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Status and Contract In Feminist Legal Theory of the Family: A Reply to Bartlett

JANET L. DOLGIN*

I. INTRODUCTION

A well-intentioned and influential branch of feminist jurisprudence is often informed—and plagued—by its ambivalence about two essentially ideological¹ concerns: the extent to which biological differences between men and women should determine their respective fates before the law; and the value of the traditional family as an institution grounded in relations of status. Although nothing necessitates that these concerns be linked (since no inevitable correlation exists between biologically-based gender differences and choices regarding the form of the family), the theorists in question have insisted upon linking them—without understanding the danger of doing so. In consequence, they have unwittingly harmed their own cause.

The danger resides in the specious arguments from biological determinism which for millennia have justified the oppression of women. As is well known, women have traditionally been understood through cultural renderings of their biological selves. The “peculiarities” of female biology have been used to “imprison [woman] in her subjectivity, circumscribe her within the limits of her own nature.”² The biological argument, thus perverted, has been so compelling, so strong, and so oppressive to women for so long, that feminists should invoke it (if at all) only with supreme caution, and with total consciousness of its cultural history, and therefore, of its potential consequences. Otherwise, the danger that the argument may be turned against them is obvious and grave.³

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1. Ideology, as used here, means, not a system of political beliefs, but the basic cultural assumptions that lie beneath a society's reactions to and view of reality. The definition follows that of the French anthropologist, Louis Dumont, who wrote: “Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.” L. DUMONT, *FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY* 22 (1977).

2. S. de BEAUVOIR, *THE SECOND SEX*, xv (1953).

3. It is relatively easy to slip from a position that women are different from men (biologically, historically, culturally) to one which grounds all differences in biological inexorabilities.

For instance, in her extraordinarily successful book, *In a Different Voice*, Carol Gilligan argued that women, unlike men, viewed themselves as essentially connected to others and that this difference accounts for differences in morality, cognitive function, aesthetic sensibility and psychological growth. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). Whether Gilligan has described a “feminist” or a “feminine” approach can be, and has been debated. See, e.g., Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584-91 (1986) (a sympathetic account of Gilligan's work that regards it as an exposition of “feminine” morality and thinking rather than feminist theory); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (criticizing Gilligan for the vagueness of her use of the term “feminine” from a feminist perspective). In either case however—and particularly if the characterization is understood as “feminine”—one is all but compelled to search for the cause and basis of the postulated

To this danger the feminists in question seem almost entirely blind. And therefore—for reasons to be discussed—in their effort to effect desirable social and jurisprudential change, they have resorted to the inevitable dictates of nature in arguments intellectually naive, and inimical to their own laudable interests.

Their work is typified by a recent article on family law by Katherine T. Bartlett, *Re-Expressing Parenthood*.⁴ Bartlett's explicit goals are impressive. Unfortunately, however, since her resort to biological imperatives is essentially uninformed, her article undermines her own intentions and the cause she wishes to serve.

Bartlett proposes a thorough revision of current American family law relating to custody disputes in particular, and, more generally, to family relations, arguing that such law is essentially oppressive, especially to women.

Bartlett presents her case through the use of three examples: single women choosing nonmarital motherhood; unmarried mothers choosing to place their children for adoption; and surrogate mothers deciding to keep their children. In Bartlett's opinion, the laws regulating such cases reflect an ideology of parenthood "which is undesirable" because "grounded in notions of exchange and individual rights" that implicitly encourage "parental possessiveness and self-centeredness." These she proposes to replace with "notions of benevolence and responsibility. . .intended to reinforce parental dispositions toward generosity and other-directedness."⁵ To that end, together with a critical analysis of current law, Bartlett offers an ethical rationale for a comprehensive program of change in addition to the program itself. Her program involves replacing a view of family law based on rights with one based on responsibility.

As opposition to oppression and the effort to replace self-centeredness with generosity seem self-evidently and equally impressive, the impulse that underlies Bartlett's article merits respect. Unfortunately, however, her argument is not ade-

quate to the impulse, being ultimately unpersuasive for three basic and related reasons. First, Bartlett fails to situate her analysis of current law in an historical context and thus fails to recognize the ideological roots of the socio-legal complex upon which she focuses. Second, and in consequence, she misinterprets the ideological basis of current law, failing to recognize within it fundamental contradictions and tensions. The most fundamental of these contradictions is that between status and contract; between a world based on set roles and biological certainties and one based on negotiation and choice. Third, and once again in consequence, she offers a program of change not only amorphous and vague, but undermined by an essential danger to her deepest commitments—a danger she apparently fails to comprehend, the danger of invoking biological inexorabilities to serve specific ends without recognizing that invocation ultimately supports the forms of oppression she hopes to obliterate.

