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Law Making for the Baby Making: An Interpretive Approach to the Determination of Legal Parentage

Marsha Garrison

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ARTICLES

LAW MAKING FOR BABY MAKING: AN INTERPRETIVE APPROACH TO THE DETERMINATION OF LEGAL PARENTAGE

Marsha Garrison

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LAW MAKING FOR BABY MAKING: AN INTERPRETIVE APPROACH TO THE DETERMINATION OF LEGAL PARENTAGE

Marsha Garrison*

This article proposes a new model for analyzing legal issues arising from technological conception and uses it to develop rules to govern the legal parentage of technologically conceived children. Professor Garrison shows that most commentators on technological conception have employed a "top-down" methodology, deriving rules for specific cases from an abstract global principle such as reproductive autonomy, freedom of contract, or anticommodification. Professor Garrison critiques these and several other approaches, showing that they offer little concrete guidance in many cases, risk the introduction of discordant values into the law of parentage, and fail to capture all of the values that have traditionally guided parentage determination. In their place, she proposes an "interpretive methodology" which, by relying heavily on current rules governing parentage determination in other contexts, would assimilate technological conception within the broader law of parental obligation. Professor Garrison argues that cases of sexual and technological conception should be governed by similar rules because, despite mechanical differences between these two reproductive methods, there are no significant differences in the parent-child relationships that they produce. She demonstrates that the interpretive approach can cabin rule-making disagreements, and that it can generate comprehensive parentage rules that are based on uniform policy goals and that ensure consistent treatment of parent-child relationships.

The past half century has witnessed a revolution in human reproduction. Fifty years ago, a man or woman who wanted a child and had failed to conceive one might, like Henry VIII, discard his or her current spouse in favor of a new and perhaps more fertile mate;¹ or, like the Biblical Abraham, he or she might begin a nonmarital relationship.² But almost nothing could be done to improve the odds that a particular couple would conceive a child. Today, a large and growing fertility industry offers a wide range of aids to conception.³ Some of these aids — ovulation predictor kits, fertility-enhancing hormone treatments, surgical interventions — increase the chance of conception through sexual intercourse. However, other methods of improving fer-

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¹ See ANTONIA FRASER, *THE WIVES OF HENRY VIII* 2 (1992).

² See *Genesis* 16:1-4.

³ Infertility affects "approximately ten to fifteen percent of American couples trying to conceive." 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 2029 (13th ed. 1994). Although the overall incidence of infertility in the American population does not appear to have risen in recent years, the number of physician visits for treatment of infertility has increased dramatically. See OFFICE OF TECH. ASSESSMENT, U.S. CONG., *INFERTILITY: MEDICAL AND SOCIAL CHOICES* 55-56 (1988); Lynne S. Wilcox & William D. Mosher, *Use of Infertility Services in the United States*, 82 *OBSTETRICS & GYNECOLOGY* 122, 122 (1993).

tility substitute for coitus a technological method of combining sperm and ovum. These methods — artificial insemination (AI) and in vitro fertilization (IVF) — change the *manner* of conception as well as its likelihood of success. Because AI and IVF achieve conception without sex, they may make use of sperm, ova, or gestational services that have been donated or sold to the individual(s) who want a child.⁴ When coupled with such a donation or sale, these technologies pose a wide range of legal questions.

Current law offers little guidance on many, if not most, of the issues arising from technological conception.⁵ The legal parentage of children born through AID and IVF is often unclear,⁶ and laws governing the use of AI and IVF are largely nonexistent.⁷

⁴ In 1996, at least 20,659 babies were conceived using IVF technology in the U.S.; 8% of IVF procedures employed donated eggs, resulting in approximately 1600 donated-egg births. See U.S. CTRS. FOR DISEASE CONTROL, 1996 NAT'L ART FERTILITY REPORT, § 1 fig. 1 (1999) (visited July 14, 1999) <<http://www.cdc.gov/nccdphp/drh/art96>> [hereinafter 1996 ART REPORT] (relying on data from 300 U.S. fertility clinics representing "almost all clinics in the United States" employing IVF technology; donated-egg births were calculated based on live births-per-cycle figures). There are no recent national studies of AI births. The best available information comes from a 1987 survey conducted by the U.S. Congress Office of Technology Assessment. It reports that during 1986–87, 172,000 women underwent artificial insemination, resulting in 65,000 total births, of which 30,000 were from artificial insemination with donor semen (AID). See OFFICE OF TECH. ASSESSMENT, U.S. CONG., BACKGROUND PAPER, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES, SUMMARY OF A 1987 SURVEY 3 (1988) [hereinafter OTA ARTIFICIAL INSEMINATION REPORT]; see also Sander Shapiro, Diane G. Saphire & William H. Stone, *Changes in American A.I.D. Practice During the Past Decade*, 35 INT'L J. FERTILITY 284, 284–85 (1990) (reporting, based on survey data, that as many as 23,400 infants were conceived using AID during 1987).

⁵ Technological conception is more often described as "assisted" or "artificial" conception. I use the term "technological" for two reasons: first, it is more precise than "assisted" because all fertility treatments, including those that rely on sexual intercourse to achieve conception, provide reproductive assistance; second, "artificial" generally implies a substitute of lesser quality rather than the "real" thing (artificial hair, for example, is not generally viewed as the equivalent of natural hair), but technological conception is real conception and its result — a child — is just as valuable as that achieved through sexual conception.

⁶ The state of the law is described in detail in section I.A.

⁷ See Karen Wright, *Human in the Age of Mechanical Reproduction*, DISCOVER, May 1998, at 75, 76 (noting the lack of regulation of technological conception and quoting one specialist describing the field as "the Wild West of medicine"); see also JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 62 (1997) (noting the inadequacy of legislative responses to technological conception). Although no state currently regulates access to technological conception or the manner in which it is performed, most do require sperm banks to screen potential donors for HIV, and a few require screening for other sexually transmitted diseases and/or genetic disorders. See, e.g., CAL. HEALTH & SAFETY CODE § 1644.5(a) (West 1999) (HIV, hepatitis B and C, syphilis, and HTLV-1); FLA. STAT. ch. 381.0041(1) (1998) (communicable diseases specified by the Florida Department of Health and Rehabilitative Services); IND. CODE. ANN. § 16-41-14-5(a)(1)–(3) (West 1998) (HIV, hepatitis B, and syphilis). As of 1998, only a few states also required the collection of genetic information about sperm or egg donors. See Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125, 135 (1998). Some states also regulate

Legislatures have been slow to respond to technological conception for a variety of reasons. One is simply the speed with which the new methods of baby making have advanced.⁸ Another is the rapid shift in parenting norms that has accompanied introduction of the new technologies; while only a couple of decades ago childbirth was sought almost exclusively by married couples in their prime childbearing years, many applicants for access to the new technologies are now single,⁹ and some are post-menopausal.¹⁰ Nor do these new applicants necessarily wish to establish traditional family forms. Some want their children to have only one legal parent;¹¹ some want their children to have no father but two mothers;¹² some want to establish "traditional"

data collection and practitioner/facility certification. See Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 650 (1997).

