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The Children of Baby M

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THE CHILDREN OF BABY M.
J. HERBIE DiFONZO & RUTH C. STERN*

I. INTRODUCTION

If “all new technology creates a lacuna in social thought,” legal thought is even less adept at navigating novelty’s pitfalls.¹ Because the law is not in the habit of anticipating social and technological changes, it approaches them with caution and skepticism. Courts proceed by carving out easements in the unfamiliar terrain. Eventually, the law evolves a set of principles for analyzing and accommodating new scientific and social practices. Often, by the time this occurs, society has embraced, rejected, or become inured to the innovation and moved on to the next one.²

We have come to expect that technology will outpace the law’s ability to comprehend it and regulate it. This lag time is not necessarily harmful; it allows new trends to take root in the culture, to reveal how they operate, and to expose their benefits and limitations, as well as areas needing further study. As Elizabeth Scott noted, the making of law and policy in a climate of controversy and “intense political pressure will seldom promote society’s long-term interests.”³ At the same time, an awareness of innovation and its influence on cultural norms is what keeps the judicial and legislative processes relevant and vital. We do not ask courts to sanction every new idea that comes along; we ask only that when novel

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¹ Bernard E. Rollin, *Telos, Value, and Genetic Engineering*, in *IS HUMAN NATURE OBSOLETE? GENETICS, BIOENGINEERING, AND THE FUTURE OF THE HUMAN CONDITION* 317, 335 (Harold W. Baillie & Timothy K. Casey eds., 2005).

² See Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 *LAW & CONTEMP. PROBS.* 109, 110–11 (2009) (showing that this has occurred with surrogacy arrangements because both politicians and the judiciary realized that these arrangements are here to stay).

³ *Id.* at 145.

issues do arise, they not take refuge in unproven assumptions and outdated precedent.

Twenty-one years—the span of a near generation—separate the New Jersey court cases of *In re Baby M.*,⁴ decided by the state's supreme court in 1988, and *A.G.R. v. D.R.H. and S.H.*,⁵ a trial court decision from 2009. Both cases roundly repudiated surrogacy contracts as void and unenforceable.⁶ In *Baby M.*, William Stern contracted with a surrogate, Mary Beth Whitehead, to be artificially inseminated with his sperm and to bear a child for him and his wife Elizabeth.⁷ Whitehead further agreed to surrender the child to the Sterns for adoption.⁸ Finding it impossible to comply with the contract, Whitehead suffered an emotional crisis and absconded with the baby, Melissa, returning her to the Sterns only by court order and after arrest.⁹ The New Jersey Supreme Court reversed the trial court's validation of the contract and authorization of Melissa's adoption by the Sterns.¹⁰ In doing so, the supreme court not only declared the contract invalid but also pronounced it evil:

It guarantees the separation of a child from its mother; it looks to adoption, regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.¹¹

Numerous amici curiae joined in support of Whitehead, several prominent feminists among them.¹² Confronting a divisive issue and a relatively uncommon reproductive practice, *Baby M.* was very much a creature of its time.¹³ The decision deplored the commodification of children, the treatment of women's bodies as "childbearing factories,"¹⁴

⁴ 537 A.2d 1227 (N.J. 1988).

⁵ No. FD-09-1838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009), available at http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

⁶ *Baby M.*, 537 A.2d at 1234; *A.G.R.*, No. FD-09-1838-07, at *5–6.

⁷ *Baby M.*, 537 A.2d at 1235.

⁸ *Id.*

⁹ *Id.* at 1236–37.

¹⁰ *Id.* at 1234.

¹¹ *Id.* at 1250.

¹² Scott, *supra* note 2, at 116.

¹³ *Id.* at 109.

¹⁴ *Id.* at 112.

and the way in which surrogacy “degraded the mother-child relationship by paying women not to bond with their children.”¹⁵

The later case, *A.G.R. v. D.R.H. and S.H.*, concerned a gay male couple, Donald and Sean Hollingsworth, who legally married in California and registered their domestic partnership in New Jersey.¹⁶ The surrogate, Angelia Robinson (Donald’s sister), agreed to carry eggs from an anonymous donor that were fertilized by Sean’s sperm.¹⁷ After giving birth to twins, Robinson claimed entitlement to the status of parent.¹⁸ In voiding the surrogacy contract and granting parental status to Robinson, the court relied almost exclusively on *Baby M.*¹⁹ The fact that Robinson, unlike Whitehead, was genetically unrelated to the twins was, for the court, “a distinction without a difference significant enough to take the instant matter out of *Baby M.*”²⁰

The court in *A.G.R.* appeared oblivious to the revolution in reproductive demographics that had occurred since *Baby M.*²¹ Many of these changes were tied to the rise of a thriving industry in assisted reproductive technology (ART).²² During the last decade of the twentieth century, the number of gay and lesbian families more than tripled.²³ The birth rate increased for women aged 35 and over, doubled for women aged 40–44, and tripled for women aged 44–49.²⁴ The number of children born to women aged 50–54 rose from 117 in 1997 to 417 in 2005.²⁵

¹⁵ *Id.*

¹⁶ *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07, at *2 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

¹⁷ *Id.*

¹⁸ *Id.* at 1–2.

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 5.

²¹ See Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 225 (1998) (“The advent and swift expansion of reproductive technology beginning in the late 1970s accelerated the transformation of the family by undermining sacred assumptions about the reproductive process.”).

²² See Crystal Phend, *Rapid Increase Seen in Assisted Reproduction*, MEDPAGE TODAY (May 28, 2009), <http://www.medpagetoday.com/OBGYN/Infertility/14405> (reporting a 25.6% jump in the number of ART cycles performed worldwide from 2000 to 2002).

²³ DAVID M. SMITH & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 1 (2001), available at http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

²⁴ Joyce A. Martin et al., *Births: Final Data for 2005*, NATIONAL VITAL STATISTICS REPORTS, Dec. 5, 2007, at 8, available at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_06.pdf.

²⁵ *Id.*

Collaborative reproduction, with its constellation of sperm, egg and embryo donors, and gestational carriers had transformed the concept of legal parentage.²⁶ No longer could the term *parent* “be determined solely by biology or genetics.”²⁷ The use of ART, especially in nontraditional families, was leading courts away from biological and gestational models towards “a more functional view of parenthood.”²⁸

As early as 1992, a Pennsylvania appellate tribunal in *Blew v. Verta*²⁹ admonished courts for failing to validate “unusual or complex” family arrangements and for perpetuating “the fiction of family homogeneity at the expense of children whose reality does not fit this form.”³⁰ The court was addressing a mother’s right to visit her son in the company of her lesbian partner,³¹ but the call for tolerance could easily apply to any nontraditional family, including those formed by surrogacy and ART. Particularly in states where surrogacy contracts are invalid,³² courts continue to fall back on genetic or biological connections when parentage and custody disputes arise. In Michigan, where surrogacy contracts are illegal, a gestational mother unilaterally declared herself the better parent for twins she had borne for an infertile couple.³³ But for the couple’s financial provision for eggs, sperm, and gestational services, the twins would not have existed. Yet, based on tenuous allegations of the intended mother’s mental unfitness, the court awarded custody to the surrogate—the only one of the parties who could claim a biological connection to the twins.³⁴ “Shotgun marriage may be dead,” noted June Carbone and Naomi

²⁶ Bruce L. Wilder, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law*, 18 J. AM. ACAD. MATRIMONIAL LAW. 177, 195 (2002).

²⁷ Dena Moyal & Carolyn Shelley, *Future Child’s Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections*, 48 FAM. CT. REV. 431, 433 (2010).

²⁸ CHARLES P. KINDREGAN & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY 93 (2006).

²⁹ 617 A.2d 31 (Pa. 1992).

³⁰ *Id.* at 36.

³¹ *Id.* at 31.

³² See M. Celeste Schejbal-Vossmeier, *What Money Cannot Buy: Commercial Surrogacy and the Doctrine of Illegal Contracts*, 32 ST. LOUIS U. L.J. 1171 (1988). A Michigan Court of Appeals has held that the right to privacy protects the decision to bear and beget a child, but it does not preclude the state from interfering in the contractual arrangement entailed in surrogacy. *Id.* at 1175. The Kentucky Supreme Court has similarly held surrogacy contracts voidable under the state’s adoption consent statutes. *Id.* at 1178.

³³ See Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at 1.

³⁴ *Id.*

Cahn,³⁵ but when the functional clashes with the biological, “shotgun parenthood is not.”³⁶ The “widely disparate” nature of state laws on surrogacy and ART obstructs uniformity and makes consistency unlikely in determining matters of parentage.³⁷

With *Baby M.* as a point of reference, this article explores the cultural, legislative, and judicial responses to new reproductive technologies. Despite earlier fears, empirical evidence disputes the notion that surrogacy and ART make childbearing slaves of women and commodities of children. Though not without problems for the families they create, these reproductive practices are here to stay, and courts and lawmakers must come to terms with them. Part II describes late twentieth century reproductive patterns and the emergence of ART. Infertility, delayed childbearing, nontraditional family arrangements, and a shortage of adoptable white babies all contributed to the rise of ART. Part III explores some of the fallacies surrounding surrogacy and presents research involving the children of ART. Surrogates, in general, are the victims of neither coercion nor exploitation. The children of ART, however, require greater attention and sensitivity to their need to know more about their parentage. Part IV considers the evolving legal standards for determining parenthood in the twenty-first century. In light of dramatic social changes in family composition and the rapid proliferation of reproductive technologies, judges and lawmakers should no longer rely on outmoded presumptions when crafting the legal norms for parentage and custody determinations. Part V argues that preconception intent plus consistent behavior should be central to whatever statutory and case law approaches ultimately emerge for resolving parenthood disputes.

II. SHOPPING FOR PARENTHOOD

In *Baby M.*, amidst a meditation on the irrelevance of voluntariness in paid surrogacy arrangements and the price of “labor, love, or life,”³⁸ Justice Wilentz opined for the court, “There are, in a civilized society, some things that money cannot buy.”³⁹ Justice Wilentz was misinformed. Even before the advent of the ART boom, it was apparent that “the wall between commerce and adoption is not completely impenetrable,” that adoption

³⁵ June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1025 (2003).

³⁶ *Id.*

³⁷ Katherine Drabiak et al., *Ethics, Law and Commercial Surrogacy: A Call for Uniformity*, 35 J. L. MED. & ETHICS 300, 301 (2007).

³⁸ *In re Baby M.*, 527 A.2d 1227, 1249 (N.J. 1987).

³⁹ *Id.*

fees “vary dramatically,” and that some adults are willing to expend “huge sums” on adopting a child.⁴⁰ The cost of domestic private adoption ranges from \$4,000 to \$30,000, as compared to \$7,000 to \$30,000 for international adoptions.⁴¹ Children who are racial minorities are sometimes less expensive to adopt than white children, indicating that adoption costs for various children, “like price in other markets, is one factor influencing people to adopt one baby rather than another.”⁴² With reproductive technologies, it is not the children that are on display but instead, the means to produce them. In ART, “egg and sperm are sold, and the rights to their contents and reproductive energy legally transferred.”⁴³ Whether it is through adoption, surrogacy, egg donor, alternative insemination, or in vitro fertilization (IVF), the exchange of money for parental status has become routine.⁴⁴ There is, in short, a “functioning market” in parenthood.⁴⁵

In the United States, this seemingly unquenchable thirst for offspring began in the mid-twentieth century with the rise of the nuclear family as the ideal of “domestic perfection.”⁴⁶ Infertile couples in the post World War II years turned to adoption to erase “the stigma of childlessness in an era of ‘compulsory parenthood.’”⁴⁷ The use of artificial insemination began to take hold in the 1930s, becoming more prevalent after World War II.⁴⁸ The first successful IVF took place in 1978, followed by the emergence of surrogate motherhood practices in the 1980s.⁴⁹

The treatment of infertility accelerated as the supply of adoptable children, especially healthy white infants, diminished.⁵⁰ By 1988, only 3%

⁴⁰ Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 425 (2004).

⁴¹ Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 10 (2003).

⁴² *Id.*

⁴³ LIZA MUNDY, *EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD* 101 (2007).

⁴⁴ Ertman, *supra* note 41, at 7, 11.

⁴⁵ *Id.* at 7.

⁴⁶ J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIMONIAL LAW. 1, 3 (2008).

⁴⁷ Appleton, *supra* note 40, at 403 (citing ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND* 127 (1997)).

⁴⁸ *Id.* at 405–06.

⁴⁹ *Id.* at 406.

⁵⁰ *Id.* at 405.

of babies born to single white women were relinquished for adoption, compared to 19% before 1973.⁵¹ Many people have been barred from adopting because of their sexual orientation, age, or marital status, and in the United States, mothers who give up their children “often hand-pick the adoptive parents.”⁵² For infertile couples, ART became an alluring alternative to adoption.⁵³ Aside from the shortage of available white babies, the adoption process could be costly, risky, and subject to disruption by the birth parents.⁵⁴ By the end of the twentieth century, the combined annual birth rate from donor insemination, IVF, and surrogacy arrangements was 76,000 while only 30,000 healthy children were available for adoption.⁵⁵

Childrearing began to change in the last century from “a community endeavor . . . designed to produce good citizens for the future” to a “route to personal satisfaction and private happiness for adults.”⁵⁶ As infertility became increasingly “medicalized,” ART marketers instilled in the infertile a sense that they were personally responsible for their undesired childlessness, fueling “the drive to pursue treatment after treatment.”⁵⁷ Today, the patient base for ART is comprised, “first and foremost,” of men with fertility problems followed by women who suffer from conditions like endometriosis, fibroids, missing uteruses, ovulation difficulties, or advanced maternal age.⁵⁸ Doctors at fertility clinics treat “plumbers, schoolteachers and lawyers” as well as patients whose desire for children has been hampered by psychological problems, life-threatening diseases, or crippling accidents.⁵⁹ Among the fastest growing clientele are single mothers, lesbians, and gays—driven less by infertility than by the absence of a willing or viable reproductive partner.⁶⁰ In lesbian couples, the non-childbearing partner often risks losing access to a child she planned for, cared for, and supported when the relationship dissolves.⁶¹ A technique

⁵¹ MUNDY, *supra* note 43, at 46.

⁵² Saul, *supra* note 33, at 45.

⁵³ See MUNDY, *supra* note 43, at 47.

⁵⁴ Appleton, *supra* note 40, at 428.

⁵⁵ *Id.* at 429.

⁵⁶ *Id.* at 401.

⁵⁷ *Id.* at 432.

⁵⁸ MUNDY, *supra* note 43, at 10.

⁵⁹ *Id.* at 11.

⁶⁰ *Id.*

⁶¹ See Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 516–17 (1993).

known as ROPA (Reception of Oocytes from PArtners) allows both women in a lesbian couple to share in the pregnancy.⁶² Eggs retrieved from one partner can be fertilized and implanted for gestation in the other.⁶³ Or if both women are fertile, they can exchange embryos with each woman gestating her partner's fertilized eggs.⁶⁴

The new reproductive technologies are part of "modernity's impulse to control the body and extend choice,"⁶⁵ and they are spurring the proliferation of nontraditional families.⁶⁶ ART has reconfigured parenthood by compartmentalizing it.⁶⁷ At the same time, for countless couples and individuals, it has made parenthood "deliciously possible."⁶⁸

In 2007, the rate of births to unmarried women reached a record 39.7% of all U.S. births.⁶⁹ A good many of these women, perhaps "tens of thousands," are single mothers by choice.⁷⁰ Some of them have grown impatient in their search for reproductively willing partners, having endured "too many years of uncertainty from too many noncommittal males."⁷¹ Liza Mundy half jokingly mused, "Reluctant single men. Where are the cover stories agonizing about the threat they pose to the traditional American family?"⁷²

But, as single-mother-by-choice Lori Gottlieb noted, ambivalence lies on both sides of the gender equation.⁷³ A lot of Gen X women "took it for granted that we could do anything we wanted" and ended up paralyzed by indecision.⁷⁴ Unwilling to compromise on their choice of mate, they forgot

⁶² S. Marina et al., *Sharing Motherhood: Biological Lesbian Co-Mothers, a New IVF Indication*, 25 HUM. REPROD. 938, 939 (2010), available at <http://humrep.oxfordjournals.org/content/25/4/938.full.pdf>.

⁶³ *Id.*

⁶⁴ *Id.* at 940.

⁶⁵ Hal B. Levine, *Gestational Surrogacy: Nature and Culture in Kinship*, 42 ETHNOLOGY 173, 175 (2003).

⁶⁶ Appleton, *supra* note 40, at 443.

⁶⁷ MUNDY, *supra* note 43, at 13.

⁶⁸ *Id.*

⁶⁹ Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, NAT'L VITAL STAT. REP., Mar. 18, 2009, at 3, 13 tbl. 7, available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_12.pdf.

⁷⁰ MUNDY, *supra* note 43, at 157.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Lori Gottlieb, *The XY Files*, ATLANTIC MONTHLY, Sep. 2005, at 149–50, available at <http://www.theatlantic.com/magazine/archive/2005/09/the-xy-files/4172/>.

⁷⁴ *Id.* at 144.

“that if you don’t choose anything, eventually you’re left with nothing.”⁷⁵ In the new millennium, women in their thirties see themselves confronting a choice “between love and offspring.”⁷⁶ As Gottlieb perused the sperm donor profiles, she found it “liberating to have the pick of the genetic crop.”⁷⁷ Instead of “marrying a schlubby but lovable man” with less than stellar physical attributes, she could “indulge hubristic fantasies of genetic engineering.”⁷⁸ Ironically, after becoming pregnant, Gottlieb attracted the attention of a surprising number of men in their thirties.⁷⁹ She believed they were charmed by her lack of ulterior motive and by the chance to be liked for their innate qualities rather than their procreative potential.⁸⁰ “The men I’m dating realize that I already have everything else I want,” explained Gottlieb, “so now I’m in this purely for a chance at love.”⁸¹

Sex has become increasingly divorced from marriage and reproduction, to the extent that the labels *marriage* and *family* no longer predictably reveal their inner workings.⁸² ART has burrowed deep into our social institutions and extended its reach around the globe. At an estimated rate of 250,000 per year,⁸³ more than 3 million ART babies have been born worldwide, making up 4% of all live births.⁸⁴ The largest sperm bank in the world is in Denmark, and it exports three-quarters of its product overseas.⁸⁵ Patients from Spain, France, Australia, and elsewhere travel to California clinics, eager to take advantage of ART regulations more liberal than in their own countries.⁸⁶ Couples—straight and gay—from Canada, the United States, Israel, Europe, and other countries “can combine eggs

⁷⁵ *Id.*

⁷⁶ *Id.* at 141.