This comment begins by describing the historical context that Bartlett neglects; correlatively, the comment presents and analyzes the ideological foundation of current family, including custody law. The comment then reviews Bartlett's program of change, describing the danger that lies beneath her suggestions. In short, this comment presents an alternative reading of current family law to the one offered by Bartlett. This alternative reading is based on an analysis, both historical and sociological, of the ideology underlying the laws in question and suggests that family law should be structured to foster carefully regulated evolution toward the use of contract without destroying the better aspects of status. More importantly, family law should not, though Bartlett ultimately suggests that it should, be grounded in biology and "status."

II. THE SOCIAL AND HISTORICAL CONTEXT

Bartlett describes contemporary family law to encapsulate a world of barter and negotiation,

distinction between a feminine and a masculine perspective. The *real* biological differences that exist between women and men can ease an unwary theorist toward a biological explanation, one that understands gender differences as inexorable, because natural. As Joan Williams has written, "Gilligan's inconsistent signals of whether she is talking about women or 'the feminine' have left relational feminism with the potential to be used as a weapon against women." Williams, *supra*, 87 MICH. L. REV. at 813 (1989).

Thus, the danger that this article analyzes in the context of one author's work—the danger of grounding "feminism" in biological determinism—is a danger to which much "feminist" and "feminine" thinking is liable to, and does, fall prey.

4. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988).

5. *Id.* at 294.

a world of entitlement and correlative obligation.⁶ She proposes, in effect, replacing that view of law *and* of the family with one attuned to the significance of relationship and responsibility.⁷

She asserts that family law has long been based in the notion of rights, rather than responsibility,⁸ and that her suggestions constitute an innovative view of the family and of family law. In fact, her suggestions represent and harmonize with a view of the family much older, more deeply entrenched, and more oppressive toward women than the view she describes as the established one.⁹

A. Status and Contract: The Law's Ambivalence

Contemporary family law is not empowered by a view of the family focused on "exchange and individual rights." Rather, it is empowered, at present, by a dynamic tension between, and ambiguity about, a view of the family focused on exchange and negotiated rights and a view of the family focused on a set of connections (*e.g.*, commitment, loyalty) akin to what Bartlett calls responsibility.

The tension in present family law stems precisely from the historical process in which rights have begun to *replace* responsibility (to use Bartlett's terms).¹⁰ Thus, in order to comprehend the present situation, it is essential that the historical process be understood.

Current understandings of the family, and of family law, can be contextualized historically and sociologically in light of a fundamental shift, described by Sir Henry Maine more than a hundred years ago, from a universe based on relations of *status* to a universe based on relations of *contract*.¹¹

Maine wrote:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution

of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account.¹²

Maine described a process involving the substitution of the autonomous individual, putatively equal to any other individual for the group and for *relationship*, as the basic unit of value in modern society. The modern world imagines the individual to be free to enter agreements—and back out of them at a price—and free to sell his or her labor power in the marketplace. The links that connect people in such a world differ radically from the ties between people in a world where the group, not the individual, is primary.

Maine continued:

Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.¹³

In contrast to a world of contract, Maine posed a world of status.¹⁴ In a world based on status relations, people are *born* to be who they are. In such a world, the inevitable dictates of nature¹⁵ ground social relations in an absolute reality. In such a world, rights and duties are fixed at birth and attend relationships understood as natural.¹⁶

Maine said it well:

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

6. *See id.* at 295.

7. *See id.*

8. *See id.* at 295-297. "Since the earliest days of the modern liberal state, parenthood has been expressed in terms of exchange." *Id.* at 297.

9. *Id.* at 299.

10. *See infra* text at notes 11-28.

11. *See Dolgin, Status and Contract in Surrogate Motherhood: An Illumination of the Current Surrogacy Debate*, 38 *BUFF. L. REV.* 517-23 (1990).

12. H. MAINE, *ANCIENT LAW* 99 (1972).

13. *Id.* at 99.

14. *See also* C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 49-51 (1962).

15. The phrase, "the inevitable dictates of nature," is used here to refer to an ideological stance and does not imply abstract, inexorable truth.