⁸ For example, intracytoplasmic sperm injection (ICSI), a technique used to overcome male infertility in the context of an IVF procedure, was first reported as an experimental procedure in 1992, see *infra* note 39; during 1995, ICSI was employed in more than 5,000 U.S. IVF procedures. See U.S. CTRS. FOR DISEASE CONTROL, 1995 NAT'L ART FERTILITY REPORT § 1 (1997) (visited Nov. 3, 1998) <<http://www.cdc.gov/nccdphp/drh/arts>> [hereinafter 1995 NATIONAL ART FERTILITY REPORT] (stating that approximately 11% of 59,142 ART cycles involved ICSI).

⁹ During a 12-month period in 1986-87, there were approximately 4,000 requests from single women for artificial insemination. See OTA ARTIFICIAL INSEMINATION REPORT, *supra* note 4, at 23. While there are no current national data on the proportion of AID users who are single women, anecdotal evidence suggests that the phenomenon is increasing in frequency. For example, the director of one California sperm bank has estimated that 40% of its AID recipients are single lesbian women. See E. Donald Shapiro & Lisa Schultz, *Single Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271, 278 (1986); see also Emma Cook, *So You Want a Baby But There's No Sign of Mr. Right*, INDEP. (London), Nov. 16, 1997, at 5 (quoting medical estimates that 300 single British women per year — 10 times the number five years earlier — were becoming parents through AID); Janet Kinosian, *And Baby Makes Two: These Days, More Thirty Something Women Are Opting For Single Motherhood*, NEWSDAY, May 11, 1999, at B13 (providing anecdotal accounts of AID use by single women); Rahel Musleah, *Single Mothers, by Choice, Increasing*, N.Y. TIMES, May 12, 1996, § 13 (Long Island Weekly), at 1 (same). Births to unmarried mothers have also risen dramatically in recent years. In 1970, 10.7% of U.S. births were to unmarried women; by 1995, 32.2% were. Compare BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 79 tbl.98 (1996) [hereinafter 1996 STATISTICAL ABSTRACT] (1970s data), with BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 80 tbl.100 (1998) [hereinafter 1998 STATISTICAL ABSTRACT].

¹⁰ According to one recent report, some 100 women aged 50 or older have borne children in the U.S. See Michael D. Lemonick, *The New Revolution in Making Babies*, TIME, Dec. 1, 1997, at 40, 45; see also Mark V. Sauer, Richard J. Paulson & Rogerio A. Lobo, *Pregnancy in Women 50 or More Years of Age: Outcomes of 22 Consecutively Established Pregnancies from Oocyte Donation*, 64 FERTILITY & STERILITY 111, 113 (1995) (noting that "[o]ocyte and embryo donation has made pregnancy possible in postmenopausal women").

¹¹ See Kinosian, *supra* note 9, at B13 (reporting anecdotal accounts of single mothers who chose to have children without legal fathers); Musleah, *supra* note 9 (same); Gary Wisby, *Single Women Opt for Kids*, CHICAGO SUN-TIMES, Jan. 5, 1997, at 1 (same).

¹² See Judy Peres, *Times Changed, Laws Didn't on Rights of Sperm Donors: Gay Relationships Not Mentioned in 1970-80s Statutes*, SEATTLE TIMES, Aug. 24, 1997, at A10 (describing cases involving lesbian couples who wish to exclude the sperm donors from parental relationship). For a broader justification of two-mother parental relationships, see Nancy D. Polikoff, *This Child*

parental relationships by conceiving with sperm from a deceased partner.¹³ The novelty and diversity of cases has inhibited the development of consensus on the best regulatory approach.¹⁴

Novelty has not, of course, inhibited debate. There is a wealth of popular and scholarly literature dealing with the ethical, legal, medical, and human issues arising from the new technologies.¹⁵ There is also some case law, as courts have been unable to duck the disputes arising from legislative inaction.¹⁶ And, in contrast to the United States, many other industrialized nations have made concerted efforts to develop a consistent legal framework to govern technological conception;¹⁷ indeed, the influential Warnock Commission, appointed by

Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459 (1990).

¹³ See, e.g., ARTHUR CAPLAN, DUE CONSIDERATION: CONTROVERSY IN THE AGE OF MEDICAL MIRACLES 73-74 (1998) (reporting that postmortem sperm retrieval has been performed more than two dozen times in the U.S., "sometimes for a wife, sometimes for a fiancée, and on one occasion for a woman who had been dating a man for a long time prior to his death"); see also Gina Kolata, *Uncertain Area for Doctors: Saving Sperm of Dead Men*, N.Y. TIMES, May 30, 1997, at A1.

¹⁴ Congress has held many hearings on issues arising from technological conception, but they have produced little legislation. For example, in 1987 and 1988, three separate House subcommittees held preliminary hearings on the implications of these technologies for families and children. See *Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearings Before the House Subcomm. on Regulation, Business Opportunities, and Energy*, 100th Cong. 1-35 (1988) (surveying related consumer protection issues); *Alternative Reproductive Technologies: Implications for Children and Families: Hearings Before the House Select Comm. on Children, Youth, and Families*, 100th Cong. 1-65 (1987) (considering the implications of new reproductive technologies); *Federal Employee Family-building Act of 1987: Hearings Before the House Subcomm. on Civil Service*, 100th Cong. 1-18 (1987) (examining access to reproductive technologies). Congress did enact the Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. § 263a-1 (1996)), which is designed to provide better and more standardized information to those choosing between IVF programs; however, the Act's requirements have never been funded. See WILLIAM J. CURRAN, MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *HEALTH CARE LAW AND ETHICS* 871-72 (5th ed. 1998).

¹⁵ See, e.g., ROBERT BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* (1995); GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (1985); LAWRENCE J. KAPLAN & ROSEMARIE TONG, *CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE* (1994).