⁷⁷ *Id.* at 143.

⁷⁸ *Id.*

⁷⁹ *Id.* at 150.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Levine, *supra* note 65, at 183.

⁸³ Katie Cottingham, *Fact or Fiction: Artificial Reproductive Technologies Make Sick Kids*, SCI. AM. (Jul. 1, 2010), <http://www.scientificamerican.com/article.cfm?id=artificial-reproductive-tech-kids>.

⁸⁴ Chitose Suzuki, *Researchers: Most ‘Test Tube’ Kids Are Healthy*, USA TODAY (Feb. 22, 2010), http://www.usatoday.com/news/health/2010-02-22-test-tube-babies_N.htm?csp=usat.me.

⁸⁵ ELIZABETH MARQUARDT ET AL., MY DADDY’S NAME IS DONOR 5 (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf.

⁸⁶ *Id.* at 15.

and sperm (their own or someone else's) and have the resulting embryo carried by a village woman in India for a fraction of the cost" in America.⁸⁷ Fertility tourism has produced a "pulsing commerce, with dollars and Euros flying around the world."⁸⁸ A growing number of twenty-first century babies are "global citizens"⁸⁹ in ways that our ancestors could never have envisioned or comprehended.

ART has come a long way since *Baby M.*'s excoriation of the childbearing marketplace. Surrogacy has slipped most of its moral constraints,⁹⁰ and many of ART's children are now old enough to speak for themselves.⁹¹ Along with aspiring parents and the clinics that serve them, the donors, surrogates, and children are the major players in ART's unfolding history. Their insight and experience are crucial to an understanding of the ways in which these new technologies have infiltrated our culture and molded our reproductive future.

III. PARTICIPANTS AND PRODUCTS IN THE REPRODUCTIVE MARKETPLACE

A. *The Surrogates*

Reproductive technologies do not alter the desire for parenthood, but they do create a gulf between marriage and motherhood and the "drives, emotions, and desires of pregnancy."⁹² In our contemporary culture, the yearning to become a parent is sufficient pretext for setting in motion the mechanisms for achieving pregnancy and parenthood.⁹³ At times, this can only be accomplished through collaborative reproduction and by "borrowing the reproductive capacity of another woman."⁹⁴ No longer are the ties of kinship forged by nature and instinct alone, but also by "choice, love, and intention."⁹⁵ Surrogate motherhood helps to form families when desire and intent are impeded by nature.

⁸⁷ *Id.* at 15–16.

⁸⁸ *Id.* at 16.

⁸⁹ *Id.*

⁹⁰ Scott, *supra* note 2, at 136.

⁹¹ See MARQUARDT ET AL., *supra* note 85, at 21–25.

⁹² Levine, *supra* note 65, at 183.

⁹³ *Id.*

⁹⁴ MUNDY, *supra* note 43, at 94.

⁹⁵ Levine, *supra* note 65, at 177.

The “moral panic”⁹⁶ that ensued in *Baby M.*’s aftermath produced laws designed either to prohibit surrogacy or to discourage it by forbidding payment to the gestational mother.⁹⁷ *Baby M.*’s Justice Wilentz had no problem with the practice as long as the surrogate mother acted voluntarily, received no remuneration, and obtained “the right to change her mind and to assert her parental rights.”⁹⁸ The trial court in *A.G.R.* engaged in identical reasoning when it voided a paid surrogacy contract, even though the gestational mother had carried the eggs of an anonymous donor.⁹⁹ In its haste to condemn the practice of surrogacy, the *A.G.R.* court seemed more concerned with the emotional harm to the surrogate mother than with the long-term needs of the children. Noting that in *Baby M.*’s time the legislature was silent on the legality of surrogacy contracts, *A.G.R.* concluded that “the additional twenty-one years of silence as to surrogacy agreements speaks even louder.”¹⁰⁰ In those intervening years, however, surrogacy changed dramatically. Today, 95% of surrogates carry embryos created by genetic materials other than their own.¹⁰¹ In fact, most surrogacy agreements “stipulate that the woman who carries the baby cannot also donate the egg.”¹⁰²

Cases like *Baby M.* are rarities today. *A.G.R.*’s facts are more problematic, though its principal defect is its rote adherence to *Baby M.* and its failure to distinguish between the fact that Whitehead was genetically related to the subject child whereas Robinson was not.¹⁰³ The court was well aware of the obligations that parental status imposes.¹⁰⁴

⁹⁶ Scott, *supra* note 2, at 125.

⁹⁷ *Id.* at 117.

⁹⁸ *In re Baby M.*, 537 A.2d 1227, 1264 (N.J. 1988).

⁹⁹ *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07, at *3 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009), available at http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

¹⁰⁰ *Id.* at *4.

¹⁰¹ Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers* 8 (2009) (unpublished manuscript), available at <http://claradoc.gpa.free.fr/doc/329.pdf>.

¹⁰² Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 47.

¹⁰³ *Compare Baby M.*, 537 A.2d at 1254–55 (dismissing an equal protection claim by a sperm donor against Whitehead, the surrogate mother who used her own eggs to fertilize the pregnancy), with *A.G.R.*, No. FD-09-1838-07, at *2 (noting that the surrogate mother Robinson, *A.G.R.*, carried the fetus created by eggs donated by an unknown woman).

¹⁰⁴ *A.G.R.*, No. FD-09-1838-07, at *2.

Awarding parental rights to a person with no genetic bond and no clearly stated intention of becoming a parent serves neither personal nor policy interests. The parties in *A.G.R.* also suffered because of their unfortunate choice of a gestational mother. Robinson, the surrogate, appears to have been psychologically unprepared to give up the twins, or possibly, the intended parent never plainly specified her role in regards to the children.¹⁰⁵ Additionally, her familial relationship to the children—she is their paternal aunt—created a continuing obstacle to the Hollingsworths' unfettered assertion of their intended parental rights.¹⁰⁶ As it is practiced today, surrogacy strives to avoid the perils of both *Baby M.* and *A.G.R.*¹⁰⁷ When it works, and it most often does, surrogacy strengthens the concept of family as surely as it transforms it.

Although surrogates admit that separating from the baby “is still the hardest part of the job,”¹⁰⁸ they rarely refuse to relinquish a child after giving birth.¹⁰⁹ Given the estimated 1,000 surrogacy agreements entered into each year in the United States, “the lack of litigation is remarkable.”¹¹⁰ In many states, lawmakers are now less concerned with discouraging and “punishing a pernicious practice”¹¹¹ than with more pragmatic issues such as clarifying parental status and “protecting all participants, especially children.”¹¹² The evolution of surrogacy's image from a coercive, commodifying moral threat to a socially accepted practice¹¹³ illustrates the triumph of the empirical over the theoretical.

This is not to suggest that the commodification question has been definitively resolved, even in the minds of the surrogates themselves. Katherine Drabiak and her coauthors defined commercial surrogacy as “a contractual relationship where compensation is paid to a surrogate and agency, excluding any reasonable medical, legal, or psychological expenses, in exchange for the surrogate's gestational services.”¹¹⁴ When a practice like surrogacy has yet to attain full cultural consensus, contractualization “insulates socially marginal transactions from the bias in

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Scott, *supra* note 2, at 120–21.

¹⁰⁸ Ali & Kelley, *supra* note 102, at 49.

¹⁰⁹ Busby & Vun, *supra* note 101, at 40.

¹¹⁰ *Id.* at 14.

¹¹¹ Scott, *supra* note 2, at 121.

¹¹² *Id.*

¹¹³ See generally Scott, *supra* note 2 (discussing changing views of surrogacy).

¹¹⁴ Drabiak et al., *supra* note 37, at 301.

majoritarian morality.”¹¹⁵ For nontraditional seekers of parenthood—single people, lesbians, and gays—contractualization offers privacy and a “safe haven” in which to pursue one’s dreams “relatively free from the constraints imposed by the lowest common denominator of public opinion.”¹¹⁶ In view of the public’s distaste for baby selling, contractualization avoids commodification claims by defining the gestational services, not the baby, as the “item for sale.”¹¹⁷ One surrogate mother explained, “If you’re being paid for your time, it’s like a contract and it severs it completely at the end because it is a job done and you’re paid for it and that’s the end of it.”¹¹⁸

This statement highlights two of the main perplexities facing surrogates: the acceptance of money for bearing a child and the act of relinquishing that child as part of the contractual obligation. To do her job, a surrogate has to make peace with her conscience on both of these issues. On the matter of fetal attachment, discussed more fully below, she succeeds by firmly believing the baby is not hers to keep.¹¹⁹ On the issue of compensation, she frames her motive as altruistic rather than financial, the “desire to help a childless couple” or to “create a family for a person who otherwise would have no way” of doing so.¹²⁰ The payment, generally a modest sum of \$20,000 to \$25,000,¹²¹ only serves to facilitate the pre-existing altruistic plan.¹²²

Research shows that although surrogates are not poor, they are usually of lower income and are less educated than the intended parents that employ them.¹²³ Most agencies decline to accept women on public assistance, and there is no empirical evidence that women are driven to surrogacy by financial crisis.¹²⁴ The vast majority of surrogates have

¹¹⁵ Ertman, *supra* note 41, at 24.

¹¹⁶ *Id.*

¹¹⁷ Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 549 (1990).

¹¹⁸ Busby & Vun, *supra* note 101, at 27 (quoting Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57, 61 (2002)).

¹¹⁹ See, e.g., Levine, *supra* note 65, at 179.

¹²⁰ Busby & Vun, *supra* note 101, at 28.

¹²¹ Ali & Kelley, *supra* note 102, at 45.

¹²² See Levine, *supra* note 65, at 181.

¹²³ Busby & Vun, *supra* note 101, at 18–20.

¹²⁴ *Id.* at 19.

already had two or three children and completed their families.¹²⁵ Payment for gestational services allows these women to work part-time or to remain at home to raise young children.¹²⁶ With the money earned, surrogates can supplement their family's income. They can also afford to indulge in a family trip to Disney World, or as in the case of one gestational mother, to build an occupational therapy gym for her autistic son.¹²⁷ In states like Texas and California, surrogacy agencies actively recruit military wives by distributing leaflets at military housing complexes and advertising in military publications.¹²⁸ With a single pregnancy, a military spouse can earn more than her husband's annual base pay, which ranges from \$16,080 to \$28,900 for new enlistees.¹²⁹ And the fact that the gestational process takes less than a year "gives them enough time between postings" to work as surrogates.¹³⁰

In terms of their personality profiles, surrogates tend to be "sociable, assertive, active, energetic and optimistic."¹³¹ They are also likely to be "self-sufficient, independent thinkers and nonconformists" who are less troubled by social taboos than other women.¹³² Rather than feeling demeaned or exploited, surrogates find the experience empowering—one that enhances self-esteem and instills "a sense of uniqueness and accomplishment."¹³³ They take pleasure in being pregnant, are skilled and knowledgeable about it, and often regard surrogacy as a "vocation or calling."¹³⁴

Altruism is self-gratifying, but surrogates also want to be thanked and appreciated, and to have their altruism "celebrated and acknowledged."¹³⁵ A personal relationship with the intended parents, "even though limited to a few visits or some telephone contact," brings greater satisfaction to the

¹²⁵ *Id.* at 22; *see generally* Ali & Kelley, *supra* note 102 (describing the lives of surrogates).

¹²⁶ Busby & Vun, *supra* note 101, at 26.

¹²⁷ Ali & Kelley, *supra* note 102, at 48.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting "Melissa Brisman, of New Jersey, a lawyer who specializes in reproductive and family issues, and heads the largest surrogacy firm on the East Coast").

¹³¹ Busby & Vun, *supra* note 101, at 21.

¹³² *Id.*

¹³³ *Id.* at 28.

¹³⁴ *Id.* (citing HELÉNA RAGONÉ, *SURROGATE MOTHERHOOD: CONCEPTION AT THE HEART* 55 (1994)).

¹³⁵ MUNDY, *supra* note 43, at 136.

surrogacy experience.¹³⁶ “I really wanted to feel as though the people I was doing this with were my friends,” said one gestational mother, “that’s how I wouldn’t feel used.”¹³⁷ When treated with “respect, honor and care,”¹³⁸ surrogates find that it is their bond with the intended parents, not with the baby, that is of the utmost value.¹³⁹

One of *Baby M.*’s prime objections to contractual surrogacy was that “the natural mother is irrevocably committed before she knows the strength of her bond with her child.”¹⁴⁰ Here, the operative term is “natural mother”: a woman who carries her own egg. In a natural pregnancy, in utero bonding maximizes survival because “the fetus carries the genes of the woman who gestates it.”¹⁴¹ In the age of reproductive technology, the dictates of evolution are yielding to functionalism.¹⁴² Today’s surrogates, who rarely carry their own egg, do not regard the fetus as their own, and it is clear that “bonding does not constitute an impediment to surrogate motherhood.”¹⁴³ If fetal attachment were such a “fundamental biological reality,” the practice of surrogacy would be “unsustainable.”¹⁴⁴ And if bonding is not consequential in surrogate pregnancies, then other mechanisms must be at work to “counteract the surrogate’s impulse to identify the child as her own.”¹⁴⁵ In her research, Heléna Ragoné

¹³⁶ Busby & Vun, *supra* note 101, at 31.

¹³⁷ MUNDY, *supra* note 43, at 136.

¹³⁸ Busby & Vun, *supra* note 101, at 32.

¹³⁹ *Id.* at 39. In her interviews with surrogates, Mundy found that many women preferred to work with gay male couples. MUNDY, *supra* note 43, at 130–31. As one surrogate explained, “Infertile couples—surrogacy is their last choice. To them, every single part of this is just another hurdle to overcome. With a gay couple, it’s their first choice. It’s the way they get to have biological children, and they’re thrilled.” *Id.* at 135 (quoting Ann Nelson, a twenty-nine-year-old surrogate). Infertile couples undergoing IVF treatment may be subject to depression and anxiety as well as lowered self-esteem, poor marital communication, sexual dysfunction, and social isolation. Chun-Shin Hahn, *Review: Psychosocial Well-Being of Parents and Their Children Born After Assisted Reproduction*, 26 J. PEDIATRIC PSYCHOL. 525, 526 (2001).

¹⁴⁰ *In re Baby M.*, 537 A.2d 1227, 1248 (N.J. 1988).

¹⁴¹ Levine, *supra* note 65, at 176.

¹⁴² *Id.*

¹⁴³ *Id.* at 177–78.

¹⁴⁴ *Id.* at 177.

¹⁴⁵ *Id.* at 178. A 2000 study of gestational surrogacy found that nearly a third of surrogates and intended parents do not share the same cultural, ethnic, and racial backgrounds. Busby & Vun, *supra* note 101, at 20. Some participants prefer to be matched with people of another race and ethnicity “because they believe that it would be less likely

(continued)

discovered these mechanisms in the surrogates' main motivations: "They wanted to help infertile couples, they wanted to earn money at home, and they loved being pregnant."¹⁴⁶ Bonding is not obstructive to surrogate motherhood because it is the circumstances preceding, rather than following, impregnation that provide the inducement.¹⁴⁷ "[T]he opportunity to have a pregnancy and birth without the responsibility of having a child to bring up after it" attracted one gestational mother.¹⁴⁸ Another felt more "like a caring babysitter"¹⁴⁹ than a mother, while still another "almost felt guilty for not feeling bad about giving up the baby."¹⁵⁰

In the course of his research, Hal Levine monitored a listserv for surrogate mothers.¹⁵¹ This network of support, encouragement, and shared experience helped surrogates overcome in utero bonding.¹⁵² One surrogate asked, "Do you think it will sound crazy if I say I want to be able to keep the baby in my room for a little while after the parents have decided to leave the hospital and go home for the night?"¹⁵³ A member of the list responded, "They are the parents. I hate to sound like I'm minimizing our job, but we are just there to carry babies. When the baby has its first cry our job is over."¹⁵⁴ In addition to supplying a ready conduit for advice and empathy, this organization of surrogate mothers helps surrogates, their families, and the intended parents accomplish a sense of closure at the end of the process.¹⁵⁵

A drive for legitimacy and professionalism motivates all of surrogacy's participants, including the surrogates' husbands, agency staff, and intended parents, as well as the surrogates themselves.¹⁵⁶ Psychological screening of potential surrogates is imperative, described by one applicant as one of

that the surrogate mother will feel a strong connection to a child who is different from her." *Id.* at 20–21.

¹⁴⁶ Levine, *supra* note 65, at 178 (citing Heléna Ragoné, *Chasing the Blood-Tie: Surrogate Mothers, Adoptive Mothers and Fathers*, 23 AM. ETHNOLOGIST 352, 352–65 (1996)).

¹⁴⁷ *Id.*

¹⁴⁸ Busby & Vun, *supra* note 101, at 29.

¹⁴⁹ Ali & Kelley, *supra* note 102, at 49.

¹⁵⁰ Busby & Vun, *supra* note 101, at 38.

¹⁵¹ Levine, *supra* note 65, at 178.

¹⁵² *See id.* at 180.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 179–80.

¹⁵⁵ *See id.* at 179.

¹⁵⁶ *Id.* at 180.

the most “grueling” and “invasive” aspects of the process.¹⁵⁷ One surrogacy agency president asserted that parents who seek out reputable agencies that carefully select their surrogates have a “99 percent chance of getting a baby and a 100 percent chance of keeping it.”¹⁵⁸

Baby M. discerned no legal prohibition against unpaid surrogacy.¹⁵⁹ But while the absence of payment might have soothed the moral qualms of Justice Wilentz, it does little for a gestational mother who spends a minimum of nine months on the job and is “on task twenty-four hours a day altering her nutrition and other behaviors, risking physical injury, undergoing profound emotional and hormonal changes, and also enduring extraordinary physical pain and hardship while giving birth.”¹⁶⁰ It is not unusual for surrogates to construe their services as “a type of gift-giving”¹⁶¹ (albeit with modest compensation), and some have likened it to organ donation.¹⁶² Janet Dolgin observed that “gifts bind,” while “contracts separate.”¹⁶³ Gifts “transform relationships,” while “contracts leave them untouched, and while gifts bespeak attachment, contracts bespeak freedom.”¹⁶⁴ She further suggested that because surrogacy agreements are a hybrid of gift and contract, legal approaches must address each of these elements.¹⁶⁵ Katherine Drabiak and her coauthors suspected that surrogates “feel socially pressured to provide a socially acceptable justification for their activity.”¹⁶⁶ Thus, notions of altruism and gift-giving serve to obscure “economic self-interest.”¹⁶⁷ But if children are “priceless gifts”¹⁶⁸ and putting a price on them is distasteful, surrogates may tend to subordinate their own financial interests. This places them at a disadvantage when negotiating contract terms.