16. *See Dolgin, supra* note 11, at 517.

usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.¹⁷

The movement from status to contract is a move from inherent value to market value.¹⁸ Lewis Hyde, differentiating gifts from commodities, describes a gift as having "worth." Its particular, inherent character precludes a gift's being exchangeable for other equally valuable things.¹⁹ Gifts are bridges. They bond people together. They make sense in and of a world of status.²⁰ Commodities separate people. They neither rely on nor activate relationships. Correlatively, in moving from status to contract, society moves from a world in which relationships are grounded in absolute views of reality, both natural and supernatural, to one in which reality is viewed in relative terms. For instance, the relationship between a mother and her child has traditionally been comprehended as flowing inevitably from the biological links between the two. An ideology of status establishes the relationship as inevitable and absolute.²¹ In distinction, market relations²² are neither inevitable nor securely anchored. They are alienable. In substituting contract for status, society substitutes freedom for security and choice for familiarity.

In the contemporary world, relations based

on contract predominate over those based on status.²³ However, in a few areas of life, status predominates. In these areas—preeminently the family—relations of status are *supposed* to be primary.²⁴ Parents are supposed to care for their children because love, not money, is involved.²⁵ In relations between family members and good friends, people are supposed to exhibit commitment and loyalty. They exchange gifts, not commodities, envision their relations as permanent, not alienable, and often assume hierarchical rather than egalitarian relations.²⁶

This description harmonizes with Bartlett's "concept of responsibility" and contrasts with the rights dimension of present law. Bartlett insists that "responsibility and relation are difficult terms to pin down," but she fails to explain why that is so. "Responsibility" and "relationship" appear to Bartlett hard to define with specificity because the central meaning of these concepts demands flexibility. As the anthropologist, David Schneider, wrote, "...all of the symbols of American kinship seem to 'say' one thing; they provide for relationships of diffuse, enduring solidarity."²⁷ Implicitly, Bartlett recognizes this when she defines responsibility, in connection to parenthood, as involving an identification with, and "commitment to, how the child 'turns out' "²⁸ and as being "derived within a social context that defines ideal roles for persons engaged in particular relationships."²⁹ Maine's concept of status entails precisely this combination of ideal roles and commit-

17. MAINE, *supra* note 12, at 100.

18. "Market value" refers, most generally, to that aspect of value called "exchange value." The term connotes the whole collection of economic, social and ideological relations that developed with and through capitalism, B. OLLMAN, ALIENATION 183 (1971), and can thus describe notions "of self and self-identity" as well as types of "production and market processes." S. BARNETT & M. SILVERMAN, IDEOLOGY AND EVERYDAY LIFE 35 (1979).

19. Gifts sometimes are exchanged for other valuable things, but to the extent that they are, they begin to take on the form of commodities and stop being gifts. L. HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 60 (1979).

20. Obviously, gifts continue to exist in a world largely defined in contractual terms. They thus exist as pockets of status in a world largely understood in different terms.

21. Even in a universe based on status, variation and play emerge. Relationships are, however, comprehended ideologically in such a universe as inevitable and absolute. See note 1 *supra*.

22. See note 18 *supra*.

23. See Dolgin *supra* note 11, at 519.

24. *Id.*

25. *Id.*

26. The anthropologist David Schneider has characterized the American family as enjoying "diffuse, enduring solidarity." Schneider wrote:

...all of the symbols of American kinship seem to 'say' one thing; they provide for relationships of diffuse, enduring solidarity. 'Diffuse' because they are functionally diffuse rather than specific in Parsons' terms. That is, where the 'job' is to get a specific thing 'done' there is no such specific limitation on the aim or goal of any kinship relationship. Instead the goal is 'solidarity,' that is, the 'good' or 'well being' or 'benefit' of ego with alter. Whatever it is that is 'good for' the family, the spouse, the child, the relative, is the 'right' thing to do. And 'enduring' in the generalized sense symbolized by 'blood'; there is no built-in termination point or termination date.

Schneider, *Kinship, Nationality and Religion in American Culture: Toward a Definition of Kinship* in SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS 67 (J. Dolgin, D. Kemnitzer & D. Schneider eds. 1977).

27. *Id.*

28. Bartlett, *supra* note 4, at 300.

29. *Id.* at 299.

ment, understood consciously by Maine, and less consciously by Bartlett, as grounded in the *nature* of relationship.

Bartlett errs decisively in asserting that our present family law system emphasizes rights to the relative exclusion of responsibility.³⁰ Her mistake is predictable. The notion that family members have *rights* vis-a-vis one another is newly important. Perhaps, because family law has traditionally been defined through the notion of responsibility based on relations of status, and because the development of rights analyses within family law has occurred amidst much sound and fury, rights analyses within family law often *appear* to predominate over those based on notions of responsibility and status.