¹⁶ See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 777-78 (Cal. 1993) (determining the legal parentage of a child born through gestational surrogacy); *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986) (determining the legal parentage of a child born through AID to a single woman when the AID statute was not followed); *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (analyzing the legality of surrogate mothering agreements and the parentage of a child born as a result of such an agreement); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (determining a divorcing couple's rights to frozen preembryos created for use in IVF).

¹⁷ By 1989, commissions had issued reports that proposed public policy on technological conception in France, Italy, West Germany, the United Kingdom, and the European Union. See JONATHAN GLOVER, *ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES: THE GLOVER REPORT TO THE EUROPEAN COMMISSION* 15 (1989); see also *WHAT PRICE PARENTHOOD? ETHICS AND ASSISTED REPRODUCTION* 104-23 (Courtney S. Campbell ed., 1992) (surveying

the British government to make legislative recommendations on the new technologies, issued its report more than fifteen years ago.¹⁸ More recently, the Canadian Royal Commission on New Reproductive Technologies has issued two volumes of commentary and recommendations.¹⁹

Given the wealth of literature on technological conception, why do we need yet another analysis? Existing policy analyses suffer from two large — in my view, fatal — deficiencies. First, in developing a regulatory framework, analysts have typically employed a “top-down” approach, deriving rules to govern the various issues posed by technological conception from one or another global principle: contract enforcement, reproductive autonomy, and an “anticommodification” ethic have all found proponents.²⁰ But as the range of principles urged by various commentators suggests, the possibilities are many and there is no obvious reason for the unconverted to choose one over another. Public debate on the issues posed by technological conception has thus all too often involved little more than an exchange of slogans, presenting few possibilities for meaningful dialogue and hampering development of legislative standards that can garner broad public allegiance.²¹ Second, existing analyses have focused largely on the novel aspects of technological conception. As a result of this bias, they typically fail to make use of — or justify their departure from — existing legal principles. The result, all too often, is proposals that would cre-

policy development in a number of nations); Jean Martin, *Prioritising Assisted Conception Services: A Public Health Perspective*, in *CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION* 241, 243–46, 248–50 (Donald Evans ed., 1996) [hereinafter *CREATING THE CHILD*] (briefly describing the work of commissions in the Netherlands and Switzerland).

¹⁸ See DEP'T OF HEALTH AND SOCIAL SEC., UNITED KINGDOM, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (1984), reprinted in MARY WARNOCK, *A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY* (1985) [hereinafter *WARNOCK COMMITTEE REPORT*]. The Report led to the Human Fertilisation and Embryology Act of 1990, which established a statutory authority to license and set standards for entities offering reproductive technology services. See Human Fertilisation and Embryology Act, 1990, ch. 37 (Eng.). For a description of legislative developments leading to the Act, see Sarah Franklin, *Making Representations: The Parliamentary Debate on the Human Fertilisation and Embryology Act*, in JEANETTE EDWARDS, SARAH FRANKLIN, ERIC HIRSCH, FRANCES PRICE & MARILYN STRATHERN, *TECHNOLOGIES OF PROCREATION: KINSHIP IN THE AGE OF ASSISTED CONCEPTION* 96 (1993).

¹⁹ See 1 ROYAL COMM'N ON NEW REPROD. TECHS., *PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES* (1993) [hereinafter *PROCEED WITH CARE*].

²⁰ For discussion of these perspectives, see *infra* Part II.

²¹ See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52–164 (1996) (describing conditions that produce fruitful democratic debate); Bruce A. Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 16 (1989) (arguing that particularly divisive moral issues should be removed from the “conversational agenda of the liberal state”).

ate two inconsistent legal regimes, one for technological conception and another for sexual conception. Because inconsistent legal standards can easily produce inconsistent results, such an approach should, at the very least, be justified. But advocates of the various top-down approaches have generally failed to do so; indeed, they have often ignored the current legal regime altogether.

In this Article I advocate an "interpretive" approach to the law of technological conception. In contrast to the top-down methodology, this approach seeks norms in society's actual practices and beliefs.²² The rule-making strategy I develop thus relies heavily on the law governing sexual conception and the implicit assumptions about parentage and family on which that law is based.

An interpretive approach to the regulation of technological conception holds a number of advantages over the alternative top-down strategy. The first is grounded in necessity: without an interpretive methodology, there is no obvious basis for choosing among competing global principles and determining what, if any, role each should play in designing regulatory standards. The interpretive approach is also consistent with the widely held view that the expression of contemporary beliefs and values is one of family law's most important functions.²³ Moreover, its use promotes coherent rules reliant on consistent, rather than discordant, values. The approach has the additional advantage of comprehensiveness: it can be applied to the full range of legal issues associated with technological conception while none of the global theories that commentators have offered can be applied in more than a small number of cases. Finally, by avoiding the tendency toward sloganeering inherent in the top-down methodology, the interpretive approach enhances the possibility of meaningful public debate and the development of legislative consensus; it has the "large advantage of allowing a convergence on particular outcomes by people unable to reach an accord on general principles."²⁴

²² For descriptions of the interpretive method and comparisons of this method with the "top-down" approach, see JULES L. COLEMAN, *RISKS AND WRONGS* 8-9, 441 n.2 (1992); RONALD DWORKIN, *LAW'S EMPIRE* 45-86 (1986); and CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 96-100 (1996), see also Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 *YALE L.J.* 283, 286-87 (1994) (defining the interpretive approach and noting the important role of interpretive theories in constitutional law and common law fields such as torts and contracts).

²³ See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 176-84 (1993); Carl E. Schneider, *The Channelling Function in Family Law*, 20 *HOFSTRA L. REV.* 495 (1992); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 *U.C. DAVIS L. REV.* 991 (1989). This "expressive" function of family law strongly suggests that most questions of family law and policy are best analyzed using an interpretive approach. See Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 *CAL. L. REV.* 41, 46-47 (1998) (arguing in favor of an interpretive approach to child support policy).

²⁴ SUNSTEIN, *supra* note 22, at 39-40.