¹⁵⁷ Ali & Kelley, *supra* note 102, at 49.

¹⁵⁸ *Id.* (quoting John Weltman, the president of Circle Surrogacy in Boston).

¹⁵⁹ *In re Baby M.*, 537 A.2d 1227, 1235 (N.J. 1988) (“We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a ‘surrogate’ mother, provided that she is not subject to a binding agreement to surrender her child.”).

¹⁶⁰ Ertman, *supra* note 41, at 12.

¹⁶¹ Levine, *supra* note 65, at 181.

¹⁶² *See id.*; Ali & Kelley, *supra* note 102, at 48.

¹⁶³ Dolgin, *supra* note 117, at 524.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Drabiak et al., *supra* note 37, at 305.

¹⁶⁷ Ertman, *supra* note 41, at 17.

¹⁶⁸ Drabiak et al., *supra* note 37, at 305.

Katherine Drabiak and her coauthors proposed a regulatory scheme determining reasonable compensation to surrogates.¹⁶⁹ Along with disparity in state surrogacy laws, there is also no uniform regulation of the practice.¹⁷⁰ The use of the internet has made surrogacy “a distinct interstate business,”¹⁷¹ and the absence of uniform industry standards exposes both surrogates and parents to exploitation by surrogacy agencies.¹⁷² Further, surrogates lack standing to bring contract claims in states that penalize, prohibit, or simply ignore the practice.¹⁷³

Surrogacy succeeds when the parties clearly understand what is expected of them. The Canadian Bar Association recommended that all surrogates obtain legal advice before entering into contracts and that fees for such legal advice be considered a compensable expense.¹⁷⁴ Legal advice is not, however, “a substitute for screening or separate and joint counseling” of surrogate applicants and parents.¹⁷⁵

Surrogacy has achieved legitimacy unanticipated in *Baby M.*’s time. The practice continues to be vulnerable to charges of commodification and baby selling, and there is lingering aversion to commerce in women’s bodies as childbearing vessels.¹⁷⁶ But the surrogates’ deeply felt motives and convictions seem to make these accusations sound, at the very least, ill informed. As to whether contractualization demeans parenthood, one might answer: “It is hard to follow the argument that pre-conception agreements reduce parenthood to a transaction. That ‘transaction’ is but the first step to becoming a parent, with most of the work of ‘family and parental responsibilities’ yet to come.”¹⁷⁷

B. The Donors

From 1998 to 2007, the number of ART cycles performed in the United States nearly doubled, producing 57,569 infants in 2007.¹⁷⁸ The

¹⁶⁹ *Id.* at 307.

¹⁷⁰ *Id.* at 306.

¹⁷¹ *Id.*

¹⁷² *Id.* at 307.

¹⁷³ *Id.* at 302.

¹⁷⁴ Busby & Vun, *supra* note 101, at 52.

¹⁷⁵ *Id.*

¹⁷⁶ See Scott, *supra* note 2, at 109.

¹⁷⁷ Busby & Vun, *supra* note 101, at 45.

¹⁷⁸ *ART Report Section 5-ART Trends 1998-2007*, CTDS. FOR DISEASE CONTROL & PREVENTION (Jan. 13, 2010), <http://www.cdc.gov/art/ART2007/section5.htm>.

“exploding market”¹⁷⁹ in human eggs is fueled by demands for stem cell research¹⁸⁰ as well as infertility in women who wait until advanced age to begin bearing children.¹⁸¹ It is estimated that 100,000 young women have been recruited to sell their eggs to the nearly 500 IVF clinics in the United States.¹⁸² Fees typically range from \$8,000 to \$15,000 but can run as high as \$100,000.¹⁸³ The egg donor industry, largely unregulated, is a lucrative business for physicians, fertility clinics, and the university OB/GYN departments connected with them.¹⁸⁴

Unlike surrogates, who are esteemed for their gestational abilities as well as for their social and communications skills, egg donors market their brains, physical assets, ethnic backgrounds, educational levels, psychological stability, and health histories.¹⁸⁵ Although egg donation sports a veneer of altruism, most young women involved in it are “savvy”¹⁸⁶ and financially motivated. Like sperm donors, they want to help people, but they also share a desire to play a role in the gene pool.¹⁸⁷ In the words of one egg donor, “Men have always been able to spread their genes. Now I can spread my genes.”¹⁸⁸ But unlike sperm donation, which carries little or no physical risk,¹⁸⁹ the effects of hormonally stimulated egg production are mostly unknown, especially in the long term. An egg donor survey conducted by Wendy Kramer and her coauthors found more than 30% of respondents experienced ovarian hyperstimulation syndrome

¹⁷⁹ Josephine Marcotty & Chen May Yee, *Miracles for Sale*, MINNEAPOLIS STAR TRIBUNE, Oct. 21, 2007, at A1.

¹⁸⁰ Jennifer Schneider, *It's Time for an Egg Donor Registry and Long-Term Follow-Up: Testimony at Congressional Briefing*, CTR. FOR GENETICS & SOC'Y (Nov. 14, 2007), <http://www.geneticsandsociety.org/article.php?id=3820>.

¹⁸¹ Alison Motluk, *The Human Egg Trade: How Canada's Fertility Laws Are Failing Donors, Doctors, and Parents*, THE WALRUS (Apr. 2010), <http://www.walrusmagazine.com/print/2010.04-health-the-human-egg-trade/>. The mean age of a mother at first birth increased nearly four years from 1970 to 2003. See Martin et al., *supra* note 24, at 2.

¹⁸² W. Kramer et al., *U.S. Oocyte Donors: A Retrospective Study of Medical and Psychosocial Issues*, 24 HUM. REPROD. 3144, 3144 (2009).

¹⁸³ *Id.*

¹⁸⁴ Schneider, *supra* note 180.

¹⁸⁵ See MUNDY, *supra* note 43, at 133.

¹⁸⁶ Schneider, *supra* note 180.

¹⁸⁷ Michael Leahy, *Family Vacation*, WASH. POST (Jun. 19, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/15/AR2005061501885.html>.

¹⁸⁸ Marcotty & Yee, *supra* note 179, at A18 (quoting Caitlin Karolczak, “an artist and antique dealer in Minneapolis” who has “been an egg donor twice”).

¹⁸⁹ Schneider, *supra* note 180.

(OHSS), with 11.6% of them requiring medical treatment, hospitalization, or both.¹⁹⁰ More than a quarter (26.4%) reported new infertility problems, changes in their menstrual cycle, or both.¹⁹¹ The risks associated with hormonal ovarian stimulation appear to increase “with the number of cycles undergone.”¹⁹² The study’s authors concluded, “There is clearly a need for an oocyte donor registry” to track the effects of egg retrieval on donors and to monitor the continuing state of their health.¹⁹³

For the most part, egg and sperm donors are anonymous.¹⁹⁴ While the Centers for Disease Control and Prevention collects data on pregnancy outcomes, multiple births, and technologies used, it does not require fertility agencies to track the health of individual donors.¹⁹⁵ Wendy Kramer and her coauthors found only 2.6% of egg donor survey respondents reported that their IVF clinics contacted them for medical updates.¹⁹⁶ More than a third of respondents experienced medical changes of potential concern to donor children.¹⁹⁷ Roughly half of these women did not attempt to contact their fertility clinic to update them due to “lack of education about the value of providing such information, along with the lack of encouragement by the fertility clinic to do so.”¹⁹⁸ Of those who attempted to contact their clinics with medical updates, several encountered “a missing or destroyed chart; a clinic that had closed or relocated and could not be found; and a clinic that declined to notify oocyte recipients on the basis of anonymity.”¹⁹⁹ The fertility industry’s lack of diligence in tracking donor health starts at the beginning of the process with a tendency to understate the risks of oocyte donation. Because of the IVF clinics’ close financial bond with oocyte recipients, a

¹⁹⁰ Kramer et al., *supra* note 182, at 3146. Severe OHSS results in severe pain or swelling of the abdomen, decreased urination, and shortness of breath, necessitating hospitalization to drain excess fluids from the body. *Ovarian Hyperstimulation Syndrome*, MEDLINE PLUS (Nov. 15, 2010), <http://www.nlm.nih.gov/medlineplus/ency/article/007294.htm>.

¹⁹¹ Kramer et al., *supra* note 182, at 3146.

¹⁹² *Id.* at 3148.

¹⁹³ *Id.*

¹⁹⁴ William Heisel, *Registry May Track Egg, Sperm Donors*, L.A. TIMES, Jan. 3, 2008, at B1.

¹⁹⁵ *Id.*

¹⁹⁶ Kramer et al., *supra* note 182, at 3147.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 3148.

¹⁹⁹ *Id.* at 3147.

potential conflict of interest prevents them from fully disclosing to donors the medical risks of egg retrieval procedures.²⁰⁰ Even when clinics fully discuss known risks and inform donors that long-term risks are unknown, donors “may not clearly understand the difference between ‘there are no known risks’ and ‘there are no risks.’”²⁰¹

The long-term health of sperm and egg donors is of profound interest to their donor offspring, particularly in regard to genetically related medical conditions.²⁰² But, while Great Britain, Sweden, Austria, Switzerland, the Netherlands, and parts of Australia maintain centralized donor registries,²⁰³ the United States does not.²⁰⁴ In the American fertility industry, which seems to prize donor anonymity above all else, experts fear that a mandatory registry would “scare away” potential donors.²⁰⁵ It would undoubtedly scare away some, perhaps even half,²⁰⁶ but the United States is slowly beginning to embrace disclosure of some aspects of donor identity. In 2009, the Ethics Committee of the American Society for Reproductive Medicine (ASRM) strongly encouraged fertility programs to maintain accurate records of donor health to enable information to be shared with donor offspring.²⁰⁷ In addition to promoting the informed consent of donors, the Committee advised programs to gather medical updates from donors that are pertinent to the health of their offspring.²⁰⁸ It also counseled programs to “give consideration to the fact that donors may have interests in learning the outcome of their donation, especially when information sharing or contact between donor and offspring are possible in the future.”²⁰⁹

The question of whether donors and their offspring should share information, and possibly establish contact, is frequently debated in the literature on ART. Jennifer Schneider and Wendy Kramer noted that as

²⁰⁰ *Id.* at 3145.

²⁰¹ *Id.*

²⁰² *Id.* at 3148.

²⁰³ MUNDY, *supra* note 43, at 181.

²⁰⁴ See Heisel, *supra* note 194, at B1, B9.

²⁰⁵ *Id.* at B9.

²⁰⁶ MUNDY, *supra* note 43, at 191.

²⁰⁷ Ethics Comm. of the Am. Soc’y for Reprod. Med., *Interests, Obligations, and Rights of the Donor in Gamete Donation*, 91 FERTILITY & STERILITY 22, 22–23 (2009), available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/interests_obligations_rights_of_donor.pdf.

²⁰⁸ *Id.* at 22, 24–25.

²⁰⁹ *Id.* at 22.

donors age, they begin to wonder about the outcome of the pregnancies to which they contributed.²¹⁰ Donors initially place great value on their anonymity, but they often later wish to know more about their genetic offspring.²¹¹ Informing donors at the outset that this opportunity might be available to them underscores the long-term impact of their decision to donate.²¹² It gives them a glimpse into the future and transforms an altruistic or economic abstraction into a living, breathing being.

For the first generation of ART's children since *Baby M.*, the veil of donor anonymity seems to be lifting, illuminating linkages to their genetic parents, the parents who raised them, and the half siblings they might one day meet—the strange new conglomeration we are coming to know as “family.”

C. The Children

Although the court in *Baby M.* ultimately awarded custody to the Sterns, it clearly recognized the magnitude of what Whitehead was expected to relinquish under the surrogacy agreement. Justice Wilentz termed it “beyond normal human capabilities” to suppose that Whitehead would give up her newborn child “without a struggle.”²¹³ After all, the Justice asked, “Other than survival, what stronger force is there?”²¹⁴

The human gift for adaptation keeps us, for the moment at least, one-step ahead of extinction. Neither survival nor mother-child bonding is rule bound, and creatures of all species, including our own, will look for nurturing in any parent figure that seems willing and able to provide it.²¹⁵ The acts of “recognizing and bonding with a parent are more dependent on exposure and learning than on a genetically programmed response.”²¹⁶ Absent “such a promiscuous capacity for trust,” an infant who is abandoned or orphaned shortly after birth “would face certain doom if it

²¹⁰ Jennifer Schneider & Wendy Kramer, *Egg Donors Need Long-Term Follow-Up: Recommendations from a Retrospective Study of Oocyte Donors in the US*, IVF.NET (Jan. 19, 2009), http://www.ivf.net/ivf/egg_donors_need_long_term_follow_up_recommendations_from_a_retrospective_study_of_oocyte_donors_in_the_us-o3950.html.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *In re Baby M.*, 537 A.2d 1227, 1259 (N.J. 1988).

²¹⁴ *Id.*

²¹⁵ Rachel Dvoskin, *Newborns Can Bond to a “Mother” from a Different Species*, SCI. AM. (Nov. 15, 2007), <http://www.scientificamerican.com/article.cfm?id=strange-but-true-newborns-can-bond-to-mother-from-different-species>.

²¹⁶ *Id.*

were unable to swap preferences for an adoptive parent.”²¹⁷ Experience with surrogacy, adoption, and ART reminds us that what is most “natural” about parent-child bonding is its capacity to flourish in “unnatural” situations.

Research by Susan Golombok and her colleagues revealed that solid maternal bonding is less dependent on genetic or gestational relationships than on “a strong desire for parenthood.”²¹⁸ When compared to parents of naturally conceived children, surrogacy parents exhibit greater warmth and emotional involvement with their children as well as lower stress levels.²¹⁹ The presence or absence of prenatal bonding is not determinative, and pregnancy “is not a prerequisite” for “positive maternal representations of the mother-child relationship.”²²⁰ Surrogacy parents have “gone to great lengths to have a child,” which results in higher motivation and commitment to parenthood.²²¹ Greater levels of warmth and emotional involvement were also seen in parents of children conceived by IVF and donor insemination (DI).²²² As is true in surrogacy and egg donor families,²²³ IVF and DI parents are “generally older than first-time parents of a naturally conceived child.”²²⁴ Possibly due to an absence of siblings, IVF, surrogacy, and DI children experience greater commitment and emotional involvement from their parents.²²⁵

Despite these enhanced levels of warmth, emotional involvement, and parental interaction, Susan Golombok and her colleagues concluded that ART children “did not differ from the naturally conceived children with respect to socio-emotional or cognitive development.”²²⁶ Further, these positive parental factors do not necessarily “result in even greater well-

²¹⁷ *Id.*

²¹⁸ Susan Golombok et al., *Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 213, 220 (2006) [hereinafter Golombok et al., *Surrogacy Families*].

²¹⁹ *Id.* at 219.

²²⁰ *Id.* at 220.

²²¹ *Id.* at 219.

²²² Susan Golombok et al., *Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children*, 66 CHILD DEV. 285, 293 (1995) [hereinafter Golombok et al., *Families Created*].

²²³ Golombok et al., *Surrogacy Families*, *supra* note 218, at 214.

²²⁴ Golombok et al., *Families Created*, *supra* note 222, at 296.

²²⁵ *Id.*

²²⁶ Golombok et al., *Surrogacy Families*, *supra* note 218, at 220.

being for the child.”²²⁷ Lutz Goldbeck and his colleagues, however, suggested that the higher socio-economic status and educational levels of many ART parents contribute to a more stimulating developmental environment in which to raise children.²²⁸

Children conceived by Intracytoplasmic Sperm Injection (ICSI) appear to have “an elevated risk of borderline delayed cognitive development compared with singletons conceived by IVF.”²²⁹ In ICSI, a single sperm is injected directly into an unfertilized egg, and unlike in IVF, bypasses the natural selection process during conception.²³⁰ Possibly, this process results in genetically based cognitive problems.²³¹ After adjusting for the educational and socio-economic advantages of ART parents, researchers found no significant statistical differences in cognitive development between naturally conceived and ART children.²³² A comparison study of IVF and naturally conceived children at ages nine to ten showed no significant difference in IQ or cognitive performance but did show somewhat higher levels of depression, anxiety, and aggression in IVF children.²³³ Except for recent research discussed below, no other studies have reported poorer socio-emotional adjustment in children conceived by IVF.²³⁴

Children conceived by ART are at higher risk for pre-term birth and low birth weight.²³⁵ Because earlier ART procedures often resulted in multiple births, it was thought that limiting the number of embryos implanted after fertilization would reduce the risk to the fetus.²³⁶ Surprisingly, however, even singleton ART infants are disproportionately

²²⁷ Golombok et al., *Families Created*, *supra* note 222, at 295.

²²⁸ Lutz Goldbeck et al., *Cognitive Development of Singletons Conceived by Intracytoplasmic Sperm Injection or In Vitro Fertilization at Age 5 and 10 Years*, 34 J. PEDIATRIC PSYCHOL. 774, 779 (2009).

²²⁹ *Id.* at 778.

²³⁰ *Id.* at 774.

²³¹ *Id.* at 778.

²³² C. Carson et al., *Cognitive Development Following ART: Effect of Choice of Comparison Group, Confounding and Mediating Factors*, 25 HUM. REPROD. 244, 247–48 (2010).

²³³ Hahn, *supra* note 139, at 530.

²³⁴ *Id.*

²³⁵ Shu-Hsin Lee et al., *Child Growth from Birth to 18 Months Old Born After Assisted Reproductive Technology*, 47 INT. J. NURSING STUD. 1159, 1164 (2010).

²³⁶ *Id.* at 1165.

born pre-term and at low birth weights.²³⁷ Adverse neurological outcomes such as epilepsy and cerebral palsy may be associated with pre-term birth and low birth weight,²³⁸ but no strong association exists between cerebral palsy and ART.²³⁹ Data collected from five European countries showed more childhood illness up to age five in ART-conceived children than those naturally conceived.²⁴⁰ Because these findings have not been sufficiently replicated, they are not definitive.²⁴¹ There is some evidence of increased risk of birth defects in ART children,²⁴² as well as epigenetic disorders such as Angelman and Beckwith-Wiedemann syndromes.²⁴³ Further study is needed to determine whether health risks to ART-conceived children are caused by parental infertility, the IVF procedures themselves, or a combination of the two.²⁴⁴ In addition, because adult-

²³⁷ Raymond D. Lambert, *Safety Issues in Assisted Reproductive Technology: Aetiology of Health Problems in Singleton ART Babies*, 18 HUM. REPROD. 1987, 1987 (2003).