In fact, rights are typically invoked when the family, comprehended as a community of responsibility, *fails* to operate. When the family founders, state intervention is invoked to delineate applicable *rights*. But, the delineation and application of rights by the state *assumes* the family to be a community of status-based relationships.

Because Bartlett sees current family law as involving contract, rather than as contract and status arguing their respective cases, she fails to notice the deep-seated presence of status in current family law, in general, and in custody law, in particular. Present law, like the society it reflects, assumes that the family is and should remain primarily a universe defined in status terms, a universe of love, not money, of commitment, not negotiation, of relationship, not autonomy.³¹ Within family law, rights must be articulated be-

cause on the whole, the system has traditionally assumed that the family is an arena in which one's obligations and privileges stem from inherent personal characteristics (e.g., sex).³² The articulation of rights in family law is, in part, an innovation capable of protecting the weaker party in status-based, hierarchical relationships.

For instance, in her analysis of a set of constitutionally based rights such as the right to procreate,³³ the right to have an abortion,³⁴ and the right to raise one's children,³⁵ Bartlett condemns the law's "single-minded focus on the rights of individuals."³⁶ But no such focus exists. In the first place, the law continues in great measure to *assume* that the family represents primarily a world of status, not contract. The rights to procreate and to raise one's children, for instance, assume that relationship is fundamental to personhood.³⁷ Secondly, as Bartlett herself repeatedly indicates, the collection of rights that she reviews is, in context, more frequently self-contradictory than harmonious.³⁸ These rights do not stem from, and do not reflect, a single minded view of reality. The contradictions that Bartlett's review demarcates do not, as Bartlett would have us believe, indicate the failure of law to appropriate models based on the concept of responsibility. Rather, they indicate the law's ambivalence about the movement from status to contract, an ambivalence which brings a useful wariness and moderation to current efforts to amend family law.³⁹

Bartlett interprets constitutional rights—particularly those based in the right to privacy—as further evidence that the law understands the family as it does the market, as an arena in which

30. *Id.* at 294.

31. *See, e.g.,* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (upholding contract between cohabitants pertaining to distribution of property and support payments yet characterizing cohabitants involved in *status* terms). The *Marvin* court wrote:

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution.

Id. at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

32. *See, e.g.,* Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 699 (1985) (describing development of economic model for spousal relations as response to demands for gender equality in marriage).

33. Bartlett, *supra* note 4, at 309, 321.

34. *Id.* at 320.

35. *Id.* at 321.

36. *Id.* at 305.

37. *See* Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972) (unwed fathers who "care about the disposition of their children" have constitutional right to hearing in custody or adoption proceedings).

38. *See, e.g.,* Bartlett, *supra* note 4, at 311, 316, 330.

39. The law's ambivalence about the move from status to contract is dramatically illustrated by the confused and contradictory positions taken with regard to the correlative rights of minors and their parents. Compare Bellotti v. Baird, 443 U.S. 622 (1979) (holding unconstitutional Massachusetts statute requiring parental consent for minor girl to get an abortion) with Parham v. J.R., 442 U.S. 584 (1979) (parents have right to admit their minor child to mental institution). The two cases were decided in the same term. In neither case did the Court address the contradiction between the holdings.

autonomous individuals have the right to negotiate reality. In fact, the Supreme Court, both in privacy rulings and in other related rulings,⁴⁰ has been ambivalent about welcoming relations based on contract, in Maine's sense, into the domain of the family.

A key to Bartlett's confusion is found in her reference to Catherine MacKinnon's assertion that "[t]he law of privacy works to translate traditional social values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives."⁴¹ Privacy law often operates as MacKinnon claims. However, the traditional social values to which she refers are largely status-based. These values are reflected in the law of privacy as applied to the family, which is thus conservative, and therefore reluctant to protect the admission of contract-based relationships into the arena of family matters because privacy law is grounded in "traditional social values." "[T]he rhetoric of individual rights" (MacKinnon's phrase) may mask, may challenge, but has not yet usurped, status. Privacy rulings, as Bartlett recognizes, offer only reluctant assistance in protecting most non-traditional family forms, not because the law of privacy defines the family in market terms, but because it assumes that the family represents a world of status, and grows wary when the traditional values associated with that world are threatened.

B. The Case of Surrogate Motherhood: An Examination of Bartlett's Thesis

The case of surrogate mothers, deciding to retain or seek custody of the baby born as a result of a surrogacy agreement, is one of the three examples Bartlett employs to illustrate her criticisms of family law. The example is especially powerful because surrogacy arrangements bring an actual contract, replete with attendant rights

and obligations, into the center of the parent-child relationship.