The interpretive approach I advocate is not novel. It is consistent with the ideal of public reason on which democratic society is based.²⁵ It reflects the widely accepted principle that like cases should receive like treatment.²⁶ It embodies the notion, pervasive within our legal system, that "the very concept of the rule of law" demands "continuity over time" and "respect for precedent."²⁷ The common law method employed by Anglo-American courts for generations is, of course, another application of the interpretive perspective.²⁸

In this Article I develop an interpretive approach to technological conception and use it to resolve some of the legal issues arising from the new methods of baby making. Part I describes the technologies in question and the limited law to which they are now subject. Part II describes and evaluates the various regulatory approaches suggested by other commentators, contrasts them with the interpretive approach I advocate, and explains why the interpretive approach is preferable. Part III utilizes the interpretive approach to develop rules governing the legal parentage of technologically conceived children.

Of course, technological conception raises a wide range of legal issues in addition to parentage, issues to which the interpretive methodology might also be applied.²⁹ I have chosen to focus on parentage here for several reasons. First, the number and complexity of issues arising from technological conception preclude the analysis of more than one area of law within a single article; indeed, many issues are worthy of, and have already received, book-length treatment.³⁰ Sec-

²⁵ For a defense of the public reason ideal, see JOHN RAWLS, *POLITICAL LIBERALISM* 212-54 (1993); and Joshua Cohen, *Moral Pluralism and Political Consensus*, in *THE IDEA OF DEMOCRACY* 270-271 (David Copp, Jean Hampton & John E. Roemer eds., 1993).

²⁶ See DWORKIN, *supra* note 22, at 165 (explaining that the provision of like treatment of like cases "requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, [and] to extend to everyone the substantive standards of justice or fairness it uses for some"); JOSEPH RAZ, *THE AUTHORITY OF LAW* 201-06 (1979) (explaining that reasoning by analogy serves the purpose of ensuring that a "new rule is a conservative one, that it does not introduce new discordant and conflicting purposes or value into the law, [and] that its purpose and the values it promotes are already served by existing rules").

²⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

²⁸ See Ronald Dworkin, *Law as Interpretation*, 60 *TEX. L. REV.* 527, 541-43 (1982) (describing the judge as a contributor to a "chain novel" and noting that "[e]ach judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable [prior] decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future"). For extended analysis of analogical reasoning by judges, see RAZ, *supra* note 26, at 180-210; and SUNSTEIN, *supra* note 22, *passim*.

²⁹ Examples include commercialism, user/donor qualifications, and requirements for or bans on particular practices such as postmortem conception, sex selection, genetic manipulation, cloning, surrogacy, etc.

³⁰ Surrogacy, for example, is already the subject of an enormous literature. Book-length treatments of the subject include MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988); DEREK MORGAN, *SURROGACY AND THE MORAL ECONOMY* (1990); NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *SURROGATE PARENTING: ANALYSIS AND RECOM-*

ond, parental status offers a number of advantages as an analytical starting point. Parentage issues are not only common to all forms of technological conception, they are also inescapable; although lack of legal regulation has precluded litigation of many issues raised by the new technologies, it ensures that questions of parental status will often be resolved in the courtroom. And because parentage issues involve similar policy concerns,³¹ the topic presents the opportunity to apply the interpretive methodology to a number of different, but linked, legal issues.

In applying the interpretive method to parentage issues arising from technological conception, I review both constitutional requirements and contemporary laws applicable to marital, nonmarital, and adoptive parenting. My review reveals that, although the structure and content of legal standards have changed along with social mores and perceptions of children's interests, family law has consistently preferred the interests of children and the public to those of parents and parent-claimants. Thus, while biological relationship typically determines legal relationship, courts and legislatures have at times ignored biology in order to provide the child with care and support from two parents, foster marital child rearing, or protect a child's established relationships. I find that, although some aspects of the emerging law of technological conception conform to this pattern, others appear to be inconsistent with it. I examine these apparent inconsistencies in greater detail, along with issues such as gestational surrogacy that require more sustained analysis simply because of their novelty. Finally, I propose rules to govern a number of parentage issues posed by current technological conception techniques³² — rules that conform with

MENDATIONS FOR PUBLIC POLICY (1988); ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE (Herbert Richardson ed., 1987); SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD (1994); CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989); THOMAS A. SHANNON, SURROGATE MOTHERHOOD: THE ETHICS OF USING HUMAN BEINGS (1988); and SURROGATE MOTHERHOOD: POLITICS AND PRIVACY (Larry Gostin ed., 1990).

³¹ In analyzing the parentage issues arising from technological conception, I do not make recommendations on whether the practices that give rise to these issues should be restricted or banned. For example, the legal parentage of children born to a surrogate mother is addressed, but not the legality of surrogate parenting. I have taken this approach for two reasons. First, some methods of technological conception — surrogate parenting is a good example — do not require sophisticated medical assistance and therefore would be difficult to stamp out; parentage issues will arise no matter what approach the law ultimately takes on the legality issue. Second, the desirability of banning practices like surrogate parenting raises complex questions of both policy and practicality, to which it would be impossible to do justice here.

³² I do not address techniques, such as cloning, that are not currently available. I have also ignored practices, such as posthumous and post-menopausal conception, that, while controversial, pose few questions related to parentage.

current law, the policies underlying that law, and public values relating to parentage and family relationships.

I. THE REVOLUTION IN REPRODUCTION: PROCESSES, PROBLEMS, AND LEGAL PRINCIPLES

A. Artificial Insemination

Artificial insemination (AI) is the oldest and most popular means of technological conception. An estimated 20,000 to 30,000 children are born in the United States each year following AI with sperm provided by donors (AID), and tens of thousands more following AI with sperm donated by husbands (AIH).³³ AI first came into widespread use during the 1950s.³⁴ Until the 1980s, it was almost invariably sought by married couples, either to enhance the probability of conception by bypassing the cervical barrier (AIH) or to "remedy" the husband's infertility (AID).

Although AIH and AID both offer an infertile couple increased odds of conceiving a child, they produce different results and different legal issues. The husband and wife who conceive using AIH are both genetic parents of the child, and thus, under traditional family law principles, they are also his legal parents. With AID, however, only the wife is genetically related to the child. Thus, under prevailing law at the time AID came into widespread use, her husband's parental status was unclear.³⁵

During the 1970s, the states began to enact legislation that clarified the AID child's legal parentage. The 1973 Uniform Parentage Act (UPA), for example, provided that "[i]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."³⁶ As of 1998, fifteen states had adopted the UPA

³³ See OTA ARTIFICIAL INSEMINATION REPORT, *supra* note 4, at 3 (estimating that in 1986-87, 172,000 women underwent artificial insemination in the United States, resulting in 35,000 births from AIH and 30,000 from AID); Shapiro, Saphire & Stone, *supra* note 4, at 290 (reporting from survey data that AID conceptions during a one-year period between 1986 and 1987 produced as many as 23,400 infants).