²³⁸ Carrie Williams & Alastair Sutcliffe, *Infant Outcomes of Assisted Reproduction*, 85 EARLY HUM. DEV. 673, 675–76 (2009).

²³⁹ Susan M. Reid et al., *Cerebral Palsy and Assisted Reproductive Technologies: A Case-Control Study*, 52 DEV. MED. & CHILD NEUROLOGY 161, 165 (2009).

²⁴⁰ M. Bondulle et al., *A Multi-Centre Cohort Study of the Physical Health of 5 Year-Old Children Conceived After Intracytoplasmic Sperm Injection, In Vitro Fertilization and Natural Conception*, 20 HUM. REPROD. 413, 417–18 (2004).

²⁴¹ Williams & Sutcliffe, *supra* note 238, at 675.

²⁴² Michele Hansen et al., *Assisted Reproductive Technologies and the Risk of Birth Defects—A Systematic Review*, 20 HUM. REPROD. 328, 336 (2004); J. Reefhuis et al., *Assisted Reproduction Technology and Major Structural Birth Defects in the United States*, 24 HUM. REPROD. 360, 362–63 (2008).

²⁴³ Lambert, *supra* note 237, at 1988. Angelman syndrome may be associated with epilepsy and poor balance, while Beckwith-Weidemann syndrome is an over-growth disorder. ANGELMAN SYNDROME GUIDELINE DEV. GROUP, MANAGEMENT OF ANGELMAN SYNDROME: A CLINICAL GUIDELINE 3 (2009); Lambert, *supra* note 237, at 1988. Epigenetic disorders result from genetic anomalies that do not actually alter DNA. John Cloud, *Why Genes Aren't Destiny*, TIME, Jan. 18, 2010, at 50, available at <http://www.time.com/time/health/article/0,8599,1951968,00.html>; Ethan Watters, *DNA Is Not Destiny*, DISCOVER, Nov. 2006, at 34, 36, available at <http://discovermagazine.com/2006/nov/cover>.

²⁴⁴ Williams & Sutcliffe, *supra* note 238, at 675. One study included a group of surrogate mothers, not infertile themselves, who were treated by IVF to carry the children of other couples. Michael Ludwig & Klaus Diedrich, *Follow-Up of Children Born After Assisted Reproductive Technologies*, 5 REPROD. BIOMED. ONLINE 317, 318 (2002). The children born to the surrogates appeared to have no increased risk of low birth weight, suggesting that it is the infertility and not the IVF procedure that contributes to higher rates of prematurity. *Id.*

onset diseases such as cardio-vascular disease and Type II diabetes may be linked to babies that are small for their gestational age, long-term tracking of children conceived by ART is essential.²⁴⁵

Despite medical concerns requiring further research, reports about the health of ART-conceived children are, overall, “reassuring.”²⁴⁶ As for emotional adjustment, children conceived by donor insemination within lesbian relationships are doing quite well. A longitudinal study of adolescents in planned lesbian families revealed significantly high levels of social and academic functioning and significantly low incidences of aggressive and rule-breaking behavior.²⁴⁷ The study’s authors credit parental engagement, educational involvement, and effective disciplinary styles for the successful adjustment of these children.²⁴⁸ Data on gay fatherhood is much scarcer, because the high costs of adoption and surrogacy make these households less common than those headed by lesbians.²⁴⁹

In their survey of adults aged eighteen to forty-five who were conceived by donor insemination, Elizabeth Marquardt and her coauthors reported decidedly mixed and complex results.²⁵⁰ A majority of donor-conceived adults described a sense of incompleteness, the feeling of having a “piece missing.”²⁵¹ One respondent explained that rather than looking for a dad, she had questions about “who I am and why I do what I do.”²⁵² Understandably, many of these donor offspring wanted to learn about their genetic origins but feared hurting or angering the parents who raised them.²⁵³ Some worried about unknowingly becoming romantically involved with someone related to them, while others felt confused about

²⁴⁵ Jeremy G. Thompson et al., *Epigenetic Risks Related to Assisted Reproductive Technologies*, 17 HUM. REPROD. 2783, 2783 (2002).

²⁴⁶ Bonduelle et al., *supra* note 240, at 418.

²⁴⁷ Nanette Garterell & Henry Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 1, 28, 33–34 (2010), available at <http://pediatrics.aappublications.org/cgi/content/full/126/3/617-a>.

²⁴⁸ *Id.* at 6–7.

²⁴⁹ Alice Park, *Study: Children of Lesbians May Do Better than Their Peers*, TIME (June 7, 2010), <http://www.time.com/time/health/article/0,8599,1994480,00.html>.

²⁵⁰ See MARQUARDT ET AL., *supra* note 85, at 5–6 (showing a summary of the study’s findings).

²⁵¹ *Id.* at 21.

²⁵² *Id.*

²⁵³ *Id.* at 22.

who their real families were.²⁵⁴ Fifty-nine percent of respondents said their parents were always open with them about their means of conception, while sixteen percent said their parents told them either before or after age twelve.²⁵⁵ Twenty percent of respondents learned about their conception in an unplanned or accidental manner.²⁵⁶ Of this latter group, a sizeable portion reported problems with the law as well as substance abuse and mental health issues.²⁵⁷ Among those who had always known about their origins, about one in five reported substance abuse issues and problems with the law.²⁵⁸

In spite of these adjustment difficulties, Elizabeth Marquardt and her coauthors discerned a “strikingly libertarian”²⁵⁹ attitude in their study subjects toward reproductive technologies in general: 61% said they favored the practice of donor conception, while 75% agreed that “every person has a right to a child” and that ART is “good for children because the children are wanted.”²⁶⁰ Equally “startling” was the finding that 20% of these adult donor offspring had already donated their own eggs or sperm or become surrogate mothers.²⁶¹ The study’s authors appear unable to convincingly reconcile these contradictory findings—donor offspring who feel troubled about their origins but who at the same time embrace the technology.²⁶² Clearly, however, the majority of donor offspring support the right of DI children to know the truth about their origins.

[A]pproximately two-thirds of grown donor offspring support the right of offspring to have non-identifying information about the sperm donor biological father, to know his identity, to have the opportunity to form some kind of relationship with him, to know about the existence and number of half-siblings conceived with the same donor, to know the identity of half-siblings conceived with the same donor, and to have the opportunity as children to

²⁵⁴ *Id.* at 33–35.

²⁵⁵ *Id.* at 55–56.

²⁵⁶ *Id.* at 56.

²⁵⁷ *Id.* at 58.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 13.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See *id.* at 12–13 (showing the findings without explanation of the inconsistencies between them).

form some kind of relationship with half-siblings conceived with the same donor.²⁶³

Research in 1996 on IVF and DI children and their family functioning showed that none of the parents had told their children about how they were conceived.²⁶⁴ Seventy-five percent of the parents decided not to tell their children, thirteen percent were undecided, and twelve percent planned to tell them.²⁶⁵ Although the majority of these parents elected not to inform their children of their origins, more than half of them told a friend or family member.²⁶⁶ It is now well-recognized that secrecy and accidental discovery produce stress, bewilderment, and feelings of betrayal in children of ART.²⁶⁷ Arguing in favor of disclosure, one donor-conceived child eloquently stated, “We didn’t ask to be born into this situation, with its limitations and confusion. It’s hypocritical . . . to assume that biological roots won’t matter to the ‘products’ of the cryobanks’ service when the longing for a biological connection is what brings customers to the banks in the first place.”²⁶⁸ In 2004, ASRM’s Ethics Committee announced its support of disclosing to children the facts of their donor conception, the available characteristics of the donor, and when all parties agree, the donor’s identity.²⁶⁹ Secrecy and anonymity are slowly giving way to more open, expansive concepts of family connection.

Parents who disclose the facts of donor conception to their children have to overcome a number of concerns. They worry that they will damage their child’s trust or emotional development or that their child will reject them.²⁷⁰ They fear their child will be stigmatized or compare herself unfavorably to other children and families.²⁷¹ Parents often struggle to find comfortable, expressive language with which to explain the use of a donor. Two basic strategies appear to predominate: “seed-planting” and “right

²⁶³ *Id.* at 11–12.

²⁶⁴ Susan Golombok et al., *The European Study of Assisted Reproduction Families: Family Functioning and Child Development*, 11 HUM. REPROD. 2324, 2324, 2329 (1996).

²⁶⁵ *Id.* at 2329.

²⁶⁶ *Id.*

²⁶⁷ Moyal & Shelley, *supra* note 27, at 435.

²⁶⁸ *Id.* at 437.

²⁶⁹ Ethics Comm. of the Am. Soc’y for Reprod. Med., *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 527 (2004).

²⁷⁰ *Id.* at 528.

²⁷¹ Kirstin Mac Dougall et al., *Strategies for Disclosure: How Parents Approach Telling Their Children that They Were Conceived with Donor Gametes*, 87 FERTILITY & STERILITY 524, 525 (2007).

time.”²⁷² Parents who choose the seed-planting method—begun at age three or four—believe it will result in children feeling they have always known about their origins.²⁷³ Disclosing early avoids the danger of waiting too long and giving the appearance of shame or concealment.²⁷⁴ Parents who prefer the right time strategy—usually initiated at age six or seven—want to ensure the child is emotionally able to process the information and formulate appropriate questions.²⁷⁵ When disclosure fails to occur by age eight, the chances of it occurring at all diminish as the child gets older.²⁷⁶ Regardless of the chosen method, none of the parents studied by Kirstin Mac Dougall and her colleagues who were candid with their children reported a negative outcome, and none regretted the decision to disclose.²⁷⁷

In the United States, traditional gamete donor programs provide only non-identifying donor information—the type of data, such as physical and personality traits, generally used to match donors and recipients.²⁷⁸ An increasing number of programs allow recipients to opt for open-identity donors who agree to permit disclosure of their identities to offspring who request it.²⁷⁹ The Identity-Release Program, offered by The Sperm Bank of California, authorizes donors to release their identities to offspring at least eighteen years of age but imposes no obligation to meet them.²⁸⁰ Research on DI offspring, ages twelve to seventeen, with open-identity donors found that most described themselves as having always known about their origins, with the average age of disclosure at less than seven years.²⁸¹ Most felt comfortable with their origins and overwhelmingly curious about their donor.²⁸² They wanted to know what he was like as a person, what he looked like, whether he had a family and what they were like, and whether the donor resembled them in any way.²⁸³ The primary thing they wanted was a photograph, and on average, they reported being moderately to very

²⁷² *Id.* at 526.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 527.

²⁷⁶ *Id.* at 531.

²⁷⁷ *Id.*

²⁷⁸ J. E. Scheib et al., *Adolescents with Open-Identity Sperm Donors: Reports from 12–17 Year Olds*, 20 HUM. REPROD. 239, 239 (2004).

²⁷⁹ *Id.*

²⁸⁰ *See id.* at 241.

²⁸¹ *Id.* at 242.

²⁸² *Id.* at 243–44.

²⁸³ *Id.* at 245–46.

likely to request their donor's identity.²⁸⁴ About two-thirds envisioned forming a relationship with their donor, most often a friendship, rather than a parent-child relationship.²⁸⁵ The study's findings "provide little support for the stereotype that offspring are looking for a father in their donor."²⁸⁶

In 2000, Wendy Kramer and her donor-conceived son, Ryan, created the Donor Sibling Registry (DSR), a website aimed at bringing donor children together.²⁸⁷ By posting the name of the sperm bank or egg donor program and the number assigned to the donor, DSR registrants can look for matches between half siblings and possibly donor parents.²⁸⁸ As of 2010, DSR's registrants numbered nearly 29,000, with more than 7,700 matches among registrants, half siblings, and donors.²⁸⁹

Less is known about donor interest in establishing relationships with offspring, although most are curious to know what their offspring are like.²⁹⁰ Mike Rubino is a donor father who agreed to meet his offspring, Aaron, age seven and Leah, age three.²⁹¹ Accompanied to the visit by their single mother, the children, especially Aaron, seemed primed to accept this new acquaintance into their lives.²⁹² Compared with other types of households, children of single-parent households have significantly more positive feelings about their donor.²⁹³ Aaron, whose wish for a dad was for someone "to play with me," bonded with Mike almost immediately.²⁹⁴ The two discovered much in common and, despite a promise to keep in touch, found it painful to separate at the visit's end.²⁹⁵ Mike, an artist who treasures his solitude, later established contact with several more offspring.²⁹⁶ But his fatherly welcome has its limits. "I'm a little concerned if any others come forward," he said, "only because I don't

²⁸⁴ *Id.* at 245.

²⁸⁵ *Id.* at 247.

²⁸⁶ *Id.* at 248.

²⁸⁷ *Educating, Connecting and Supporting Donor Families*, DONOR SIBLING REGISTRY, <http://www.donorsiblingregistry.com/> (last visited Dec. 27, 2010).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Scheib et al., *supra* note 278, at 249.

²⁹¹ Leahy, *supra* note 187.

²⁹² *Id.*

²⁹³ Scheib et al., *supra* note 278, at 244.

²⁹⁴ Leahy, *supra* note 187.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

know how much time I could spend with everyone.”²⁹⁷ A single donor can have “at least twenty identified offspring.”²⁹⁸ The children sired by Fairfax Donor 1476, number approximately forty, and have their own website.²⁹⁹ Several donors, overwhelmed by donor offspring contact requests, have withdrawn their identifying information from the DSR.³⁰⁰ “Not everyone,” observed Liza Mundy, “wants to be part of an unprecedented extended family.”³⁰¹

Whatever our assumptions about surrogates, donors, and the children of ART, the empirical realities are sometimes surprising or even counterintuitive. Questions of familial ties, rights, and responsibilities have never been simple, and these new reproductive technologies roil the waters even more. As the culture more fully absorbs family-fashioning innovations, law and policy will, eventually, catch up with them. In the interim, our notions of what is ideal and what is functional drift further and further apart, exposing discomfiture and ambivalence in legal and legislative thinking. Clarity and certainty are still a long way off. But in the years since *Baby M.*, practical experience and research have aimed to unseat moral rhetoric and blind theorizing, lighting a path toward anchoring law and policy in the known world of living families.

IV. PARENTHOOD IN THE TWENTY-FIRST CENTURY: THE EVOLVING LEGAL STANDARDS

The issue of parentage can no longer be confined to a box labeled *birth* or *adoptive parent*. As countless Americans have shown, “individuals may comprise a legally cognizable family through means other than biological or adoptive.”³⁰² Children are being born into families whose composition differs radically from the married heterosexual dyad of common law vintage.³⁰³ Retaining an exclusively biological nexus to parenthood runs

²⁹⁷ MUNDY, *supra* note 43, at 168.

²⁹⁸ *Id.* at 173.

²⁹⁹ *Id.* at 170.

³⁰⁰ *Id.* at 173.

³⁰¹ *Id.* at 172.

³⁰² *In re Parentage of L.B.*, 122 P.3d 161, 169 (Wash. 2005).

³⁰³ See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion) (noting that “[t]he demographic changes of the past century make it difficult to speak of an average American family”); *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989) (Scalia, J.) (plurality opinion) (noting that although “[t]he family unit accorded traditional respect in our society, which we have referred to as the ‘unitary family,’ is typified, of course, by the marital family, [it] also includes the household of unmarried parents and their children”).

counter to the reality of how these new families are formed.³⁰⁴ Twenty-first century American families have arranged themselves in many different ways. Unmarried couples—both heterosexual and homosexual—are recalibrating the cultural norms for family life, raising children, and relating to each other and to the larger community as members of a family.³⁰⁵ Married couples and their children now form a minority of households.³⁰⁶ Yet our legal system has not kept pace with cultural change.³⁰⁷ Family law statutes still largely envision an Ozzie and Harriet world in which families appear as two heterosexual spouses and their biological children.³⁰⁸

But major changes are afoot. The legal system is in the process of shifting from biological to functional norms. Families may now be “characterized by two or more persons related by birth, adoption, marriage, or choice.”³⁰⁹ Their key elements are “socioemotional ties and enduring responsibilities, particularly in terms of one or more members’ dependence on others for support and nurturance.”³¹⁰ Courts are the beachhead for this

³⁰⁴ See, e.g., *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000) (observing that “[p]arenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities”).

³⁰⁵ See DiFonzo & Stern, *supra* note 46, at 38 (“The citadel of the biological/adoptive family has for some years been besieged by the burgeoning segment of nontraditional families.”); see also *Hofstad v. Christie*, 240 P.3d 816, 820 (Wyo. 2010) (“Even if [the parties] are not married, nor related by blood, that they lived together on and off for approximately ten years, all the while sharing an intimate relationship which resulted in the birth of their twins is evidence that a family relationship exists.”).

³⁰⁶ See DiFonzo & Stern, *supra* note 46, at 23.

³⁰⁷ See generally Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002) (describing the difficulties of achieving legal acceptance of reproductive technologies); Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147 (2000) (describing similar difficulties, with particular focus on the difficulties experienced by gay men and lesbians).

³⁰⁸ See generally DeLair, *supra* note 307, at 162–73 (noting assumptions in the legal world).

³⁰⁹ Katherine R. Allen et al., *An Overview of Family Diversity: Controversies, Questions, and Values*, in *HANDBOOK OF FAMILY DIVERSITY 1* (David H. Demo et al. eds., 2000).

³¹⁰ *Id.*; see also CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 31 (1996) (viewing a family as “the smallest, organized, durable network of
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revolution, because society is evolving faster than the formal legal system, and disputes are often presented to judges who have little statutory or case law guidance in these new areas.³¹¹ In assessing these dilemmas of modern family life, one state supreme court suggested a growing receptivity to the actual parenting arrangements and family structure the parties themselves have made:

The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto. . . . Thus, the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent.³¹²

The rapid pace of change in reproductive technologies has created a yawning gulf between the realities of family life and most statutorily prescribed norms.³¹³ Legislative dictates are supposed to guide the judiciary in adjudicating these disputes, but legislatures are not revising the

kin and non-kin who interact daily, providing domestic needs of children and assuring their survival").

³¹¹ See DiFonzo & Stern, *supra* note 46, at 38–39 ("Courts are gradually—and legislatures more gradually still—recognizing the pervasiveness of alternative family forms by allocating legal rights and burdens to 'equitable parents' equivalent to biological and adoptive families." (citations omitted)).

³¹² E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (internal citations omitted).

A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent.

Id. "The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." *Id.* The American Law Institute has promulgated a definition of de facto parent grounded in living with the child in an arrangement between the legal parent and the de facto parent. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 118 (2002).