Bartlett suggests that legal responses to the dilemmas posed by surrogacy should not focus on rights (e.g., the right to adopt, to procreate, to retain a parental role) or on "fairness and equality for the parents," but on a "demonstration of responsibility and commitment to the quality of the [parent-child] relationship."⁴²

The so-called *Baby M* case, involving an actual contract, negotiated and signed by the biological parents, provides strong ground for examining Bartlett's central thesis. The case, involving a custody battle between Baby M's biological ("surrogate") mother and her biological father, was brought by William Stern, the biological father, who asked the New Jersey courts to enforce a surrogacy agreement between himself, the surrogate, Mary Beth Whitehead, and her husband, Richard Whitehead.⁴³ If Bartlett is correct in asserting that custody law prefers the model of the market, of rights, of contract, to that of status and responsibility—if, as she insists, "the critical fact is that surrogacy arrangements, however dressed up," legitimize almost exclusively "bargain and exchange over the incidents of parenthood"⁴⁴—then the opinions of both the trial court and the appellate court should everywhere reflect primarily—indeed almost exclusively—the underlying assumptions and the language of the autonomous, self-interested individual involved in commerce.

In fact, however, the judicial opinions in the case represent antagonistic conceptions of the law controlling surrogacy. The trial court upheld the surrogacy contract, terminated Mary Beth Whitehead's parental rights, and immediately allowed William Stern's wife, Elizabeth to adopt the baby.⁴⁵ In contrast, the New Jersey Supreme Court declared surrogacy contracts void and possibly criminal, and reversed the termination of the biological mother's parental rights' and the adop-

40. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (demarcating a "private realm of family life which the state cannot enter"); *Belle Terre v. Boraas*, 416 U.S. 1 (1973) (holding constitutional a zoning ordinance restricting occupancy to one-family units on grounds that it encourages "family needs" and "family values.") *Id.* at 9. The ordinance defined family as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." *Id.* at 2; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of

the liberties protected by the Due Process Clause of the Fourteenth Amendment.")

41. Bartlett, *supra* note 4, at 310 n.72 (quoting C. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 97 (1987)).

42. *Id.* at 336.

43. See Dolgin, *supra* note 11, for detailed analysis of the *Baby M* case in light of the differences between status and contract.

44. Bartlett, *supra* note 4, at 332.

45. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

tion of the baby by Elizabeth Stern. Beneath these differences, however, the two opinions share a set of ideological assumptions: that, in short, the demands of the marketplace must give way before the sacred demands of the family, understood in status terms.⁴⁶

The trial judge, who appeared to uphold the surrogacy contract, in fact began his opinion by asserting that the child's best interests constituted the primary issue in the case and that "[a]ll other concerns raised by counsel constitute commentary."⁴⁷ For the trial court, the contract was a *deus ex machina*, appropriated to effect the ends of status and responsibility. The trial judge saw the court as *creating a family* for Baby M. Judge Sorkow wrote for the court:

When [Baby M] was born on March 27, 1986, there were no, attendant to the circumstances of her birth [sic], family gatherings, family celebrations or family worship services that usually accompany such a happy family event. The facts found by this court . . . tell quite a different story.

In reality, the fact of family was undefined if non-existent [sic]. The mother and father are known but they are not family. The interposition of their spouses will not serve to create family without further court intervention⁴⁸

Moreover, in Judge Sorkow's view, the family so created reflected all the advantages of status and responsibility. He wrote,

This court is satisfied by clear and convincing proof that Mr. and Mrs. Stern wanted and planned for this child. They intended to be parents of the child. They have a strong and mutually supportive relationship wherein each respects the other and there is a balancing of obligations. There is proof of a successful cooperative parenting effort. The Sterns have a private, quiet and unremarkable life which augers well for a stable household environment.⁴⁹

The New Jersey Supreme Court's support of status was more explicit and more consistent than the trial court's.⁵⁰ The supreme court ruled that children cannot be purchased and that contracts cannot replace "motherhood."⁵¹ The court concluded that the surrogacy contract violated New Jersey statutes governing adoption and parental terminations as well as state public policy. The court wrote:

This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.⁵² . . .

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. 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.⁵³

In short, *both* courts did precisely what Bartlett says should be done, but, despite the evidence, denies is done: they resolved the conflict over the child by deciding "what kinds of children and families—what kinds of relationships—we want to have."⁵⁴

Thus, on the evidence of the *Baby M* case, considered as a unit, Bartlett's thesis, as applied to current custody law, is discredited. Bartlett may disagree with the manner in which the concept of responsibility is formulated in the *Baby M* opinions. But she may not be permitted, without challenge, to assert that those opinions argue from presumptions of contract and rights to the exclusion—or even significantly to the detriment—of presumptions of status and responsibility.⁵⁵ The courts and the parties themselves all

46. Dolgin, *supra* note 11, at 541.

47. 217 N.J. Super. at 323, 525 A.2d at 1132.