³⁴ The first recorded successful human artificial insemination apparently occurred in 1770. See E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1986-87).

³⁵ Compare *People v. Sorensen*, 437 P.2d 495, 501-02 (Cal. 1968) (en banc) (holding a mother's husband to be her child's legal father on the theory that he had voluntarily assumed that responsibility by consenting to AID), and *Strnad v. Strnad*, 78 N.Y.S.2d 390, 391-92 (Sup. Ct. 1948) (same), with *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411-12 (Sup. Ct. 1963) (holding the child illegitimate but the husband liable for the child's support based on his consent to AID).

³⁶ UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 301 (1973).

or a virtually identical standard, and fifteen others had enacted similar statutes that varied by eliminating the licensed physician requirement.³⁷

Although the AID statutes resolved the status issue that courts initially confronted, they failed to resolve a host of other legal questions that might arise from the use of AID — and which increasingly do.³⁸ The status issues posed by AID today reflect a shift in its usage. Advances in the treatment of male infertility have markedly reduced the number of married couples who seek AID,³⁹ while a remarkable change in parenting norms has greatly expanded the number of would-be parents who seek AID for reasons unrelated to infertility: many of these new AID applicants are single women who wish to achieve pregnancy but have no male partner;⁴⁰ others are parties to a surrogate parenting agreement;⁴¹ and an occasional applicant wishes to become pregnant using sperm from a deceased partner.⁴² Many of these new users continue to employ sperm banks and physician assistance in order to ensure donor screening and anonymity, but others rely on known donors and perform AID at home without physician involvement.⁴³

The larger legal context has also shifted. As AID developed during the 1950s and 60s, its practitioners followed the model pioneered by adoption agencies. In both contexts, the goal was to provide would-be parents with the closest possible substitute for their own biological child; secrecy, participant anonymity, and physical-trait “matching” were employed to achieve these ends. But while AID practitioners still

³⁷ See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 cmt., 9B U.L.A. 196–97 (Supp. 1998).

³⁸ For a review of the case law, see Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R.4TH 295 (1991).

³⁹ Intracytoplasmic sperm injection (ICSI), involving the injection of a single sperm into an ovum, was introduced in 1992. Although the technique was first used with ejaculated sperm, surgically obtained immature sperm and spermatids from the epididymis or testis are now used as well. See A. Van Steirteghem et al., *The Development of Intracytoplasmic Sperm Injection*, 11 HUMAN REPRODUCTION 59, 59, 62–64 (Supp. 1 1996); E.R. te Velde, A.L. van Baar & R.J. van Kooij, *Concerns About Assisted Reproduction*, 351 LANCET 1524, 1524 (1998). Because ICSI avoids the problem of low sperm counts, it markedly increased the success rate of IVF with husband sperm. In 1995, almost 50,000 ICSI cycles had been undertaken globally. See *id.*

⁴⁰ See *supra* note 9.

⁴¹ See *infra* pp. 850–52.

⁴² See sources cited *supra* note 13.

⁴³ See Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 117, 120–21 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998) (reporting that many lesbian AID users rely on donors located through personal networks because of exclusionary policies of physicians and sperm banks or because of the desire to “solicit sperm from a . . . male relative of one woman to impregnate her partner . . . to buttress their tenuous legal, symbolic, and social claims for shared parental status . . .”); Lisa Belkin, *Pregnant with Complications*, N.Y. TIMES, Oct. 26, 1997, (Magazine) at 34 (providing anecdotal accounts); Peres, *supra* note 12 (same).

follow the old model, adoption practice has turned away from it. The federal government has severely restricted racial matching in adoption,⁴⁴ and disclosure increasingly replaces secrecy; agencies and experts now counsel openness about the adopted child's origins, and adoption statutes have accordingly moved toward open records⁴⁵ and even "open adoption," in which the biological parent retains some form of contact with the child after her adoptive placement.⁴⁶

The legal status of unmarried biological fathers has shifted even more dramatically. Although both AID users and adoptive parents could afford to ignore biological fathers during the 1950s and 60s — in most states unmarried fathers had no legal rights whatsoever⁴⁷ — the Supreme Court has since held that an unmarried father who has "grasp[ed] th[e] opportunity [to develop a relationship with his child] and accept[ed] some measure of responsibility for the child's future" is entitled to constitutional protection.⁴⁸ A number of state courts have accordingly voided adoptions when the unmarried father had no notice of the proceeding and promptly came forward to obtain custody.⁴⁹ Courts have also permitted challenges to the marital presumption of legitimacy,⁵⁰ and even sperm donors who have asserted claims to visitation or custody have sometimes been recognized as legal parents.⁵¹

Current AID statutes were not drafted with an eye to either the new users or the new legal context in which AID occurs. Most do not address the paternity of an AID child born to an unmarried woman.⁵²

⁴⁴ See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1903 (forbidding delay or denial of adoption based on race). For a discussion of this statute, see Recent Legislation, 110 HARV. L. REV. 1352 (1997).

⁴⁵ See *infra* pp. 890-91.

⁴⁶ See *infra* note 259 and accompanying text.

⁴⁷ See *infra* pp. 885-89.

⁴⁸ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

⁴⁹ See, e.g., *Steven A. v. Rickie M.* (*In re Adoption of Kelsey S.*), 823 P.2d 1216, 1236 (Cal. 1992); *In re Petition of Doe*, 638 N.E.2d 181, 182-83 (Ill. 1994); *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992); *In re Raquel Marie X.*, 559 N.E.2d 418, 428 (N.Y. 1990). For a critical review of the case law, see Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994).

⁵⁰ See, e.g., *K.S. v. R.S.*, 669 N.E.2d 399, 400-01 (Ind. 1996); *C.C. v. A.B.*, 550 N.E.2d 365, 370 (Mass. 1990); *In re J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994). In a plurality opinion, the Supreme Court has held that the Constitution does not require states to permit such challenges. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124-29 (1989) (plurality opinion).

⁵¹ See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 535-36 (Ct. App. 1986); *In re R.C.*, 775 P.2d 27, 27 (Colo. 1989); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 356 (N.Y. App. Div. 1994); *McIntyre v. Crouch*, 780 P.2d 239, 241 (Or. Ct. App. 1989). See generally Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285, 290-300 (1993) (describing cases and contrasting the rules governing AID births to married and unmarried women).