³¹³ See *In re Parentage of L.B.*, 122 P.3d 161, 165 (Wash. 2005) (referring to the "advancing technologies and evolving notions of what comprises a family unit").

statutory schemes fast or thoroughly enough.³¹⁴ Courts often employ case-by-case adjudication in these broad policy areas when they find “statutory silence regarding the interests of children begotten by artificial insemination, and the rights and responsibilities of adults in such parenting arrangements.”³¹⁵ Silence is a two-edged statutory sword, however. Some

³¹⁴ See *J.F. v. D.B.*, 848 N.E.2d 873, 881 (Ohio Ct. App. 2006) (Slaby, J., concurring). Consider the plaintive and not-infrequent note struck by the appellate judge:

The Ohio legislators have acknowledged but failed to address the rapid technological advances of surrogacy. The majority and I want to again emphasize that we do not address custody issues in this case. The case is the foundation of many and various issues to be decided by the state legislators or courts of the future. Extrapolating from the facts of this case, one can only imagine what the future can bring, the issues that will be raised, and the variety of conclusions that can result without legislative regulation.

The majority points out that there are only a few states that have even begun to address the issue of determining who the parents of a surrogate child may be. Even the few states that have begun to address the issues involved have approached the issues from four different directions. Unless the state legislators begin to address the multiple issues involved, it will be the children that will be caught in a continual tug of war between the egg donor or donors, the sperm donor or donors, the surrogate parent or parents, and those that simply want to adopt a child from what they perceive as the ideal parents. *Id.*

³¹⁵ In re *L.B.*, 122 P.3d at 169 n.9. A small number of state statutes furnish exceptions to the general legislative languor in this area. See, e.g., KY. REV. STAT. ANN. § 403.270 (West 2004) (defining “de facto custodian” as “a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for [specified time periods]” and directing that in determining custody “equal consideration . . . be given to each parent and to any de facto custodian”). The Kentucky Court of Appeals noted that the statute is intended to afford “standing in a present custody matter to non-parents who have assumed a sufficiently parent-like role in the life of the child.” *Sullivan v. Tucker*, 29 S.W.3d 805, 807–08 (Ky. Ct. App. 2000). An Oregon statute provides for the rights of an individual “who establishes emotional ties creating child-parent relationship.” OR. REV. STAT. § 109.119 (2009). The statute defines such a relationship in psychological, physical, and temporal terms:

“Child-parent relationship” means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the

(continued)

judges see legislative silence as a golden opportunity to behave like traditional common law judges, filling in the interstices with the accumulated wisdom of similar cases in light of evolving norms.³¹⁶ Other judges find a different solace in silence. They limit their job to applying the statutes as written, and they toss the policy dilemmas back to the legislature.³¹⁷

child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

Id. § 109.119(10)(a). See *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 731 (Or. 2004) (noting that the statute supplies the legal standard for "determining custody as between a legal parent . . . and other persons who have established a child-parent relationship with a child").

³¹⁶ See *Janice M. v. Margaret K.*, 948 A.2d 73, 94 (Md. 2008) (Raker, J., dissenting).

One thing is clear: the Maryland Legislature is silent when it comes to the question of visitation with children when a non-traditional family is dissolved. In the face of this silence, I believe that a *de facto* parent is different from "third parties" and should be treated as the equivalent of a legal parent, with the same rights and obligations.

Id.; see also *Alison D. v. Virginia M.*, 572 N.E.2d 27, 31 (N.Y. 1991) (Kaye, J., dissenting) ("[Virginia's] Domestic Relations Law . . . does not define the term 'parent' at all. That remains for the courts to do, as often happens when statutory terms are undefined."); James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923, 933 (2001) ("In order to accommodate the best interests of the children of these nontraditional unions, courts have begun re-commissioning and adapting doctrines from equity practice in order to adjust the statutory definition.").

³¹⁷ See, e.g., *In re Roberto d.B.*, 923 A.2d 115, 132 (Md. 2007) (Cathell, J., dissenting).

This case illustrates that the process of manufacturing children can lead to unusual situations that would have been virtually inconceivable decades ago when the relevant statutory scheme was enacted. I do not necessarily agree or disagree that the remedy for the present situation created by the majority is appropriate or otherwise. I think it is wrong for the majority to fashion, in the first instance, the public policy it is

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A. Equitable Relief: How Judges Deal with Missing or Ill Fitting Statutes

Reproductive technology cases are not unique in forcing a reexamination of what constitutes a family.³¹⁸ Nor are they the first domestic phenomenon to pit judicial reticence against legislative inertia, prodding one or the other into finally taking up the reins of decision-making.³¹⁹ Given the flood of nontraditional family cases, the legislative vacuum is leading to a transformation in the judicial allocation of parenting rights and obligations. A selection of recent cases—many of them controversial—illustrates the broad dimensions of the rift between law and culture in the construction of the modern family and suggests movement toward an eventual resolution premised on functional norms in surrogacy and related cases.³²⁰ It bears emphasizing that the trend in these cases is essentially *conservative*, in the sense that the courts are aiming to preserve the parental status quo.³²¹ The forces aiming to upend the established family structure are staking their claim on traditional legal norms, which admittedly never contemplated the variety of family structures at play in American culture today.

The task of apportioning parental rights and duties in a divided family is always a difficult one.³²² But it is even harder in these nontraditional

creating as a remedy. The issues present in this case, going as they do to the very heart of a society, are, in my view, a matter for the Legislative Branch of government and not initially for the courts.

Id.; see also *In re Clifford K.*, 619 S.E.2d 138, 162 (W.Va. 2005) (Maynard, J., dissenting) (“Although families in our society today have taken on new forms, many have not yet been recognized by our Legislature. In my opinion, this Court should not impose its judgment where the Legislature has not spoken.”).

³¹⁸ See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 504–06 (1976) (reversing a criminal conviction under an ordinance that narrowly defined the term “family” in light of historical non-linear composition of families).

³¹⁹ See *In re Clifford K.*, 619 S.E.2d at 153–54 (addressing a statutory gap and recognizing same-sex partner’s right to intervene and challenge the custody award of deceased partners’ biological child to child’s maternal grandfather).

³²⁰ See, e.g., *A.H. v. M.P.*, 857 N.E.2d 1061, 1069–70 (Mass. 2006) (explaining the recognition of the de facto parent doctrine).

³²¹ *Id.* at 1064–65 (establishing that this case was not “about ensuring that families in which parents are of the same gender” have the same level of structure and stability provided to heterosexual parents by law but merely “about the best interests of the child” where one parent demonstrated “an inability to place the child’s needs above her own”).

³²² See, e.g., *In re Marriage of Williams*, 90 P.3d 365, 370 (Kan. Ct. App. 2004) (holding the “exceptional case” language of Kansas’ divorce decree statute to require an

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cases. The pressure brought to bear on the family and children as a result of the separation of the adult partners is often compounded by the argument that one of the adults who was parenting the children—and was accepted in that role by both the other partner and the children—is actually an interloper, a legal stranger to the family.³²³

Maintaining the parent-child bonds in cases where families break up is an emotionally taxing enterprise, but it is a charge family courts have undertaken for generations. In cases where children's welfare is in jeopardy, the premise for court intervention is found in most states' general equity powers.³²⁴ The basis for recognition of de facto parenting stems from the principle “‘that disruption of a child's preexisting relationship with a nonbiological parent can be potentially harmful to the child,’ thus warranting State intrusion into the private realm of the family.”³²⁵

Courts employing equity in these circumstances are sometimes accused of engaging in “judicial lawmaking.”³²⁶ But that is an oddly inapt categorization to describe the process of enforcing the rules the family created for itself and lived by long enough to establish a cognizable family

individualized, case-by-case approach based on all the evidence to determine if divided custody was allowable).

³²³ *A.H.*, 857 N.E.2d at 1065 (rejecting same-sex partner's argument that she was a de facto parent or parent by estoppel, not a legal stranger to her partner's child in a custody dispute).

³²⁴ *Id.* at 1070.

³²⁵ *Id.* (quoting *Blixt v. Blixt*, 774 N.E.2d 1052, 1061 (Mass. 2002)); see also Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 74 (2006) (arguing that the parentage presumption “should apply equally to children born of a same-sex marriage, domestic partnership, or civil union, as well as to children who live with a same-sex partner in a parent-child relationship”).

To protect children from the emotional harm of being abruptly cut off from one of the only two parents they have ever known, courts in a growing number of states have heeded the call of Nancy Polikoff and others, and have applied a variety of judge-made equitable and common law doctrines to fill in the gaps and to ensure that children are provided with at least a minimal level of protection for their emotional and caregiving relationships with their functional but nonlegal parents.

Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1178 (2010) (footnote omitted).

³²⁶ *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 894 (Mass. 1999) (Fried, J., dissenting).

structure.³²⁷ It is difficult, for example, to make sense of a dissenting justice labeling a decision as “anti-family” which held that a woman should be awarded parenting rights when she lived in an intimate relationship with the child’s biological mother, shared in the decision to bring the child into the world, helped plan the birthing, helped create a nursery in which to care for the child upon his arrival, and “mothered” the child from birth until the death of his biological mother.³²⁸ Such a decision may contradict some homophobic views of what constitutes an appropriate family life, but it clearly affirms the particular family in which this child was raised and allocates parenting rights to the only living parent the child has ever known.

Shaping family law through equitable principles is inevitably controversial because it involves significant tension between the court’s general equity power and specific statutory commands, which may not address the issue presented. The Washington Supreme Court fittingly characterized the judicial dilemma in these situations: “[W]e are asked to discern whether, in the absence of a statutory remedy, the equitable power of our courts in domestic matters permits a remedy *outside* of the statutory scheme, or conversely, whether our state’s relevant statutes provide the exclusive means of obtaining parental rights and responsibilities.”³²⁹

³²⁷ See, e.g., *Debra H. v. Janice R.*, 930 N.E.2d 184, 204 (N.Y. 2010) (Smith, J., concurring) (“Each of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced.”).

³²⁸ *In re Clifford K.*, 619 S.E.2d 138, 161 (W.Va. 2005) (Maynard, J., dissenting) (“I am dismayed that this Court has written an opinion that is so anti-family.”). But see *id.* at 154, 158–60 (describing the comprehensive nature and extent of the parent-child relationship between Tina B. and Z.B.S. that persuaded the majority of the court).

³²⁹ *In re Parentage of L.B.*, 122 P.3d 161, 166 (Wash. 2005) (emphasis in original); see also *id.* (noting that state courts have also “invoked their equity powers and common law responsibility . . . in spite of legislative enactments that may have spoken to the area of law, but did so incompletely”).

Sometimes a court relies on a statute whose terms appear only inferentially to apply to the case. See, e.g., *In re Clifford K.*, 619 S.E.2d at 147. The West Virginia Supreme Court held that a deceased mother’s lesbian partner had standing to seek custody of the child conceived and born during their relationship and jointly raised by them. *Id.* at 143. The court relied on the provisions of W. VA. CODE § 48-9-103(b), which provides that “[i]n exceptional cases the court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child’s best interests.” *Id.* at 147–48. The court defined “exceptional cases” as those “when intervention is likely to serve the best interests of the subject child(ren).” *Id.* at 143. The court held that, in these exceptional cases, a

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Decisions affording equitable relief in these parenting cases have not gone unchallenged; at times, they have been furiously opposed by dissenting judges and contradicted by decisions in other courts.

In 1999, the Massachusetts Supreme Judicial Court affirmed equity jurisdiction to grant visitation to the former same-sex partner of the biological mother of the child.³³⁰ The evidence showed that the women jointly made the decision to have the child and that the partner had fully co-parented the child with the biological mother, who had consented to the initiation and continuation of this family structure.³³¹ Each woman had always referred to the other as the child's parent, and the child told people that he has two mothers, one he called "Mommy," and the other he called "Mama."³³² The court held that the partner had become the child's *de facto* parent, and thus, was entitled to visitation.³³³ This resolution mirrored and carried forward the very family arrangements that the couple created for themselves and the child.³³⁴ Nonetheless, the decision prompted a pointed dissent, challenging the use of equity to circumvent (as the dissent saw it) established legal principles:

The probate judge's order in this case was wholly without warrant in statute, precedent, or any known legal principle, and yet the majority of this court has upheld it. As such, the opinion the court delivers today is a remarkable example of judicial lawmaking. It greatly expands the courts' equity jurisdiction with respect to the welfare of children and adopts the hitherto unrecognized

"psychological parent" may properly intervene in a custody proceeding. *Id.* The dissent contended that the majority had re-written the statute to its liking: "[T]he majority has resorted to legislating a new class of persons who will now have standing to take part in custodial disputes even though they have no biological or other statutorily recognized right to do so." *Id.* at 162 (Maynard, J., dissenting).

³³⁰ *E.N.O.*, 711 N.E.2d at 889–90, 894.

³³¹ *Id.* at 888–89.

³³² *Id.* at 889.

³³³ *Id.*; see also *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (holding that the same-sex partner of a biological mother who had assumed a parental role in helping to raise the biological mother's child had established a "psychological parenthood" with respect to the child, and thus, had a legal right to petition for custody and visitation).

³³⁴ *E.N.O.*, 711 N.E.2d at 892 (discussing the co-parenting agreement between the women, which stated that the child would continue his relationship with the plaintiff in the event the couple's relationship ended).

principle of de facto parenthood as a sole basis for ordering visitation.³³⁵

A more recent example of this type of equitable relief may be found in a 2009 Montana Supreme Court decision affirming the grant of parenting rights to a lesbian co-parent.³³⁶ In *Kulstad v. Maniaci*, the majority applied a state statute, which allowed third parties to acquire parental interests when the “natural parent has engaged in conduct that is contrary to the child-parent relationship”; the third party “has established with the child a child-parent relationship”; and “it is in the best interests of the child to continue that relationship.”³³⁷ A dissenting justice insisted that the statute should be struck down as an unconstitutional infringement upon a natural parent’s fundamental rights.³³⁸ The dissent further elaborated on the dangers of wielding equitable principles in order to ascertain parentage:

Today the Court retreats from its clear declaration of the fundamental constitutional rights of parents. In exchange, the Court adopts an equitable, case-by-case inquiry to determine if a third party should be granted a parental interest of a child that must be balanced against a natural parent’s rights. The Court’s decision will open a Pandora’s Box of potential attacks upon the right of fit and

³³⁵ *Id.* at 894 (Fried, J., dissenting). The dissent’s skeptical view of de facto parenting found an echo in the reasoning of *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

While it *may* be true that in our society the term “parent” has become used *at times* to describe more loosely a person who shares mutual love and affection with a child and who supplies care and support to the child, we find it inappropriate to legislate judicially such a broad definition of the term “parent” as relating to legal rights relating to child custody and/or visitation.

Id. at 918 (emphasis in original). By contrast, the Washington Supreme Court noted that the term de facto parent “describes an individual who, in all respects functions as a child’s actual parent.” *In re Parentage of L.B.*, 122 P.3d 161, 168 n.7 (Wash. 2005).

³³⁶ *Kulstad v. Maniaci*, 220 P.3d 595, 610 (Mont. 2009).

³³⁷ *Id.* at 606 (applying MONT. CODE ANN. § 40-4-228 (2009)).

³³⁸ *Id.* at 613–15 (Rice, J., dissenting).

capable parents to raise their own children. I dissent from this weakening of parental constitutional rights.³³⁹

Another argument against the expansion of equity jurisprudence targets the judiciary's supposed lack of expertise in family policy. The argument insists that judges are ill equipped to draft the substantive and procedural rules governing when child welfare provisions should apply and when and how they may be modified.³⁴⁰ Under this view, fashioning an *equitable parent* doctrine forces a court "to improvise, as it goes along, substantive standards and procedural rules about when legal custody may be modified, what terms and conditions may be set, and other matters that already have well-charted passageways under state statutes and related court decisions."³⁴¹

The problem with this view is that the "well-charted passageways"³⁴² are now full of nontraditional families whose very composition challenges established notions of family law.³⁴³ Our "dominant legal norm" posits

³³⁹ *Id.* at 611. Arguably, the majority was interpreting a statute and not relying on equitable principles. See *id.* at 606–10 (majority opinion) (applying the particular facts of the case to the elements of the Montana statute to determine whether the district court's decision to award Kulstad a parental interest should be upheld). But the dissent objected to the "equitable, case-by-case inquiry," which would follow from the majority's interpretation of the statutory framework. *Id.* at 611 (Rice, J., dissenting).

³⁴⁰ See, e.g., *Debra H. v. Janice R.*, 904 N.Y.S.2d 263, 272–73 (N.Y. 2010) (refusing to "sidestep[] [New York law] as presently drafted and interpreted . . . to create an additional category of parent—a functional or de facto parent—through the exercise of [the court's] common-law and equitable powers" and explaining that such a task is better suited for the legislature).

³⁴¹ *Cotton v. Wise*, 977 S.W.2d 263, 265 (Mo. 1998) (en banc). A similar complaint has been lodged by maintaining that the legislature is best equipped to deal with the entirety of a complex issue, while the judiciary of necessity only resolves problems in an incremental fashion. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 898 (Mass. 1999) (Fried, J., dissenting) ("Only the Legislature is in a position to deal systematically and comprehensively with [the subject of children raised by same-sex partners]. Our imprecise, indirect, and piecemeal entry into this field can only cause confusion.") Yet, another objection is lodged by courts, which prefer the clear rules of biology and adoption to what they view as a complex and prolix alternative: "These equitable-estoppel hearings—which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction—are likely often to be contentious, costly, and lengthy." *Debra H.*, 904 N.Y.S.2d at 271.

³⁴² *Cotton*, 977 S.W.2d at 265.

³⁴³ *E.N.O.*, 711 N.E.2d at 891 (noting that "notions of the modern family" include "nontraditional families," such as same-sex couples with children). In discussing
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that “family is a heterosexual, marital, biological unit, [but] our social and cultural patterns expose a culture that is largely at odds with that nuclear, marital family norm.”³⁴⁴ But the patterns in our lives so often diverge from the pathways in our laws, what are courts to do? Parents receive the law’s imprimatur because society considers them central to family life.³⁴⁵ That parenthood was once framed in biological terms was a historical inevitability—virtually a tautological position. But the argument that parenthood has now been uprooted from its biological grounding and transplanted into functional soil does not stem from a new conception of families.³⁴⁶ Rather, it grows out of the same core family tradition—parents nurture children into adulthood—and that difficult task remains a central

nontraditional families, it is instructive to keep in mind Janet Dolgin’s observation that “[t]he term ‘traditional family’ refers . . . to a social construct.” Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 524 (2000); see also JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 30–31 (1986) (describing how the “traditional family” was constructed in the nineteenth century as a product of modern capitalism).