48. *Id.* at 401, 525 A.2d at 1172.

49. *Id.* at 397, 525 A.2d at 1170.

50. The New Jersey Supreme Court observed that "[a]lthough clearly expressing its view that the surrogacy contract was valid, the trial court devoted most of its opinion to the question of the baby's best interests. The inconsistency is

apparent." *In re Baby M*, 109 N.J. 396, 417, 537 A.2d 1227, 1238.

51. 109 N.J. at 422, 537 A.2d at 1240.

52. *Id.* at 437-38, 527 A.2d at 1248.

53. *Id.* at 441-42, 527 A.2d at 1250 (footnote omitted).

54. Bartlett, *supra* note 4, at 303 (footnote omitted).

55. *Id.* at 336.

stressed the overriding need to safeguard the family as an arena in which relationships are based on status.⁵⁶

III. THE PROGRAM OF CHANGE

Even more unsettling, perhaps, than Bartlett's failure to describe accurately the ideological assumptions that underlie current family law is her failure to define clearly the program of change she herself proposes. Both failures flow, directly and inevitably, from the insufficiencies of her historical analysis. And the second is, as a practical matter, more significant than the first, since her vagueness blinds her to an essential danger inherent in her program—a danger which is clear, present and grave, the danger that her ultimate reliance on biological correlates of gender as determinants of legal choice will encourage the very oppression she opposes.

A. Bartlett's Program

Bartlett desires, in general, that the law replace a view (hardly existent, as the evidence shows) of parenthood based on a cycle of exchange with a view based on a cycle of gift.⁵⁷ Gift she associates with responsibility and connection. However, she cannot characterize and explain the values implicit in gift. Responsibility she refers to as "a certain type of connection that persons may experience in their relationships with one another."⁵⁸ And the "connection," she declares, "is one of identification," which is "positive and affirming," and which "seeks what is good for the other person."⁵⁹ All of this, of course, sounds lovely. But as Bartlett herself seems to realize, she is unable to sustain the analysis: her concepts, she admits, are difficult to concretize. And in the end, there is no obvious or logical link between these concepts and the specific proposals Bartlett offers.

It is no accident that Bartlett's concepts are "difficult terms to pin down."⁶⁰ Nor is it accidental that her self-conscious theory is ultimately un-

connected to the program she fashions.⁶¹ Both difficulties stem from her failure to recognize and analyze the roots and social character of her central concepts and, consequently, her failure to perceive that her concept of responsibility is simply a transformation of a very old view of family relations, a transformation of status, as defined by Maine.

Basic to Bartlett's program for change is her invocation of a "mystical bond" between mother and child, created during pregnancy and childbirth, as a "constructive starting point" for modeling "how we might want parents to feel about their children."⁶²

That bond established, a great deal follows almost inevitably. The first case Bartlett presents involves mothers choosing non-marital motherhood without interference from the biological father.⁶³ Recognizing her resolution as primarily a rhetorical move, Bartlett suggests that in regulating conflicting parental claims between biological fathers and unmarried women seeking motherhood-by-choice, the legal system should be cognizant of "which connections between parent and child are most important to validate."⁶⁴ When a choice must be made, she continues, but we are unable to "attach positive value to the biological connection of both parents,"⁶⁵ we may

want to take account of the different degrees of relationship that have been formed. At the time of childbirth, the mother's relationship to her child has developed through pregnancy and childbirth. In contrast, the father's relationship is only a potential one. Affirming the mother's connection to the child (rather than her 'rights' or the father's absence thereof) strengthens the importance of relationship to our understanding of parenthood.⁶⁶

The connection to the child on which Bartlett relies is a connection based in nature. Moreover, Bartlett's characterization of the connection here belies her own definition of relationship as recip-

56. See *supra*, text at notes 47-52; Brief on Behalf of Respondent at 80, *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) ("Through surrogate parenthood, traditional family values are strengthened."); Brief on Behalf of Mary Beth and Richard Whitehead at 34-55, *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) (describing mother-child relationship as grounded in inexorabilities of biology).

57. Bartlett, *supra* note 4, at 295.

58. *Id.* at 299.

59. *Id.*

60. *Id.* at 298.