⁵² As of 1996, 15 states had statutes that explicitly severed the parental rights of a sperm donor who had provided sperm to a licensed physician, whether or not the sperm user was married. See

Nor do current statutes typically provide guidance either on the AI donor's rights to a relationship with his biological child or the child's rights to information about her origins. In sum, current law on artificial insemination provides an extremely limited response to an isolated legal issue; it fails to assimilate AID into the broader set of legal principles governing parental rights and relationships.

B. *In Vitro Fertilization*

While AI avoids sex, *in vitro* fertilization (IVF) moves the entire process of conception outside the body.⁵³ In IVF, ovarian stimulation is followed by the collection of eggs ready for fertilization.⁵⁴ The process of fertilization takes place *in vitro* in a laboratory; some or all of the resulting preembryos are then implanted into the uterus or fallopian tubes.⁵⁵ The first IVF birth occurred in 1978 in Great Britain.⁵⁶ Since then, tens of thousands of children conceived through IVF have been born in the United States alone.⁵⁷

Like AI, IVF was originally employed by married couples with fertility problems; thus the first IVF baby, Louise Brown, was conceived using Mrs. Brown's ova in combination with her husband's sperm. But as with AI, the uses of IVF have expanded.⁵⁸ Because IVF takes

Kristin E. Koehler, Comment, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 332 nn.79-80 (1996) (listing state statutes). The Uniform Status of Children of Assisted Conception Act (USCACA), USCACA § 4(a), 9B U.L.A. 191, 196 (Supp. 1994), adopted in two of those fifteen states, provides that a sperm donor is "not a parent of a child conceived through assisted conception," whether or not the mother is married. *Id.*

⁵³ For a basic description of IVF methodology, see KAPLAN & TONG, *supra* note 15, at 255-68.

⁵⁴ Egg retrieval originally involved laparoscopic surgery under general anesthesia. Increasingly, however, ultrasound-guided transvaginal aspiration is used, eliminating the need for both anesthesia and laparoscopy. See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 99 (1994) [hereinafter ROBERTSON, *CHILDREN OF CHOICE*].

⁵⁵ Variations on "traditional" IVF include zygote intrafallopian transfer (ZIFT), in which the fertilized egg is implanted into the fallopian tubes. ZIFT is usually performed before the fertilized egg has begun cell division. Gamete intrafallopian transfer (GIFT), a variation on ZIFT, involves the placement of both sperm and unfertilized egg into the fallopian tube, where fertilization and implantation occur as they would with coital reproduction. Pregnancy rates with ZIFT and GIFT are higher than with traditional IVF. See generally BLANK & MERRICK, *supra* note 15, at 87-89 tbl.4-1 (comparing GIFT, ZIFT, and IVF processes). But GIFT and ZIFT are nonetheless employed much less frequently than traditional IVF. See 1996 ART REPORT, *supra* note 4, § 1 (reporting that, in 1996, ZIFT and GIFT represented only 7% of total cycles).

⁵⁶ See ROBERT EDWARDS & PATRICK STEPTOE, *A MATTER OF LIFE: THE STORY OF A MEDICAL BREAKTHROUGH* (1980) (providing a description of the development of IVF and the first birth, written by the physicians who developed the process).

⁵⁷ See 1996 ART REPORT, *supra* note 4; Michael D. Lemonick, *The New Revolution in Making Babies*, TIME, Dec. 1, 1997, at 40, 42.

⁵⁸ Developments in AI have themselves contributed to the growth in IVF use. ICSI, for example, which greatly increases the chances that a man with low sperm counts will be able to fa-

the process of conception outside the body, it permits the use of donated eggs (the analog to AID);⁵⁹ this practice has expanded dramatically because IVF success rates for older women substantially increase when the eggs of younger women are employed.⁶⁰ IVF also permits the use of another woman to gestate the fetus; although less common than IVF with donated ova, this practice, too, has increased. The net result is a confusing array of "parents"; for example, would-be parents *A* and *B* might obtain sperm from Man *C* and eggs from Woman *D*, then have a doctor implant the resulting preembryos in Woman *E* to be carried to term. And, as with AI, today's IVF users are not necessarily married couples with fertility problems. *A* and *B* might be a gay couple, or *A* and *B* might be simply *A*, a single man or woman.

The parenting possibilities created by IVF present a host of legal issues. One set of questions relates to the legal parentage of children born through IVF. While arguably more complex, these questions are similar to those raised by AID. But IVF also poses altogether new legal problems relating to the status of preembryos created in vitro.⁶¹ Were these preembryos within her body, the pregnant woman could choose to abort them or carry them to term. When they are outside the womb, the woman's rights are less clear.

Courts have begun to address the legal issues raised by IVF, but legislatures have thus far been almost entirely inactive.⁶² The Tennessee Supreme Court has ruled that preembryos created through IVF and frozen for future use are neither persons nor property; when a married couple that had donated genetic material for the creation of

ther a child, has significantly expanded the number of fertile women who seek access to IVF. See *supra* note 39.

⁵⁹ Ova are rarely "donated" without compensation; instead, would-be mothers seek donors through advertising and offer fees of \$3000 or more. See Jan Hoffman, *Egg Donations Meet a Need and Raise Ethical Questions*, N.Y. TIMES, Jan. 8, 1996, at 1; Adrienne Knox, *What's a Human Egg Worth? Debate Intensifies*, MINNEAPOLIS STAR TRIB., Apr. 5, 1998, at E1.

⁶⁰ See Mark V. Sauer, *The Impact of Age on Reproductive Potential: Lessons Learned from Oocyte Donation*, 30 MATURITAS 221, 223-24 (1998). Without donated eggs, older women have poor prospects of achieving a live birth through IVF. See 1995 NATIONAL ART FERTILITY REPORT, *supra* note 8, at figs.9, 10 (reporting that women with no previous live birth who used their own eggs had a 24.6% live birth rate if they were under 35, a 17.1% rate if they were 35-39, a 7.6% rate if they were over 39, and 0% if they were 47 or older).

⁶¹ For a brief overview of different perspectives on the preembryo's moral status, see KAPLAN & TONG, *supra* note 15, at 268-76.

