies the best-interest standard will result almost invariably in courts deciphering the best interests of children by focusing on the interests and rights of their (competing) parents. That tendency, which defined earlier cases involving disputes over custody or parentage, becomes even clearer amidst the peculiar complexities of cases occasioned by reproductive technology.

In contrast, the dissent reversed traditional assumptions about parentage and best interests, and proposed that parentage should flow from, as well as assure, a child's interests. It cannot, of course, be known how that suggestion would have been applied had the dissent's view been accepted by a majority of the court. Were the dissent's proposal to be applied in an

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272. *Id.* at 602 (citations omitted).

273. *Bennett v. Jeffreys*, 356 N.E.2d 277, 282-83 (N.Y. 1976) (allowing judicial inquiry into whether interests of child would be served by placement of child with foster parents rather than biological mother but restricting such inquiry to cases involving “extraordinary circumstances”).

274. 851 P.2d at 783 (quoting Shultz, *supra* note 257, at 397).

275. *Id.* at 782 n.10.

actual gestational surrogacy case, the difficulties encountered by the New Jersey courts in *Baby M*<sup>276</sup> would be magnified by the possibility that two biological mothers and three biological parents might logically be recognized. Justice Kennard followed familiar judicial considerations in suggesting that in such a case, a reviewing court should focus on the adults' "ability to nurture the child physically and psychologically . . . and to provide ethical and intellectual guidance. Also crucial to a child's best interests is the 'well recognized right' of every child 'to stability and continuity.'"<sup>277</sup> This guidance provides almost no concrete assistance to a trial court asked to establish the best interests of a child such as Christopher.

In the end, neither the majority nor the dissent in *Johnson* paid any real heed to the interests of the child. The majority precluded the need to examine the child's interests by presuming expressly that, in the nature of the case, intending parents will serve their children well. The dissent, proposing that the child's best interests determine its parentage, left future courts without a clue about how to accomplish that task.

In this case, complicated beyond ordinary custody and parentage disputes by the simultaneous and novel challenge presented to the biological and social correlates of parenthood, all the justices of the state supreme court<sup>278</sup> agreed about one thing. Both the decision of the majority and that of the dissent unsettle traditional understandings about family by substituting choice for inexorable truth as the determinant of parentage. Yet, both justified that substitution by an appeal to tradition, through reference to the interests of the child involved in the case. Neither opinion, however, entertained concretely the interests of the actual child.

#### *D. The Cases Compared*

The responses of the New Jersey courts in *Baby M* most closely resembled responses of courts handling more routine cases involving questions about custody. This is not accidental. Unlike *Johnson* and *Davis*, *Baby M* presents only minimal disruption to cultural expectations about

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276. See *supra* notes 215-23 and accompanying text (discussing failure of the New Jersey Supreme Court to consider real correlates of Baby M's situation in making conclusions about her best interests).

277. *Johnson*, 851 P.2d at 799 (quoting *Burchard v. Garay*, 724 P.2d 486, 491 (Cal. 1986) (Mosk, J., concurring)).

278. One justice concurred, agreeing that Crispina Calvert should be named the "natural mother of the child she at all times intended to parent and raise as her own" but disagreeing with the majority's further suggestion that surrogacy contracts were not inconsistent with state public policy. *Id.* at 787-88 (Arabian, J., concurring).

human reproduction. Artificial insemination has been known for centuries, and has been used in human reproduction for two centuries.<sup>279</sup> The procedure, in requiring the extra-corporal transfer of sperm, disrupts the continuity of the reproductive process, but does not seriously challenge cultural assumptions about the meanings of maternity, paternity, or the parent-child bond. As a result, *Baby M* could be, and to a large extent was, framed by the courts to resemble other far less exceptional disputes about children between antagonistic adults.

*Baby M* did, however, threaten *social* expectations about the forms through which families should be established. Most of the contradictions and confusions in the *Baby M* opinions result from the courts' (and larger society's) reluctance to design the parent-child bond in contractual terms. Both of the courts that heard the case were able to rely on the best interests of the child to resolve the dispute in a manner that seems, at least at first, to differ only minimally from many other best-interest analyses. In fact, of course, that analysis, precisely because it was largely effected *as if* the case were no different than a thousand other custody cases, failed ultimately to take account of the child's best interests within the social context that led to the creation of, and would continue to define, the child's life. In the end, the state supreme court determined the best interests of a fictive child, and not of the actual child involved in the case.

Both *Davis* and *Johnson*, in contrast with *Baby M*, challenge the conceptions on the basis of which society has comprehended kin relations. In each of these cases, courts invoked children (or embryos), and justified the decisions reached with assurances that the children, or potential children, would be well served. However, neither case allowed for simple application of the best-interest test. So in *Davis*, the state supreme court determined that embryos, although not people, are owed a "special respect" as potential people, and thereby established the moral frame within which the dispute should be resolved. Then, apparently without recognizing the gap between that frame and the actual resolution, the court examined and selected among the interests of the adults whose donated gametes had produced the embryos in question.