61. Bartlett's proposed program for change is connected to the assumptions—of which she is apparently not fully aware—that underlie her theory. See *infra*, Sec. III(B).

62. Bartlett, *supra* note 4, at 333.

63. *Id.* at 306-15.

64. *Id.* at 315.

65. *Id.*

66. *Id.*

rocal. Claims for the primacy of this relationship appear real because they are based in natural inevitabilities.

In her second case, involving unmarried women choosing to place their children for adoption despite the objections of the biological father,⁶⁷ Bartlett offers a similar approach:

[T]he law might begin with a presumption that the mother's actual relationship to the child established during pregnancy and childbirth makes her decision to place the child for adoption a responsible one, a presumption which the father may overcome with evidence that his plan to keep the child is more responsible.⁶⁸

Here, Bartlett attempts to deny that the predicates of her proposal are natural rather than historical or cultural by using the word "relationship" to describe the mother-child tie. Obviously, however, the proposal is founded on what Bartlett herself later describes as "the natural vagaries of nature [that] give an initial advantage to the mother."⁶⁹

Finally, Bartlett discusses surrogacy with the example of a surrogate mother seeking to retain custody of the child and preclude the parental claims of the biological father.⁷⁰ This is the most complicated of her three cases from the present perspective because it so clearly questions the meaning of mother by separating "motherhood" into component parts.⁷¹ Is the "real" mother⁷² the genetic mother, the woman who donates the egg? Is she the gestational mother, the woman in whose womb the foetus develops? Or, is she the contracting mother, the woman who signs an agreement to obtain the dreamed of child?⁷³

Curiously, Bartlett virtually neglects the claims of the contracting mother, analyzing instead the comparative claims of the gestational

mother and the biological father. Here, as elsewhere, Bartlett proposes that the biological mother is in the superior position because the "vagaries of nature" side with her. She writes:

As we have seen, custody law applicable to disputes between unmarried parents tends to favor a child's mother. When both parents feel strong instincts toward their children, it is unfortunate that a continuing, meaningful relationship between the child and both parents is impractical. When it is, a hard choice must be made, and should be made not on the basis of fairness to either parent, but according to rules that affirm responsible parent-child relationships, giving priority to those that have already been formed. In many cases, the biological father will be required to accept the disappointment of his expectations of parenthood, in the face of the existence of a parent-child relationship, that, through the vagaries of biology, will give an initial advantage to the mother.⁷⁴

Bartlett's suggestion reflects precisely Maine's universe of status,⁷⁵ in which "personal conditions" (e.g., sex) establish a person's social position "irreversibly at birth."⁷⁶

B. The Dangers of the Program

Ultimately Bartlett's attempts to lay the framework for resolving the three cases she presents becomes an effort, albeit unwitting, to perpetuate, in more humane forms, a view of society, and therefore of law, as rooted immutably in eternal nature, and therefore sacred.

Thus, her glance is not, as she imagines, toward a future at present undefined, but to a past altogether, for her purposes, too rigorously de-

67. *Id.* at 315-26.

68. *Id.* at 325.

69. *Id.* at 336.

70. *Id.* at 326-37.

71. See Dolgin, *supra* note 11, at 546.

72. Similar questions could be asked with regard to the "real" father. However, typically surrogacy agreements do not differentiate the biological and contracting fathers. It is, of course, possible for the sperm donor and the contracting father to be different individuals; then, similar questions arise with regard to fathers as those that always arise in surrogacy cases with regard to mothers.

73. Presently, contracting (*non*-biological) mothers do not sign surrogacy agreements in the United States in order to

avoid violating adoption statutes. When a biological father signs such an agreement the contract is arguably valid since the child is already 'his'; thus, he cannot purchase it. This practice would change were legislation enacted which excludes surrogacy from the coverage of statutes prohibiting baby-selling.

74. Bartlett, *supra* note 4, at 336.

75. That Bartlett is willing to rely on "the vagaries of biology" here despite her own recognition that both parents may "feel strong instincts toward their children" is precisely the sort of dependence on nature (status, biology) that cannot be excused and that will ultimately rebound to the detriment of women.

76. MAINE, *supra* note 12, at 179.

fined, and more dangerous to her deepest aspirations than she comprehends.