³⁴⁴ Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789 (2003). Not only is our culture at odds with the family legal system, but there is currently “no consensus even as to what family law is,” and basic issues abound as to the proper composition of the family itself. Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 269 (2000); see also Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1112–15 (1999) (discussing different scholarly views on the construction of families). The first paragraph of the introduction to a contemporary family law casebook points out that “fundamental changes in the ways in which Americans organize their family lives have spurred questions about what were once basic presuppositions of family law.” IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 3 (5th ed. 2010).

³⁴⁵ See, e.g., Levi R. Smylie, *Strengthening Our Families: An In-Depth Look at the Proclamation on the Family*, 6 J.L. & FAM. STUD. 375, 376 (2004) (noting that family is a “central component[] of our society” and discussing the “important and distinct roles” that parents occupy within a family).

³⁴⁶ See, e.g., Dolgin, *supra* note 343, at 524–25 (stating that today’s modern family comes in many forms, despite the traditional belief that family ties flow from biology, and expressing the hope that regardless of an individual’s view of familial relationships, “families will resemble one another in placing love and loyalty before all else”).

socializing fact of our culture.³⁴⁷ The “equitable parent” cases all attempt to answer the same question that biological parenthood presupposed:³⁴⁸ Who has been raising this child?³⁴⁹

Some judges justify maintaining a key role for equity jurisprudence on the ground that the primary institutional expertise in family law resides in the courts. “The Legislature is ill-equipped to deal with the myriad situations in which children find themselves. It has long been a foundational tenet of American jurisprudence that, when legal remedies prove inadequate to solve a problem, society looks to the doctrine of equity and the courts.”³⁵⁰

Consider the “psychological parenthood” test adopted by the New Jersey Supreme Court.³⁵¹ In order for a “third party” to become legally

³⁴⁷ See Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 816 (1998) (“[F]avor[ing] respect or moral accommodation for a broad range of family forms that are capable of providing nurturing environments to its members.”).

³⁴⁸ Compare *E.N.O.*, 711 N.E.2d at 892 (discussing the plaintiff’s participation in raising the child and determining that the plaintiff was the child’s “de facto parent”), *Kulstad v. Maniaci*, 220 P.3d 595, 609–10 (Mont. 2009) (discussing the child-parent relationship that existed between the plaintiff and the child), and *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (discussing the plaintiff’s involvement in the child’s life and the plaintiff’s assumption of many parental obligations), with *Dolgin*, *supra* note 343, at 524 (quoting anthropologist David M. Schneider, who explained that “[i]f science discovers new facts about biogenetic relationship, then that is what kinship is and was all along”).

³⁴⁹ It bears reiterating how limited the scope of the de facto or equitable parent doctrine truly is, as it applies only when the parent in question has “undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.” *Philbrook v. Theriault*, 957 A.2d 74, 79 (Me. 2008) (quoting *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004)).

³⁵⁰ *Van v. Zahorik*, 597 N.W.2d 15, 27 (Mich. 1999) (Kelly, J., dissenting).

³⁵¹ *V.C. v. M.J.B.*, 748 A.2d 539, 553 (N.J. 2000). The New Jersey Supreme Court largely adopted the test set out by the Wisconsin Supreme Court in *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995). *Id.* Many other jurisdictions have recognized common law rights on behalf of psychological or de facto parents. See, e.g., *In re Interest of E.L.M.C.*, 100 P.3d 546, 558–61 (Colo. App. 2004) (finding a compelling state interest in preventing harm to a child satisfies strict scrutiny analysis and affirming recognition of “psychological parent” doctrine in context of former same-sex partner’s petition for equal parenting time); *C.E.W.*, 845 A.2d at 1151–52 (recognizing de facto parents and placing them in parity with statutory parents); *E.N.O.*, 711 N.E.2d at 893–94 (holding that the trial court had jurisdiction to award visitation between child and de facto parent); *A.C. v. C.B.*, 829 P.2d 660, 663 (N.M. Ct. App. 1992) (recognizing same-sex dual parent relationship and reversing the trial court’s ruling that the co-parenting agreement was unenforceable); *In re* (continued)

recognized as a co-parent, four steps are required.³⁵² The legal parent “must consent to and foster the relationship between the third party and the

Bonfield, 780 N.E.2d 241, 247–49 (Ohio 2002) (holding that because the state statute specifically defined “parent,” the court found it “inappropriate to . . . broaden the narrow class of persons” to include the biological mother’s same-sex partner; and thus, the partner was “not entitled to the benefit of statutes that are clearly inapplicable to such a familial arrangement,” but concluding that courts do have jurisdiction to consider a petition for shared custody as not preempted by statute); *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001) (concluding the lesbian partner “assumed a parental status and discharged parental duties with the consent of [the biological mother],” and thus, has standing as person in loco parentis to bring an action for partial custody and visitation); *Rubano v. DiCenzo*, 759 A.2d 959, 975–76 (R.I. 2000) (finding no “infer[ence] [of] legislative intent to preclude standing to a de facto parent” and concluding that “a person who has no biological connection to a child but who has served as a psychological or de facto parent to that child may . . . establish his or her entitlement to parental rights vis-à-vis the child”); *Middleton v. Johnson*, 633 S.E.2d 162, 167 (S.C. Ct. App. 2006) (finding that an ex-boyfriend who lived with the child for nine years should be recognized as a psychological parent or de facto parent and gain visitation rights); *In re J.W.F.*, 799 P.2d 710, 714 (Utah 1990) (“[T]he fact that a person is not a child’s natural or legal parent does not mean that he or she must stand as a total stranger to the child where custody is concerned. Certain people, because of their relationship to a child, are at least entitled to standing to seek a determination as to whether it would be in the best interests of the child for them to have custody.”); *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (holding the state’s common law recognizes de facto parents); *In re Clifford K.*, 619 S.E.2d 138, 140 (W.Va. 2005) (noting that the former lesbian partner of the deceased biological mother “was child’s psychological parent and unusual and extraordinary circumstances existed”).

Other jurisdictions have rejected this analysis. See, e.g., *Egan v. Fridlund-Horne*, 211 P.3d 1213, 1221 (Ariz. Ct. App. 2009) (“[W]e sharply disagree with the bold pronouncement of the Washington Supreme Court [*In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005)] that, if a person can establish standing as a de facto parent, then that person has a fundamental liberty interest in the care, custody, and control of the child, to the same extent as the legal parent.”); *Janice M. v. Margaret K.*, 948 A.2d 73, 73 (Md. 2008) (“[D]e facto parent status is not recognized as a legal status in Maryland.”); *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999) (refusing to recognize de facto parent status).

³⁵² *V.C.*, 748 A.2d at 551. Deeming one of the lesbian co-parents as a “third party” petitioner has been criticized as a distorted way to approach basic issues in a family created by two lesbian co-parents. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 350 (2002).

Lesbian coparents are anything but third parties—they are involved, nurturing, loving, and supportive parents. Lesbian coparents are different from traditional third parties because they intend and plan,

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child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.”³⁵³

The psychological parent analysis exemplifies how courts act to protect children who may be harmed unless creative judicial solutions are developed to fill the gaps in statutory enactments.³⁵⁴ But the accusations of “judicial lawmaking” ring particularly hollow when applied to this equitable doctrine.³⁵⁵ A close reading of the first prong of the test illustrates how closely this doctrine mirrors traditional norms of family governance and child welfare.³⁵⁶ The issue of psychological parenthood is raised only if co-parenting was intended and acted upon by the original biological or adoptive parent.³⁵⁷ The creation of shared parenthood for a particular child is, thus, *entirely* within the control of the original legal parent of that child.³⁵⁸

However, the legal parent cannot have it both ways. She cannot “invite a third party to function as a parent to her child” and then later pretend, once that parent-child relationship has matured, that the family she helped bring into being never existed.³⁵⁹ A sensible estoppel principle should bar this argument. But more fundamentally, rejecting this argument is implicit in the central child welfare task of the courts: avoiding injury to children. Severing an established parent-child relationship harms a child,

with their partner’s agreement and encouragement, to be a parent. Lesbian coparents thus actively participate in the decision to create a family and, indeed, function as parents. But, because under existing law and court practice lesbian coparents are not protected by state divorce or parentage statutes, they are denied legal recognition of their actual parental role. *Id.*

³⁵³ *V.C.*, 748 A.2d at 551.

³⁵⁴ See *Simons ex rel Simons v. Gisvold*, 519 N.W.2d 585, 587 (N.D. 1994) (identifying the purpose of psychological parent analysis as “prevent[ing] serious harm or detriment to the welfare of the child”); see also *L.B.*, 122 P.3d at 166.

³⁵⁵ *E.N.O.*, 711 N.E.2d at 894 (Fried, J., dissenting).

³⁵⁶ *V.C.*, 748 A.2d at 551 (“[T]hat the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child . . .”).

³⁵⁷ *Id.* at 552 (noting that this prong “is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent’s relationship with the child”).

³⁵⁸ See *id.* (“That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child.”).

³⁵⁹ *Id.*

whether that relationship began through biological means or following the invitation of and cultivation by the legal parent.³⁶⁰ As every matrimonial lawyer and judge knows, child custody battles in divorce courts frequently involve the cruel display of one parent trying to deny the other parent contact with their child.³⁶¹ When the second parent is a psychological or de facto parent, the spectacle is no less barbaric, and the potential harm to the child no less ruinous. As the New Jersey Supreme Court observed, the law should follow the psychological reality of family life: "At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."³⁶² And as the South Dakota Supreme Court similarly emphasized, "[T]he temporal, mental and moral welfare of children are paramount. This strikes the proper balance between a natural parent's custodial rights to his or her child and the child's personal welfare. Children come first."³⁶³

This acceptance of the familial status quo also has constitutional moorings. The Supreme Court has acknowledged that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."³⁶⁴ Equity powers may be employed creatively under these circumstances. But they are designed to conserve, to the extent feasible, the family structure, which the parties themselves adopted when they were contemplating a shared family life rather than when they were crafting a tactical litigation position.³⁶⁵ The goal is always to maintain the particular family that stands before the court, to the extent possible. Equity in these cases begins by recognizing "the emotional bonds that develop[ed] between family members as a result of shared daily life," particularly the parent-child relationships.³⁶⁶

The outré legal position in these cases is not the one taken by courts deploying equity solutions to bolster the family created by the parties

³⁶⁰ *See id.*

³⁶¹ *See* FLORENCE BIENENFELD, CHILD CUSTODY MEDIATION: TECHNIQUES FOR COUNSELORS, ATTORNEYS AND PARENTS 1 (1983).

³⁶² *V.C.*, 748 A.2d at 550.

³⁶³ *Quinn v. Mouw-Quinn*, 552 N.W.2d 843, 847 (S.D. 1996).

³⁶⁴ *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974).

³⁶⁵ *See V.C.*, 748 A.2d at 547 n.4.

³⁶⁶ *Id.* at 550; *see also* *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977) (noting that "biological relationships are not [the] exclusive determination of the existence of a family").

themselves. Instead, it is a position taken in many of the lesbian co-parenting cases, known as a “chutzpah” argument.”³⁶⁷ In this argument, the biological or adoptive parent claims that the woman whom she invited to share in her life and co-parent her child, and who has with her consent and cooperation for several years “on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfill[ed] the child’s psychological needs for a parent, as well as the child’s physical needs,” should now legally be deemed a stranger to the child.³⁶⁸ This argument is not creditable. Rather, equity should reject, as a form of “unclean hands,” the position articulated by the biological or adoptive parent seeking to deny the family structure that she worked so hard to establish.

B. Equity Principles in Reproductive Technology Cases

When considering the current legal standards found in surrogacy and other reproductive technology cases, it is best to look back at the *Baby M.* litigation in the late 1980s. Elizabeth Scott has etched that picture well, referring to the “dramatic and emotional legal battle between a housewife who had dropped out of high school and a couple with graduate degrees and professional careers who sought to have a child with her assistance.”³⁶⁹ During the case proceedings and in the wake of the *Baby M.* decision, surrogacy was portrayed as involving the selling of babies and the exploitation of women.³⁷⁰ The case generated very powerful emotional, ideological, and political responses, focusing “national attention on the

³⁶⁷ A recent opinion of the United States Court of Appeals for the Second Circuit explains the word and its derivation:

“Chutzpah” as a legal term of art is analytically similar to “unclean hands,” though not necessarily coterminous with that concept as understood in Chancery. The “classic definition” of chutzpah has been described as “that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.”

Motorola Credit Corp. v. Uzan, 561 F.3d 123, 128 n.5 (2d Cir. 2009) (quoting LEO ROSTEN, *THE JOYS OF YIDDISH* 92 (1968)).

³⁶⁸ *Simmons v. Comer*, 438 S.E.2d 530, 540 n.15 (W.Va. 1993) (quoting JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1979)).

³⁶⁹ Scott, *supra* note 2, at 113.

³⁷⁰ *See id.* at 116–17.

issue and fram[ing] the practice as commodification.”³⁷¹ Nearly all the statutes enacted in the period after the New Jersey Supreme Court decision in *Baby M.* either banned surrogacy contracts or discouraged them by forbidding payments to the surrogate or to intermediaries, or by giving surrogates the right to rescind after the birth of the baby.³⁷²

But this public denigration of surrogacy did not last very long. By the early 1990s, opposition began to fade.³⁷³ In New Jersey (the state which, because of *Baby M.*, took the lead in condemning surrogacy), a bill banning the practice was introduced in the state legislature in 1993.³⁷⁴ It was based on the recommendations of a task force appointed by New Jersey Governor Thomas Kean, which studied surrogacy exhaustively for four years.³⁷⁵ But the bill died without any fanfare, and it has never been reintroduced.³⁷⁶

What happened? Perhaps the answer to the puzzling change in legal and social milieu is that the scientific answers made the legal questions more complicated. Reproductive technology rapidly developed a facility for accomplishing gestational surrogacy, in which the gestational carrier provides the womb but not the egg.³⁷⁷ As with *Baby M.* surrogacy, in vitro fertilization is used to implant an embryo into the surrogate.³⁷⁸ But this embryo contains no genetic material from the woman who is to give birth.³⁷⁹ The egg and the sperm come from other sources: one or both of

³⁷¹ *Id.* at 113. In New York, the Council on Children and Families and the Division for Women maintained that surrogacy “reinforces the notion that women and children are chattels.” *Id.* at 119.

³⁷² *Id.* at 117.

³⁷³ *Id.* at 120.

³⁷⁴ *Id.*

³⁷⁵ See N.J. COMM. ON LEGAL & ETHICAL PROBLEMS IN THE DELIVERY OF HEALTH CARE, AFTER *BABY M*: THE LEGAL, ETHICAL AND SOCIAL DIMENSIONS OF SURROGACY, at iii (1992) (reporting the findings of the New Jersey Task Force regarding surrogacy and proposed reform).

³⁷⁶ Scott, *supra* note 2, at 120.

³⁷⁷ See *supra* notes 101–02 and accompanying text.

³⁷⁸ See generally DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 24–32 (2006) (explaining that the in vitro fertilization was first successfully demonstrated in 1978 and increased dramatically beginning the mid-1980s). In 2010, the Nobel Prize in physiology or medicine was awarded to Robert G. Edwards, a biologist who helped develop the in vitro fertilization procedure for treating human infertility. See Nicholas Wade, *In Vitro Fertilization Pioneer Wins Nobel Prize*, N.Y. TIMES, Oct. 5, 2010, at A1.

³⁷⁹ Levine, *supra* note 65, at 175.

the intended parents, anonymous donors, or—more problematically, as a number of contested cases have shown—a relative or friend who was promised or who expects to have a role to play in their genetic offspring's life.³⁸⁰ Gestational surrogacy quickly became far more common than *Baby M.* surrogacy.³⁸¹ Should there be a legal difference between gestational and so-called traditional surrogacy?

Increasingly, courts are answering yes. A 1998 Massachusetts case illustrated the emphatic differences between traditional and gestational surrogacy.³⁸² *R.R. v. M.H.*³⁸³ involved a "surrogacy parenting agreement" for a child who was conceived through artificial insemination of the mother with the father's sperm.³⁸⁴ The parties were married, but not to each other, and the mother had agreed to a pre-birth transfer of custody to the father.³⁸⁵ The Massachusetts Supreme Judicial Court held the contract unenforceable because child custody may only be determined by a court after determining the best interests of the child, and not by the parties via a pre-birth stipulation.³⁸⁶ The court raised no equitable concerns because the legal rules governing child custody were clear and obviously had been traduced by the parties.³⁸⁷ The court stressed that the case "concerns traditional surrogacy, in which the fertile member of an infertile couple is one of the child's biological parents."³⁸⁸ The court took pains to

³⁸⁰ See Sharyn Roach Anleu, *For Love but Not for Money?*, 6 GENDER & SOC'Y 30, 31–33, 36–37 (1992); Martha A. Field, *Surrogacy Contracts—Gestational and Traditional: The Argument for Nonenforcement*, 31 WASHBURN L.J. 1, 7–8 (1991).

³⁸¹ Field, *supra* note 380, at 7.

³⁸² *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

³⁸³ *Id.*

³⁸⁴ *Id.* at 791.

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 796, 797 ("The mother and father may not, however, make a binding best-interests-of-the-child determination by private agreement. Any custody agreement is subject to a judicial determination of custody based on the best interests of the child."); see also *In re Baby M.*, 537 A.2d 1227, 1240 (1988) (reaching the same conclusion).

³⁸⁷ *R.R.*, 689 N.E.2d at 797. Even though it found no ambiguity in the guiding legal principles in this case, the court did make a commonly noted plea for legislative guidance. *Id.* ("A Massachusetts statute concerning surrogacy agreements, pro or con, would provide guidance to judges, lawyers, infertile couples interested in surrogate parenthood, and prospective surrogate mothers.")

³⁸⁸ *Id.* at 795. As the court made clear, traditional surrogacy raises concerns akin to those which arise under adoption cases:

(continued)

distinguish an unenforceable pre-birth transfer of custody from a determination of genetic parenthood in a gestational surrogacy case “when the birth mother has had transferred to her uterus an embryo formed through in vitro fertilization of the intended parents’ sperm and egg.”³⁸⁹

The legal status of surrogacy today is far from clear. Most states have not specifically legislated the practice.³⁹⁰ Some states have outlawed surrogacy,³⁹¹ whereas others have regulated the practice.³⁹² Not until

The mother’s purported consent to custody in the agreement is ineffective because no such consent should be recognized unless given on or after the fourth day following the child’s birth. In reaching this conclusion, we apply to consent to custody the same principle which underlies the statutory restriction on when a mother’s consent to adoption may be effectively given.