⁶² See BLANK & MERRICK, *supra* note 15, at 96-98 (noting that some states have record-keeping and reporting provisions and that few states regulate IVF directly). A handful of states have begun to regulate donations of ova and embryos. See, e.g., FLA. STAT. ANN. § 742.11(2) (West 1997) (providing that a child born to a married woman conceived by donated gametes or preembryos is "irrebuttably presumed to be the child of the recipient gestating woman and her husband, provided that both parties have consented in writing"); TEX. FAM. CODE ANN. § 151.102-151.103 (West 1996) (providing that a child born to a married woman using her husband's sperm and a donated oocyte or preimplantation embryo is the child of the marriage if both spouses have consented in writing to the procedure).

such preembryos later divorced, the court held that, based on the facts and lack of an agreement regarding disposition of the preembryos, the spouse who wished to destroy the preembryos was entitled to do so over the objection of the other spouse.⁶³ The California Supreme Court has held that a baby born using IVF and a gestational surrogate was the legal child of the genetic parents,⁶⁴ and a lower court in New York has ruled that a woman who bore a child through IVF using donated ova was the child's legal mother.⁶⁵ A case involving the parentage and custody of twins born to a woman who underwent IVF with "donated" preembryos that had allegedly been cryopreserved only for the future use of the genetic parents is currently before the California courts, but has not yet been resolved.⁶⁶

C. *Pregnancy for Another: The Various Forms of Surrogacy*

Surrogacy — bearing a child for someone else — stands in contrast to AI and IVF in that it requires no technology at all. The Biblical Sarah, Rachel, and Leah all made use of surrogates — their handmaids — in order to produce children for their husbands;⁶⁷ conception was achieved sexually rather than technologically. Modern surrogacy, however, invariably involves conception through AI. In the case of gestational surrogacy, in which the woman who gives birth is not genetically related to the child she bears, IVF is employed as well.

Modern surrogacy also differs from that of Biblical times in its reliance on contract. Biblical surrogacy involved an informal understanding between the infertile woman, her husband, and her handmaid, but surrogacy today is almost invariably conducted on the basis of a formal, written document specifying rights and obligations. Surrogacy today is also commercial: contracts almost always require pay-

⁶³ See *Davis v. Davis*, 842 S.W.2d 588, 597, 604 (Tenn. 1992); cf. *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998) (upholding a preembryo disposition contract and noting the importance of effecting the parties' intentions). The Supreme Court of Israel has reached the opposite conclusion. See Joel Greenberg, *Israeli Court Gives Wife the Right to Her Embryos*, N.Y. TIMES, Sept. 13, 1996, at A10. For background and commentary on the frozen embryo problem, see Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131 (1993); and Stephanie J. Owen, Note, *Davis v. Davis: Establishing Guidelines for Resolving Disputes over Frozen Embryos*, 10 J. CONTEMP. HEALTH L. & POL'Y 493 (1994).

⁶⁴ See *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

⁶⁵ See *McDonald v. McDonald*, 608 N.Y.S.2d 477, 478 (N.Y. App. Div. 1994).

⁶⁶ See Valeria Godines, *A Baby of Their Own; but Couple Says Legal Fight for Twins Continues*, PRESS-ENTERPRISE (Riverside, Cal.), Feb. 4, 1997, at A1; Susan Kelleher & Dave Parrish, *Woman After Twins' Custody Meets the Birth Mother*, ORANGE COUNTY REG., Apr. 2, 1996, at B1.

⁶⁷ See *Genesis* 16:1-4, 15; 30:1-10.

ments both to the woman who will bear the child and to a service that has brokered the arrangement.⁶⁸

Commercial, contract surrogacy emerged in the United States in the late 1970s.⁶⁹ Although its use has spread, the number of surrogate births remains small in comparison to those obtained through AI and IVF alone; in 1993 the Center for Surrogate Parenting estimated that 4000 surrogate births had occurred in the United States.⁷⁰

Public attention became focused on surrogacy as a result of the widely-publicized case of *In re Baby M*,⁷¹ involving the legality of an agreement by a "surrogate" mother to relinquish the child she had conceived through AI to the sperm donor and his wife in return for \$10,000.⁷² Perhaps because of the media attention, state legislatures reacted to surrogacy with greater speed than they have reacted to AI and IVF. By 1987, at least seventy-two bills pertaining to surrogacy had been introduced in Congress, state legislatures and the District of Columbia; today, nearly half of the states have statutes regulating surrogacy.⁷³ Almost all of these statutes declare commercial surrogacy contracts void and unenforceable.⁷⁴ Some additionally criminalize participation in and/or brokering of a surrogacy agreement.⁷⁵ A few explicitly permit noncommercial surrogacy.⁷⁶ And three states (New Hampshire, Nevada, and Virginia) permit some forms of commercial surrogacy, although all allow the birth mother to rescind the surrogacy contract within a specified time period.⁷⁷

⁶⁸ See LYNDA BECK FENWICK, *PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY* 230-33 (1998) (describing typical contract problems and terms and noting that surrogate fees vary "from program to program, ranging from \$10,000 to perhaps \$20,000, or, in some programs, whatever the parties negotiate"); see also *In re Baby M*, 537 A.2d 1227, 1265-73 (N.J. 1988) (reproducing a surrogacy contract).

⁶⁹ See FIELD, *supra* note 30, at 5.

⁷⁰ See BLANK & MERRICK, *supra* note 15, at 110.

⁷¹ 537 A.2d 1227 (N.J. 1988).

⁷² See *id.* at 1235.

⁷³ See BLANK & MERRICK, *supra* note 15, at 123; FIELD, *supra* note 30, at 157-58.

⁷⁴ See IRA MARK ELLMAN, PAUL M. KURTZ & ELIZABETH S. SCOTT, *FAMILY LAW: CASES, TEXT, PROBLEMS* 1498 (3d ed. 1998); see also BLANK & MERRICK, *supra* note 15, at 125 tbl.5-1 (categorizing state laws); Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2346-49 (1995) (same).

⁷⁵ See, e.g., UTAH CODE ANN. § 76-7-204 (1995) (making entering into surrogacy agreements a class B misdemeanor).

⁷⁶ See, e.g., FLA. STAT. ANN. § 63.212(i) (West Supp. 1999) (allowing "preplanned adoption agreement[s]" but restricting payments to surrogate to reimbursement for medical, legal, and "reasonable living expenses," and permitting mother to rescind agreement up to seven days after giving birth); N.Y. DOM. REL. L. §§ 122-124 (McKinney 1999); WASH. REV. CODE §§ 26.26.210-26.26.260 (1997).