The essence of the danger—that the ideological universe she invokes may perpetuate the very forms of oppression she aims to destroy—is illuminated by the anthropologist David Schneider, in an analysis that harmonizes with Maine's position and provides a useful model for the present analysis. According to Schneider, the symbols of American kinship "are all concerned with unity of some kind."⁷⁷ All of them

seem to say one thing; they provide for relationships of diffuse, enduring solidarity. 'Diffuse' because they are functionally diffuse. . . [T]he goal is 'solidarity,' that is, the 'good' or 'well being' or 'benefit' of ego with alter. . . . And 'enduring' in the generalized sense symbolized by 'blood'; there is no built-in termination point.⁷⁸

It is about the impulse to diffuse, enduring solidarity that the symbols of American kinship speak. Moreover, these symbols—especially those, like blood, that refer to a natural substance—effectively nurture the impulse toward kinship, in the most literal sense, to fixed, enduring, immutable nature. Such symbols best promote the illusion of an ultimate reality when substantialized, since substantialized symbols⁷⁹ ground the moral correlates of kinship, thereby making them appear real and natural. For example, blood between parents and children helps decisively to establish, clearly and irrevocably, what " 'acting as a parent' or 'as a child' means."⁸⁰

Unfortunately, such positioning can promote and legitimize exploitation. In fact, for reasons too complex to discuss here, for millennia, in the West, one of the intentions of such positioning has been to do precisely that.⁸¹ Thus, the theory

of fixed, immutable nature as the ground both of social custom and of law—the ideology of status, as defined by Maine—has been used as an argument in support of oppression; and nowhere, perhaps, to more destructive effect than against women, especially in their aspect as mothers.⁸² Their biology, the argument runs, is their fate: constricted by their unique, immutable intimacy with nature, in particular with blood, they are doomed to essential, eternal inferiority.⁸³

Neither the premise nor the conclusion of this argument need detain us. But vigilance necessitates that its unwitting appearance in the minds of its opponents be, at the minimum, noted with regret. And thus we refer to its presence, virtually as axiom, in Bartlett.

With depressing consistency, the details of Bartlett's program for change turn out, on examination, to be grounded in the universe of status; and, in particular, to lapse into precisely the danger against which Schneider's analysis warns. Anxious to establish kinship, she appeals consistently to "biological facts," transforms them into "cultural constructs," and concludes, unfortunately, that such constructs "constitute a model for commitment."⁸⁴

IV. CONCLUSION

In her rush to create a better world, Bartlett thus falls, as the evidence above shows, unwittingly into the hands of her enemies. At one point she appears to recognize that the ideology she espouses as a model for the parent-child tie is the same ideology that has limited women's options and barred them from the marketplace.⁸⁵ But everywhere else she fails to comprehend the danger of the responsibility and commitment she seeks. She fails, in short, to adequately under-

77. Schneider, *supra* note 26, at 67.

78. *Id.*

79. Substantialized symbols (e.g., blood, mud, "the people") represent the essence of people and their social relations and contrast with contractualized symbols which "involve. . . notions of individuals (more or less) freely entering into agreements to do certain things in accordance with certain standards or rules. Contractualized symbolism appears most clearly in the 'marketplace.'" BARNETT & SILVERMAN, *supra* note 18, at 51. Substantialized symbols are the symbols "involved in ideas such as natural substance." *Id.*

80. *Id.* at 190.

81. See L. DUMONT, *HOMOHIERARCHICUS* 254-57 app. (1970); J. P. SARTRE, *ANTI-SEMITES AND JEWS* 37-39 (1965).

82. See *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (denying women the right to practice law. Justice Bradley,

concurring, wrote, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. . . . It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence."

83. See *United Automobile Workers v. Johnson-Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S.Ct. 1522 (March 26, 1990) (No. 89-1215) (upholding "fetal protection" policy which precluded the company—a battery maker—from employing "women with childbearing capacity" in jobs involving exposure to lead).

84. This process of reification can play itself out: next, the law can transform the "model for commitment" into a compulsory prescription for behavior.

85. Bartlett, *supra* note 4, at 333.

stand that the "mystical bond" she invokes between a mother and her child, as a starting point for constructing a model of the parent-child relationship, can be, and historically has often been, used as a shackle,⁸⁶ a tool for defining women as inadequate and incomplete.⁸⁷ In consequence, she proposes a program of change which, despite her intentions, looks, not forward into a more equitable, more caring future, but backward, to a dreary, callous past.

No enlightened human being will fail to respect Bartlett's longing for a society grounded in sensitivity, benevolence, and selfless love—for a society, in short, in which justice predominates. But the longing itself is not sufficient. In the absence of rigorous historical and social analysis, current law cannot be understood, and a workable program of social change cannot be set forth. Only the adequate discipline of thought can bring us closer to the heart's desire.

86. See note 81 *supra*.

87. See de BEAUVOIR, *supra* note 2, at xv-xvi.