Id. at 796.

³⁸⁹ *Id.* at 795 n.10. The Massachusetts high court decided the gestational surrogacy issue in *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1141 (Mass. 2001).

³⁹⁰ See Charles P. Kindregan, Jr., *Family Law in the Twenty-First Century: Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIMONIAL 43, 54–55 (2008). See generally *Surrogacy Laws: State by State*, HUMAN RIGHTS CAMPAIGN (2009), <http://www.hrc.org/issues/2486.htm>; *Guide to State Surrogacy Laws*, CENTER FOR AMERICAN PROGRESS (2007), http://www.americanprogress.org/issues/2007/12/surrogacy_laws.html/#VP.

³⁹¹ See, e.g., N.Y. DOM. REL. LAW § 122 (McKinney 1999) (“Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”).

³⁹² See 750 ILL. COMP. STAT. 47/15 (2006). In 2004, the Illinois legislature passed the Gestational Surrogacy Act (GSA), limiting enforcement to gestational surrogacy contracts and declaring that the intended parents automatically become the child’s legal parents at birth. *Id.* Other states have passed similar legislation. See, e.g., ARK. CODE ANN. § 9-10-201 (2009) (declaring that the intended parents of children born through gestational surrogacy are the legal parents of such children); FLA. STAT. ANN. § 63.213 (West 2005) (allowing a “preplanned adoption agreement” but not for valuable consideration beyond expenses and with the opportunity for the mother to rescind consent within seven days); 750 ILL. COMP. STAT. 47/15 (2006) (declaring that the intended parents automatically become the child’s legal parents at birth); NEV. REV. STAT. ANN. § 127.287(5) (LexisNexis 2010) (exempting surrogacy agreements from the ban on payment in adoptive placements); N.H. REV. STAT. ANN. § 168-B:16 (2008) (requiring “judicial preauthorization”); TEX. FAM. CODE ANN. § 160.756 (West 2008) (adopting the Uniform Parentage Act’s Article 8, and thus, providing for judicial validation of a gestational agreement with the effect that “the intended parents will be the parents of a child born under the agreement”); VA. CODE

(continued)

recent years was there adequate common law development to suggest a compelling rationale. This deficiency in our legal tradition should not be surprising. As one trial court aptly noted, “[F]or millennia, giving birth was synonymous with providing the genetic makeup of the child that was born.”³⁹³ The common law was silent on alternative reproduction because “[b]irth and blood/genetics were one.”³⁹⁴ But for the past several decades, the assumption that giving birth aligns with a genetic match has weakened to the point that a legal overhaul is needed.³⁹⁵ Technology has injected entropy into this branch of family law: “By the middle of the twentieth century, issues of legal parenthood were well settled in American law; in the first decade of the twenty-first century, those issues are hardly settled at all.”³⁹⁶ Collaborative reproduction is forcing a recalibration of governing norms, beginning with the fundamental question of determining parentage.³⁹⁷

Initially, courts tended to treat issues that arose in the context of assisted reproduction by ignoring the reproductive technology and its implications. For example, in a much-discussed 1991 lesbian co-parenting case, the New York Court of Appeals refused to grant visitation to a woman who co-parented a child for over two years with her partner who had given birth by intrauterine insemination using donor sperm.³⁹⁸ The two women had agreed on a co-parenting arrangement, given the child the names of both women, and in fact shared the duties of parenting the

ANN. §§ 20-160, 20-162 (2008) (providing for prior judicial approval, and reformation of contracts not approved by the court, to include the designated requirements).

³⁹³ *Belsito v. Clark*, 644 N.E.2d 760, 763 (Ohio Com. Pl. 1994).

³⁹⁴ *Id.*

³⁹⁵ See Kindregan, *supra* note 390, at 47 (“The separation of *biological* parenthood from *intended* parenthood is a truly revolutionary event that throws much of the earlier law of parenthood into chaos.”).

³⁹⁶ *Id.* at 43.

³⁹⁷ See Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605 (2003). Recent developments in reproductive technologies have forced courts to confront issues in determining maternity for the first time in history. See, e.g., *In re Roberto d.B.*, 923 A.2d 115, 122 (Md. 2007) (considering the novel question of “construing the parentage statutes in a way that affords women the same opportunity to deny parentage as men have”); UNIF. PARENTAGE ACT art. 8 introductory cmt. (amended 2002), 9B U.L.A. 75 (Supp. 2010) (“[B]y definition, a child born pursuant to a gestational agreement will need to have maternity as well as paternity clarified.”).

³⁹⁸ *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991).

child.³⁹⁹ But New York's highest court believed that only biology and adoption could establish parentage.⁴⁰⁰ Defining one of the child's co-parents as a nonparent allowed the court to reaffirm the prohibition on extending parenting rights to a nonparent, a point reinforced in a different context by the U.S. Supreme Court in *Troxel v. Granville*.⁴⁰¹

In surrogacy and other assisted reproductive technology (ART) cases, similar considerations govern most judicial efforts to reconcile the rights of those who claim a seat at the family table. Many courts have recognized that "[t]he changing realities of modern family life, and the increasing use of collaborative reproductive technology to procreate children by asexual means, has forced a reconsideration of the meaning of parenthood."⁴⁰² When statutory means are ill fitting or entirely absent, courts may not—as legislatures often do—simply postpone dealing with the difficult issues presented to them. Instead, courts must often craft equitable remedies in an effort to achieve substantial justice between the parties and for the children and society at large.

A 2010 surrogacy case from the Indiana Court of Appeals illustrates one court's statutory dilemma and its equity-based resolution.⁴⁰³ *In re the Paternity and Maternity of Infant R.* involved the joint petition of a married couple and the wife's sister to declare the paternity and maternity of an unborn child.⁴⁰⁴ An embryo formed from the couple's genetic material was implanted in the wife's sister, who agreed to serve as a surrogate mother and give birth to their child.⁴⁰⁵ After the child's birth, the husband executed an affidavit to acknowledge his paternity of Infant R, which the

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 29.

⁴⁰¹ 530 U.S. 57 (2000) (upholding on due process grounds the parents' decision regarding the extent of visitation afforded to the child's grandparents).

⁴⁰² Kindregan, *supra* note 390, at 45; *see, e.g.,* Belsito v. Clark, 644 N.E.2d 760, 764 (Ohio Com. Pl. 1994) ("It is apparent that the law must adapt and change to end the confusion caused by surrogacy. The question is, how will it adapt? Will the genetic test, or the birth test, or some other means be used to identify those individuals who will be classified as having the legal status of natural mother in cases such as this one in which the surrogate has not provided the genetic imprint for the child?").

⁴⁰³ *In re the Paternity & Maternity of Infant R.*, 922 N.E.2d 59 (Ind. Ct. App. 2010).

⁴⁰⁴ *Id.* at 60.

⁴⁰⁵ *Id.* As a number of cases illustrate, the sister of an infertile woman (or of a brother in a same-sex couple) often agrees to serve as a gestational surrogate. *See, e.g., id.*; Smith v. Brown, 718 N.E.2d 844, 845 (Mass. 1999); A.G.R. v. D.R.H. & S.H., No. FD-09-1838-07, at *2 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009); Belsito, 644 N.E.2d at 761.

trial court accepted.⁴⁰⁶ But after a hearing to resolve the issue of the child's maternity, the trial court found that "Indiana law does not permit a non birth mother to establish maternity," and thus, held the surrogate to be the legal mother.⁴⁰⁷

On appeal, the court acknowledged that "no legislation enacted in this State specifically provides procedurally for the establishment of maternity; it is presumed that a woman who gives birth to a child is the child's biological mother."⁴⁰⁸ But the court did not view the legislative fissure as fatal to the petition.⁴⁰⁹ The court noted that it was "confronted with reproductive technologies not contemplated when our Legislature initially sought to provide for the establishment of legal parentage for biological parents."⁴¹⁰ To accept statutory silence as the final word would lead to a result inconsistent with broad and fundamental family law policies established by the legislature.⁴¹¹

Instead, the appellate court focused on "the public policy embodied" in the paternity statutes, which, "together with the unique factual circumstances presented," pointed to the conclusion "that equity should provide an avenue for relief in this case."⁴¹² The court then explained why rejecting an equitable remedy would run counter to the public policy expressed in the legislative scheme:

[I]f equity ignores technological realities that the law has yet to recognize, a child born in the circumstances alleged herein would be denied the opportunity afforded to other children of this State, that is, to be legally linked to those with whom he or she shares DNA. Moreover, a

⁴⁰⁶ *Infant R.*, 922 N.E.2d at 60.

⁴⁰⁷ *Id.* (quoting the trial court).

⁴⁰⁸ *Id.* at 61 (citing IND. CODE § 31-9-2-10, which defined, in relevant part, a "birth parent" to be "the woman who is legally presumed under Indiana law to be the mother of biological origin").

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* The court rejected the parties' joint contention that the state paternity statutes should be extended to resolve disputes over maternity: "[I]t is for the Legislature to evaluate and deliberate comprehensive proposals for changes to these statutes." *Id.* Cf. *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (holding that under the state equal rights amendment, paternity statutes apply equally to both males and females, and the process by which males can challenge paternity can also be employed by females to challenge maternity).

woman who has carried a child but is not biologically related to that child would be denied a remedy available to putative, but not biological, fathers, that is, the removal of an incorrect designation on the birth certificate and the avoidance of legal responsibilities for another person's child.

We are aware of no reason why the public interest in correctly identifying a child's biological mother should be less compelling than correctly identifying a child's biological father. Indeed, establishing the biological heritage of a child is the express public policy of this State.⁴¹³

Under these circumstances, the court deemed itself empowered to accomplish the legislative purpose through a construction ““contrary to the strict letter”” of the statute.⁴¹⁴ Limiting its holding to avoid statutory redrafting, the court found that the case presented such “narrow circumstances” as to warrant finding in the paternity statutes a “procedural template” for allowing the parties to rebut the presumption of maternity grounded in giving birth.⁴¹⁵ The court thus remanded the proceedings for an evidentiary hearing to allow the genetic mother to establish her claim to maternity.⁴¹⁶

Infant R. appears, in one sense, to be an atypical case. Both the intended parents and the surrogate were on the same side, seeking to have the genetic mother rather than the gestational surrogate declared the legal mother.⁴¹⁷ But the legal parameters are so new in this area that cases often

⁴¹³ *Infant R.*, 922 N.E.2d at 61–62 (citation omitted). In his brief to the appellate court, appellants' counsel framed the point in more colloquial terms: “That the legal community has not caught up with the medical community does not absolve the courts from their obligation to apply our laws fairly and equally to both sexes.” Brief for Appellants at 10, *In re the Paternity & Maternity of Infant R.*, 922 N.E.2d 59 (Ind. Ct. App. 2010) (No. 64A03-0908-JV-367), available at <http://indianalawblog.com/documents/Appellant%27s%20Brief%20Infant%20R%201-28-10.pdf>.

⁴¹⁴ *Infant R.*, 922 N.E.2d at 62 (quoting *N. Ind. Ry. Co. v. Lincoln Nat'l Bank*, 92 N.E. 384, 387 (Ind. Ct. App. 1910)).

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 61.

arise in the declaratory judgment manner without opposition.⁴¹⁸ In *Culliton v. Beth Israel Deaconess Medical Center*, the Supreme Judicial Court of Massachusetts considered whether a trial court had the authority to grant a declaration of paternity and maternity in an alternative reproduction case.⁴¹⁹ The surrogate gave birth to twins who were the genetic children of the plaintiffs, pursuant to what the court termed a “gestational carrier contract.”⁴²⁰ The trial court had denied relief because of a “lack of clarity and certainty” as to its authority.⁴²¹ On appeal, the state’s highest court agreed that there was no direct authority for relief in the jurisdiction and noted that legal authority elsewhere was “sparse and not altogether consistent.”⁴²²

The *Culliton* case illustrates some of the dilemmas of technological change outstripping the pace of legislation. The twins “technically were born out of wedlock, because the gestational carrier was not married when she gave birth to them.”⁴²³ Had the surrogate been married, her husband would have been presumed to be the father of the children to whom she gave birth.⁴²⁴ But “it is undisputed that they were conceived by a married couple”; and thus, “the children should be presumed to be the children of marriage.”⁴²⁵ While the paternity statute clearly contemplated sexual intercourse as a predicate to paternity, “reproductive advances have eliminated the necessity of having sexual intercourse in order to procreate.”⁴²⁶ After considering these incompatible presumptions, the court concluded that the paternity statute “is simply an inadequate and

⁴¹⁸ See, e.g., *In re Roberto* d.B., 923 A.2d 115, 117 (Md. 2007) (agreeing that the surrogate’s name need not be listed as birth mother where the gestational carrier gave birth to a child whose genetic material came from donor eggs and father’s sperm); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1136 (Mass. 2001) (ruling on a stipulation filed jointly by genetic parents and gestational carrier for the entry of judgment seeking a declaration that the genetic parents were the children’s legal parents); *Belsito v. Clark*, 644 N.E.2d 760, 761–62 (Ohio Com. Pl. 1994) (resolving declaratory action by finding that married couple were the legal parents of the child where the married couple’s embryo was implanted into the wife’s sister who gave birth).

⁴¹⁹ *Culliton*, 756 N.E.2d at 1135.

⁴²⁰ *Id.*

⁴²¹ *Id.* (quoting the order of the Probate and Family Court).

⁴²² *Id.* at 1136.

⁴²³ *Id.* at 1137.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

inappropriate device to resolve parentage determinations of children born from this type of gestational surrogacy.”⁴²⁷

The adoption statutes also failed to resolve the *Culliton* case. Adoption becomes a relevant consideration in traditional surrogacy cases but not in gestational surrogacy. A “traditional” surrogate is the genetic as well as the gestational mother of the child she is carrying: “The child is thus, undisputedly, ‘her’ child to be surrendered for adoption.”⁴²⁸ Adoption law must govern any agreement she makes regarding the parental rights to her child, because she is the legal mother of the child at birth.⁴²⁹ But imposing the adoption law requirements (including in particular the significant waiting periods) in a gestational surrogacy case makes no sense because doing so would deprive the genetic parents of their parenting rights upon birth.⁴³⁰ Therefore, the court concluded that the adoption statute “was not intended to resolve parentage issues arising from gestational surrogacy agreements.”⁴³¹

In holding that the genetic parents were “the lawful parents of the twins,”⁴³² the court acknowledged “the importance of establishing the rights and responsibilities of parents as soon as is practically possible.”⁴³³ The court elaborated on the importance of rapid and accurate determinations of parentage for minimizing adverse consequences to children like the *Culliton* twins:

⁴²⁷ *Id.*

⁴²⁸ *Id.* In the Uniform Parentage Act, the term “gestational mother” replaced “surrogate mother,” in part so as to avoid confusion:

The term [“surrogate mother”] is especially misleading when “surrogate” refers to a woman who supplies both “egg and womb,” that is, a woman who is a genetic as well as gestational mother. That combination is now typically avoided by the majority of ART practitioners in order to decrease the possibility that a genetic\gestational mother will be unwilling to relinquish her child to unrelated intended parents.

UNIF. PARENTAGE ACT art. 8 introductory cmt. (amended 2002), 9B U.L.A. 75 (Supp. 2010).

⁴²⁹ See MASS. GEN. LAWS ANN. ch. 210, § 2 (West 2010) (requiring consent of mother before issuance of any adoption decree).

⁴³⁰ *Culliton*, 756 N.E.2d at 1137–38.

⁴³¹ *Id.* at 1138.

⁴³² *Id.* at 1141.

⁴³³ *Id.* at 1139.

Delays in establishing parentage may, among other consequences, interfere with a child's medical treatment in the event of medical complications arising during or shortly after birth; may hinder or deprive a child of inheriting from his legal parents should a legal parent die intestate before a postbirth action could determine parentage; may hinder or deprive a child from collecting Social Security benefits . . . and may result in undesirable support obligations as well as custody disputes (potentially more likely in situations where the child is born with congenital malformations or anomalies, or medical disorders and diseases). Our holding provides that such consequences, at least in some circumstances, can be minimized or avoided, thus furnishing a measure of stability and protection to children born through such gestational surrogacy arrangements.⁴³⁴

In 2007, the Ohio Supreme Court decided the *Surrogate Triplets* case.⁴³⁵ The court held that a gestational surrogacy contract violates no public policy of Ohio, even when one of the provisions prohibits the gestational surrogate from asserting parental rights regarding the children she bears using another woman's artificially inseminated egg.⁴³⁶ The court acknowledged that "neither the General Assembly nor any other governmental body in Ohio has ever enunciated a public policy concerning gestational surrogates."⁴³⁷ But the court resolved the contractual issue by using contractual norms, noting that "[a] written contract defining the rights and obligations of the parties seems an appropriate way to enter into surrogacy agreement,"⁴³⁸ as long as the contract is held "subservient to the public welfare."⁴³⁹ Three dissenting justices admitted that "whether the surrogate mother would be considered a parent under Ohio law is not . . . a

⁴³⁴ *Id.*

⁴³⁵ *J.F. v. D.B. (Surrogate Triplets)*, 879 N.E.2d 740 (Ohio 2007); see Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEVELAND ST. L. REV. 1, 31 (2008).

⁴³⁶ *Surrogate Triplets*, 879 N.E.2d at 741–42. The court noted the critical difference between gestational and traditional surrogacy. *Id.* at 742.

⁴³⁷ *Id.* at 741.

⁴³⁸ *Id.*

⁴³⁹ *Id.* (quoting *Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Kinney*, 115 N.E. 505 (Ohio 1916)).

settled legal issue.”⁴⁴⁰ They characterized the surrogacy contract as “an agreement among unrelated persons for the creation of a child for the payment of money.”⁴⁴¹ Moreover, they claimed that the decision contravened the state statute⁴⁴² that barred any person from offering “inducements to parents to part with their offspring.”⁴⁴³ The state supreme court divided four to three,⁴⁴⁴ which indicates the lack of consensus in this critical and sensitive area of the law.

V. THE CHILDREN OF *BABY M.*: SOLVING SURROGACY’S CORE PROBLEM

The debate between the majority and dissent in the *Surrogate Triplets* case, like many similar cases, can appear to be a semantic contretemps over whether the baby to whom the gestational surrogate gives birth is her “offspring.”⁴⁴⁵ But alternative reproduction technologies have destroyed all previous understandings of parentage. To some extent, the arguments resemble quarrels between two sides speaking different languages, with neither comprehending the other. While the existence of sharply conflicting views is indisputable, their durability is open to question.