Similarly, the state supreme court in *Johnson* bypassed familiar legal responses. In *Johnson*, the state supreme court fashioned a response which, in asking courts to rely on parental intent to establish parentage, sided fully with the world of contract and autonomous individuality. The court then described that same response as benefitting inevitably the children whose fate it would determine.

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279. See SHALEV, *supra* note 196, at 58-60.

In all of these cases, courts invoked children and their interests in order to justify an astonishing variety of ends not directly related to those children. Children were invoked, for instance, (by the trial court in *Baby M*) to mitigate the court's obvious discomfort at having validated the contractualization of the parent-child bond; (by the trial court in *Davis*) to proclaim the potential humanity and consequent respect owed to gametic and embryonic material, frozen or fresh; (by the state supreme court in *Davis*) to erect a moral vision in terms of which courts should entertain the fate of frozen embryos, but which bore little relevance to the court's actual conclusions; (by the state supreme court in *Johnson*) to mediate the contradictions between a world founded in terms of contract (intent, as generally understood) and a world founded in terms of status ("intent" as the court reinterpreted the notion).

The courts justified each position and each end through association with images of childhood. But in these cases, and increasingly as the consequences of assisted reproduction more fully challenge expectations about the sources and limits of family, such association with images of children remains just that, an association unsupported by even the attempt to determine and affect the interests of children.

#### CONCLUSION

In the years following the Industrial Revolution, society elaborated images of children and childhood that had begun to develop with the wane of the feudal order. These images served a deep nostalgia for a world of tradition assumed to have preceded the upheavals brought with the nineteenth century marketplace. In identifying children as the enduring center of family life, society erected a framework within which to connect the present to a valued past. That framework provided an apparent bulwark in society's attempts to constrain and regulate the transformation of the family that began in the mid-nineteenth century. Those attempts were expressly institutionalized by the law in the form of the best-interest standard. In that form, society's apparent concern for children served children rather poorly.

However, the best-interest standard allowed a legal system, compelled to respond to continuous change in the form and understanding of family, to effect the double illusions of consistency and decency. In fact, the flexibility of the best-interest standard provided a means for the law to respond to, and variously to accept or to reject, almost any fad that, at one time or another, seemed to define society's emerging understanding of the family and of the parent-child bond. Moreover, the illusion of decency, provided by the

standard's apparently consistent focus on children, was belied with almost equal consistency by the consequences of the standard's application to actual children. The standard allowed courts to further a variety of adult interests and agendas under the guise of protecting children.

More recently, the law has been less adept at relying on children's interests and on images of children to resolve and justify the resolution of disputes about the family. Courts continue to invoke children and even, as in *Baby M*, to apply the best-interest standard, but the turmoil engendered for understandings of family by the confluence of contemporary social and technological transformations renders the results obviously inadequate. Courts plead for legislative guidance, but that guidance comes slowly and is quickly rendered obsolete by rapid technological change. And, more important, legislators, like judges, must comprehend the implications for social life of such changes in the meaning and form of family before they can wisely regulate the changing family.

So, a debate about the family, initiated over a century ago, intensifies. Old truths are invoked, discarded, and re-imagined. Possibilities for designing families in terms of status and in terms of contract multiply.<sup>280</sup> For a long time, certain truths about children—about their centrality and enduring value—stood apparently unaffected, at the eye of the debate, and thereby provided a harbor within which the larger debate could be anchored. Only now, with the added pressure of the challenges reproductive technology presents to old understandings of family is this central, powerful symbol of family—of traditional and modern families, alike—also being openly subjected to re-examination and reconstruction.

Messages redefining the family are still communicated, if less securely and less coherently, through references to children in cases involving reproductive technology as the stakes at issue in the debate about the fate and form of the family in American society escalate. In the process, the interests of children are encompassed and subsumed by the ideological debate. Nostalgic images of families of yore, symbolized most forcefully by children-in-families, have served polemic interests for those who favor the preservation of a hallowed past, and almost equally for those who endorse individualizing and contractualizing the formation and operation of family life but who temper the harshest implications of *that* choice with assurances about the continuing appreciation of children and childhood. As the debate unfolds, society continues to sacrifice the interests of children. Even more, evidence accumulates that suggests a new and far more radical shift away

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280. See Strathern, *supra* note 116 (analyzing ideological contours of debate about status and contract).

from children and their interests in comprehending and regulating the family. If so, we are witnessing a fundamental alteration in the status of childhood—even perhaps the “disappearance of childhood.”<sup>281</sup>

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281. See POSTMAN, *supra* note 47 (suggesting that childhood as a notion may be eroding).