Most of the judges who have addressed this issue appear to be searching for guidance from their respective legislatures rather than expressing eternal certainties in this rapidly evolving field. Some judges are willing to employ equitable solutions; others resist. But all sides acknowledge that the reproductive genie cannot be put back into the bottle of traditional parentage. While the fundamental right to parent is at the heart of these cases, almost none of the rhetoric speaks in terms of immutable rights because the experience of the families so often reveals a structure at odds with the one envisioned in statutes and case law from an era whose biological assumptions seem quaint in the twenty-first century.

A 2010 Ohio appellate case, in which “neither of the women who [were] parties to the surrogacy agreement [were] genetically related to the child,” exemplifies the serious problems facing the courts in this area.⁴⁴⁶ In this case, an unmarried woman employed the services of a reproductive

⁴⁴⁰ *Id.* at 743 (Cupp, J., dissenting).

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ OHIO REV. CODE ANN. § 5103.17 (West 2010).

⁴⁴⁴ *Surrogate Triplets*, 879 N.E.2d at 742 (majority opinion).

⁴⁴⁵ *Id.* at 743 (Cupp, J., dissenting).

⁴⁴⁶ *S.N. v. M.B.*, 935 N.E.2d 463, 468 (Ohio Ct. App. 2010), *appeal denied* 931 N.E.2d 126 (Ohio 2010).

health center to assist her in locating a surrogate, a sperm donor, and an egg donor for a gestational surrogate pregnancy.⁴⁴⁷ The intended mother selected the sperm and egg donors and then purchased the donated eggs and sperm.⁴⁴⁸ Another woman contacted the reproductive health center expressing her desire to become a gestational surrogate.⁴⁴⁹ The center paired the two women who ultimately entered into a gestational surrogacy contract.⁴⁵⁰ The contract stated, “[A]ny child or children born to Surrogate as a result of this Agreement will be the Intended Mother’s child or children.”⁴⁵¹ After in vitro fertilization combined the selected donor eggs and sperm, the resulting embryos were implanted in the surrogate.⁴⁵² The surrogate gave birth to twins (one of whom died soon after birth).⁴⁵³

Each woman claimed to be the legal mother of the child.⁴⁵⁴ The modern-day Solomonic judgment in this case was rendered, not at sword’s point but as an application of contract law. The Ohio Court of Appeals held that “the presumption [of maternity stemming from giving birth] may be rebutted by clear and convincing evidence of proof of parentage, including, as in the case of paternity, a voluntary acknowledgement of maternity.”⁴⁵⁵ The court viewed the surrogacy contract as sufficient proof of the intended mother’s “clear intention to cause the birth of the child and raise it as her own,” thus, demonstrating her “voluntary acknowledgement of maternity.”⁴⁵⁶ Finding this evidence sufficient to rebut the traditional presumption of maternity, the court held that the intended mother was the child’s legal mother.⁴⁵⁷

Although “[t]he majority of states with legislation on the subject of surrogacy make surrogacy agreements void,”⁴⁵⁸ the number of children born through surrogacy agreements continues to increase. “Despite the legal uncertainties, thousands of children are born each year pursuant to

⁴⁴⁷ *Id.* at 464–65.

⁴⁴⁸ *Id.* at 465.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* (quoting the contract).

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *See id.* at 465–66.

⁴⁵⁵ *Id.* at 470.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 471.

⁴⁵⁸ D. KELLY WEISBERG, FAMILY LAW CODE, SELECTED STATES AND ALI PRINCIPLES 325 (2008).

gestational agreements.”⁴⁵⁹ As Joanna Grossman pointed out, the popular perception that surrogacy is problematic is mistaken because “the vast majority of surrogacy arrangements are carried out without a hitch.”⁴⁶⁰

In 2004, the Illinois legislature passed the Gestational Surrogacy Act (GSA), providing for the enforcement of gestational surrogacy contracts and declaring that the intended parents automatically become the child’s legal parents at birth.⁴⁶¹ The Illinois law contemplates a pre-birth registration process rather than a judicial proceeding to establish the status of the intended parents.⁴⁶² The Illinois GSA is based on the Uniform Parentage Act, which authorizes a “prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents” to enter into a gestational agreement.⁴⁶³ Under the Uniform Parentage Act, a valid agreement must include the following provisions:

- (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
- (2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and
- (3) the intended parents become the parents of the child.⁴⁶⁴

The previous uniform act on this subject, the Uniform Status of Children of Assisted Conception Act (USCACA), had proposed two alternatives: to regulate gestational agreements through judicial review or to declare

⁴⁵⁹ UNIF. PARENTAGE ACT art. 8 introductory cmt. (amended 2002), 9B U.L.A. 75 (Supp. 2010).

⁴⁶⁰ Joanna L. Grossman, *Time to Revisit Baby M? A New Jersey Court Refuses to Enforce a Surrogacy Agreement, Part Two*, FINDLAW (Jan. 20, 2010), <http://writ.news.findlaw.com/grossman/20100120.html>.

⁴⁶¹ 750 ILL. COMP. STAT. ANN. 47/15 (West 2010); *see also id.* at 47/20(a)(2), 20(b)(2) (West 2010) (paralleling several other states’ surrogacy-enforcement laws by restricting enforcement to arrangements in which the surrogate has given birth before and the intended parents have a medical need for the surrogacy).

⁴⁶² *Id.* at 47/35 (setting forth requirements for determining how “a parent-child relationship shall be established prior to the birth of a child born through gestational surrogacy”).

⁴⁶³ UNIF. PARENTAGE ACT § 801(a), 9B U.L.A. 76.

⁴⁶⁴ *Id.* § 801(a)(1)–(3), 9B U.L.A. 76.

gestational agreements void.⁴⁶⁵ The new Uniform Parentage Act rejected that approach, noting in the comment to section 801 that “[t]he scientific state of the art and the medical facilities providing the technological capacity to utilize a woman other than the woman who intends to raise the child to be the gestational mother, guarantee that such agreements will continue to be written.”⁴⁶⁶ While some scholars see value in submitting parentage to contract law,⁴⁶⁷ formal contracts are often the tools of those with greater financial resources.⁴⁶⁸ An over reliance on contractual formalities may “leave many children—particularly children born to lower-income families who have fewer resources available to them—unprotected.”⁴⁶⁹

Although the contractual approach to parentage moves in the appropriate direction of validating the child’s actual family, it does not comprehensively deal with the issue.⁴⁷⁰ Statutory efforts might significantly clarify parenting rights, especially if they are modeled after the Uniform Parentage Act or the American Bar Association’s Model Act Governing Assisted Reproductive Technology.⁴⁷¹ Even with statutory improvements, problems will remain for families who do not fit within

⁴⁶⁵ *Id.* at art. 8 introductory cmt., 9B U.L.A. 75.

⁴⁶⁶ *Id.* § 801 cmt., 9B U.L.A. 77.

⁴⁶⁷ See, e.g., Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 20 (2008) (identifying ways that contracts can “mitigat[e] judicial bias”); Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 913 (2007) (arguing “that properly drafted parenting agreements should be enforced by family courts”).

⁴⁶⁸ Joslin, *supra* note 325, at 1221.

⁴⁶⁹ *Id.*

⁴⁷⁰ See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 178–82 (1997) (arguing that by relying on intent in reproductive technology cases, courts have not been applying contract law; instead, courts try to avoid pure contract theory in family law cases in order not to subject the family to the rules of the marketplace).

⁴⁷¹ The American Bar Association Family Law Section has included a gender neutral, marital-status neutral assisted reproduction provision in its Model Act Governing Assisted Reproductive Technology (ABA Model Act). AM. BAR ASSOC., MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 603 (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (“An individual who provides gametes for, or consents to, assisted reproduction by a woman as provided in Section 604 with the intent to be a parent of her child is a parent of the resulting child.”).

formal legal parameters. For nontraditional families who have children through ART, a workable analogy may be drawn from the “functional” family norms articulated in the equitable parentage cases.⁴⁷² The intended parents in a surrogacy agreement or ART procedure should be treated as the equivalent of the functional parents in a contested custody case. In many gestational surrogacy cases, the intended parents made possible the creation of the child, a child who would literally not exist were it not for the actions of those parents.

In *Johnson v. Calvert*,⁴⁷³ the California Supreme Court characterized the actions of the parties to a contested gestational surrogacy case in functional terms:

Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark’s and Crispina’s child. The parties’ aim was to bring Mark’s and Crispina’s child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child’s mother. Although the gestative function Anna performed was necessary to bring about the child’s birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child’s mother. No reason appears why Anna’s later change of heart should vitiate the determination that Crispina is the child’s natural mother.⁴⁷⁴

In emphasizing the parties’ intentions and behavior, the court suggested that its role was to validate the reasonable decisions of intended parents

⁴⁷² See *supra* text accompanying notes 312–17.

⁴⁷³ 851 P.2d 776 (Cal. 1993). The court held that genetic consanguinity and giving birth are means of establishing a mother and child relationship, but “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.” *Id.* at 782.

⁴⁷⁴ *Id.*

and to preserve the resulting family.⁴⁷⁵ This brace of norms—intention plus behavior—denotes a simple but telling format for approaching cases of second-parent disputes in gestational surrogacy and ART cases in general. Intent plus behavior will lead to a finding that nonparents have become parents, so long as both adult partners manifest intent plus behavior, and the behavior includes establishing a parent-child relationship.

In contested gestational surrogacy cases, the intended parents have typically not had the opportunity to develop a parent-child relationship with the baby whose birth may have triggered the gestational carrier's decision to renounce the surrogacy agreement. However, the intended parents may have done everything possible to become that child's functional parents. If they have done so, they should be declared the child's legal parents. Of course, the gestational carrier has her own functional argument. This argument relies on the fact that for nine months, she carried the child and then went through the pains of childbirth to deliver the child. But that contention must be viewed in its proper context. The surrogate intended to form no family tie with the child. She intended to be anything *but* the child's legal parent. Had she not solemnly expressed her intent to *avoid* parenthood, she would never have become the gestational carrier for this child. And until after the birth of the child, the surrogate in many of these cases did not act in any way to contravene the understanding that the intended parents were the legal parents.

Katharine Baker observed, "Preconception intent is critical to courts' allocations of parental rights."⁴⁷⁶ This preconception intent, coupled with

⁴⁷⁵ See *id.* at 786–87.

⁴⁷⁶ Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 29, 11 (2004) ("Commentators and courts widely endorse the preconception intent standard as the appropriate one to decide disputed parental rights issues stemming from reproductive technologies that allow people to conceive without intercourse and separate genetic contributions from gestational ones."); see also Lori B. Andrews, *Legal and Ethical Aspects of New Reproductive Technologies*, 29 CLINICAL OBSTETRICS & GYNECOLOGY 190, 199–200 (1986) (arguing the preconception intent should govern in cases of artificial insemination); John Lawrence Hill, *What Does It Mean to Be a "Parent"?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 418 (1991) ("[T]he intended parents should be considered the 'parents' of the child born of [reproductive technologies] . . ."); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302 ("[L]egal rules governing modern procreative arrangements and parental status should recognize the importance and legitimacy of

(continued)

the intended parents' behavior demonstrating furtherance of their goal to create new life with the help of a gestational surrogate, establishes that the intended parents are the baby's functional and real parents. They should be declared the legal parents.

Preconception intent plus consistent behavior is key. Consider a New York appellate case presenting a scenario contrasting with that of *Johnson*.⁴⁷⁷ The wife in *McDonald v. McDonald* was unable to conceive naturally, and she and her husband agreed to an in vitro fertilization in which the husband's sperm was mixed with eggs from an anonymous donor.⁴⁷⁸ The fertilized eggs were then implanted in the wife's uterus, and she gave birth to twins.⁴⁷⁹ The parties later became engaged in a divorce action and bitterly contested child custody.⁴⁸⁰ The husband argued that the court should award him custody because the twins had no mother, since his wife was genetically unrelated to them.⁴⁸¹ The court ruled that when a woman gestates and delivers a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the legal mother.⁴⁸²

In *McDonald*, the wife was the gestational carrier,⁴⁸³ but she was nobody's surrogate.⁴⁸⁴ She gave birth to a baby to whom she was a genetic stranger.⁴⁸⁵ Yet the court did not doubt that she was the child's legal mother.⁴⁸⁶ The New York court found the reasoning of *Johnson* persuasive in what the *McDonald* court termed "a true 'egg donation' situation."⁴⁸⁷ In

individual . . . intentions . . ."). But see Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 879–80 (2000) (arguing that parental determinations in cases of reproductive technologies should be governed by existing rules governing parentage determination, many of which do not honor intent, which would harmonize sexual and technological conception).

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

⁴⁷⁸ *Id.* at 478.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 479.

⁴⁸² *Id.* at 480.

⁴⁸³ *Id.* at 478.

⁴⁸⁴ See BLACK'S LAW DICTIONARY 1036 (8th ed. 2004) (defining *surrogate mother* as a "woman who carries out the gestational function and gives birth to a child for another" (emphasis added)).

⁴⁸⁵ *McDonald*, 608 N.Y.S.2d at 478.

⁴⁸⁶ *Id.* at 480.

⁴⁸⁷ *Id.*

McDonald, as in *Johnson*, preconception intent plus consistent behavior supplied the evidence required for the court to confidently determine parentage. A case from California, *In re Marriage of Buzzanca*, also supports this reasoning.⁴⁸⁸ A husband and wife arranged for a gestational surrogate to bring to term an embryo genetically unrelated to either of them.⁴⁸⁹ After the fertilization, implantation, and pregnancy, a divorce action was filed.⁴⁹⁰ The wife claimed that she and her husband were the child's lawful parents.⁴⁹¹ Both the husband and the gestational carrier disclaimed parentage.⁴⁹² The California Court of Appeals rejected what it called the trial court's "extraordinary conclusion" that the child had no legal parents.⁴⁹³ Instead, the court reasoned that the parties' acted-upon preconception intent meant that the child had come into existence only because the husband and wife "agreed to have a fertilized egg implanted in a surrogate."⁴⁹⁴ The court emphasized that it was not enforcing the surrogacy contracts in this case but rather was "concerned with the consequences of those agreements as acts which caused the birth of a child."⁴⁹⁵ The intending parents acted consistently with their purpose, and the court deemed them the legal parents of the resulting child.⁴⁹⁶

⁴⁸⁸ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

⁴⁸⁹ *Id.* at 282.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 289.

⁴⁹⁶ See *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994); see also *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005).

An unmarried, heterosexual couple had three children by obtaining eggs donated from an anonymous third-party female, fertilizing the eggs in vitro with the man's sperm, and implanting the fertilized eggs in the woman's uterus. The couple intended to rear the children together as father and mother. When the couple's relationship deteriorated, the woman filed a parentage action seeking custody and child support. In response, the man claimed that the woman had no standing as a parent because, lacking genetic connection to the children, she failed to qualify as a parent under Tennessee's parentage statutes. On this basis, the man sought sole and exclusive custody.

Id. at 716. The state supreme court held that the woman is the children's legal mother and noted that its holding was "tailored narrowly to the specific controversy now before us." *Id.*

(continued)

Although this proposed test looks to intention as actuated by behavior, there is no reason to wait until after the birth of the child. A pre-birth registration process would be consistent with rational planning, would reduce uncertainty, and would lead to consistent results.⁴⁹⁷ The Uniform Parentage Act provides that if the statutory requirements are met, “a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the agreement.”⁴⁹⁸ As Courtney Joslin pointed out, “Where children are brought into the world through assisted reproduction, there is necessarily a convergence of procreative activity and intent to parent; there is no other reason to engage in that procreative activity.”⁴⁹⁹

Whatever the ultimate legal configuration of parentage for children of ART, the need to achieve a workable resolution as soon as possible could not be more pressing. Up to one-third of women who use ART are unmarried.⁵⁰⁰ *Chaotic* and *dysfunctional* would accurately describe a legal system which provides that “in the vast majority of states, children born to unmarried couples through alternative insemination are excluded from [established] parentage rules.”⁵⁰¹ Whether enacted by a legislature or developed through the equity power of the courts, a rule based on

at 716–17. The court acknowledged that “Tennessee’s parentage and related statutes were simply not designed to control the circumstances of this case.” *Id.* at 729. But any other ruling would be untenable:

To restrict legal maternity to genetic consanguinity alone where, as in this case, the genetic “mother” is an egg donor who has waived her parental rights and who has been and remains permanently anonymous would result in the absurdity of children having, for all practical purposes, no legal mother. *Id.*

⁴⁹⁷ See, e.g., UNIF. PARENTAGE ACT § 803 (amended 2002), 9B U.L.A. 364 (Supp. 2010). Alternatives to pre-birth registration include post-birth determination of the respective parental rights and formal adoption of the child, both of which introduce doubt and delay into the process. See, e.g., *McDonald*, 608 N.Y.S.2d at 477 (illustrating the difficulty courts face when trying to determine parental rights). A post-birth determination of parental obligations might also necessitate the issuance of two birth certificates, one immediately upon birth and the other after the conclusion of the post-birth procedure. See, e.g., *Doe v. N.Y. Univ.*, 666 F.2d 766 (2d Cir. 1981) (demonstrating the issuance of two birth certificates).

⁴⁹⁸ UNIF. PARENTAGE ACT § 803(a), 9B U.L.A. 364.

⁴⁹⁹ See Joslin, *supra* note 325, at 1223.

⁵⁰⁰ *Id.* at 1177.

⁵⁰¹ *Id.* at 1184.

preconception intent plus consistent behavior would serve both parents and children in the new family.

In a world in which family composition depends much more on function than on blood, the intended parents of a child should be deemed the legal parents because they are the ones who have done the most to prepare a family for that child. This article began by considering *Baby M.*, the seminal case in surrogacy. After more than two decades of legal and technological changes, “dramatic increases in the number of same-sex couples having and raising children, and the ever-widening variety of family forms,” it seems difficult to disagree with Joanna Grossman that “the [*Baby M.*] ruling itself seems dated.”⁵⁰² *Baby M.* may have been correct in its time, but today we must resolve a new generation of parenthood issues. The children of *Baby M.* deserve their real parents, those who assumed the responsibility for bringing them into being.

VI. CONCLUSION

New technologies are colliding with traditional reproductive standards. The sparks produced from the impact have ignited both resistance and innovative thinking in the law and policy arena. Years from now, when the smoke has lifted, future generations will wonder at the sound and fury emanating from these practices. The one constant in this controversy, the unchanged and unchanging impetus, is the desire for children and family, however we choose to create them.

⁵⁰² Grossman, *supra* note 460.