⁷⁷ See NEV. REV. STAT. § 127.287 (1997) (excluding from state baby-selling prohibitions a "lawful contract to act as a surrogate"); N.H. REV. STAT. §§ 168-B:16, 168-B:25 (1994) (recognizing judicially approved surrogacy contracts, specifying allowable payments, and allowing surro-

Most surrogacy laws assume that the "surrogate" birth mother is genetically related to the child; they thus fail to address the increasingly common phenomenon of gestational surrogacy.⁷⁸ With gestational surrogacy, it is possible for a child to have three "mothers" — one who is genetically related to the child, one who gave birth to the child, and one who planned the pregnancy and intended the child to be hers. It is also possible for a child to have three "fathers" — one related to the child genetically, one married to the woman who gave birth to it, and one who planned the pregnancy and intended it to be his. Current law, even in states with statutes governing surrogacy, typically fails to offer clear (or even murky) answers as to the rights and obligations of these various parties.⁷⁹

D. The Need for Legal Reform

Current American law is clearly inadequate to resolve legal issues arising from the various forms of technological conception. That is not, of course, necessarily a bad thing. It is not always possible for the law to keep up with technological change. When the pace of change is rapid and the impact of that change difficult to assess, it may be preferable to deal with new legal issues on an ad hoc basis initially, deferring a more comprehensive approach until consensus emerges on its scope and substance.

But AI, IVF, and surrogacy are no longer novel technologies. Indeed, AI and IVF are offered by hundreds of commercial providers to tens of thousands of would-be parents each year.⁸⁰ And while researchers continue to develop technical refinements, the legal issues posed by reproductive technology are now quite clear.

Most other industrialized nations have thus begun to move toward comprehensive regulation of technological conception. In the United

gate to rescind agreement within 72 hours of child's birth); VA. CODE ANN. §§ 20-156-20-165 (Michie 1995 & Supp. 1999) (setting out requirements for enforceable surrogacy contract, permitting payment of "reasonable medical and ancillary costs," and authorizing surrogate rescission of contract within 180 days of conception). Both the New Hampshire and the Virginia laws ostensibly forbid inducement of surrogates for a fee, but contain broad exceptions for the surrogate's "expenses." See N.H. REV. STAT. §§ 168-B:16, 168-B:25; VA. CODE ANN. §§ 20-156-20-165.

⁷⁸ In 1995, only ten states had statutes dealing with gestational surrogacy. See Andrews, *supra* note 74, at 2346 n.16. The only state high court that has considered gestational surrogacy ruled that the child's biological mother was entitled to custody. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

⁷⁹ See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (1998) (resolving the issue of child support obligations toward a child conceived with donated eggs and sperm and gestated by a surrogate after the divorce of a married couple who arranged for the child's birth).

⁸⁰ While there are no national data on AID providers, there are at least 300 fertility clinics offering IVF. See 1996 ART REPORT, *supra* note 4, at nat. summ. In 1996, those clinics performed more than 55,000 IVF procedures. See *id.*

Kingdom, the Human Fertilisation and Embryology Act of 1990⁸¹ set standards to govern AID, IVF, and surrogacy; it also established a governmental agency to regulate technological conception providers and resolve new issues through administrative rulemaking.⁸² The Royal Commission on New Reproductive Technologies has proposed a similar regulatory structure for Canada.⁸³ Industrialized countries without regulatory agencies have typically enacted legislation to govern technological conception practices or have established national commissions to formulate legislative standards.⁸⁴

Our peers among the family of nations have not chosen to enact statutory standards governing technological conception on the assumption that such laws will put to rest all further legal and moral debate. Instead, legislation has been premised on the view that the whole area "will remain one of public interest and also of controversy."⁸⁵ Continued controversy has not, however, been seen as a reason to forgo the advantages of clear and consistent legal standards to guide the decisionmaking of consumers and professionals and a regulatory framework within which to debate and resolve new issues as they arise. There is every reason to assume that such a course would be advantageous in the United States as well.

II. LAW MAKING FOR BABY MAKING: A COMPARISON OF APPROACHES

A. *Top-Down Approaches*

Much of the commentary on legal issues arising from technological conception begins — and ends — with an appeal to one or another global principle. Commentators have variously urged that procreative rights, contract law, and an anticommodification ethic should guide policymaking on technological conception. Admittedly, these ap-

⁸¹ Human Fertilisation and Embryology Act, 1990, ch. 37 (Eng.).

⁸² *See id.* For a detailed account of the Act and the legislative debates leading up to it, see DEREK MORGAN & ROBERT G. LEE, *BLACKSTONE'S GUIDE TO THE HUMAN FERTILISATION & EMBRYOLOGY ACT 1990: ABORTION & EMBRYO RESEARCH, THE NEW LAW* (1991).

⁸³ *See PROCEED WITH CARE*, *supra* note 19, at 107–25.

⁸⁴ For a survey of the law relevant to technological conception in 13 European nations, see Linda Nielsen, *Legal Consensus and Divergence in Europe in the Area of Assisted Conception — Room for Harmonisation?*, in *CREATING THE CHILD*, *supra* note 17, at 305. For a more detailed description of the French statutory scheme enacted in 1994, see Christian Byk, *French Assisted Reproduction Legislation*, in *CREATING THE CHILD*, *supra* note 17, at 347. Three Australian provinces have legislation governing technological conception. *See* Infertility Treatment Act, 1995, ch. 63 (Vict.); Human Reproductive Technology Act, 1991, ch. 22 (W. Austl.); Reproductive Technology Act, 1988, ch. 10 (S. Austl.).

⁸⁵ MORGAN & LEE, *supra* note 82, at 3 (quoting U.K. Labour Party spokeswoman on health).

proaches all offer something to the policymaker; procreative rights, for example, should limit state regulation restricting technological procreative choices just as they curtail state regulation restricting sexual procreative choices. But none of the principles proposed as a decision-making lodestar is capable either of resolving the full range of parentage issues posed by the new technologies or of capturing all of the values that guide parentage determination in other contexts.

1. *Rights-Based Analysis.* — The best known proponent of a rights-based approach is Professor John Robertson who, extrapolating from Supreme Court cases recognizing a constitutionally protected interest in decisionmaking about contraception and abortion,⁸⁶ has argued that “if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally” and that “[o]nly substantial harm to tangible interests of others should . . . justify restriction [on use of reproductive technologies].”⁸⁷ Based on this analysis, Robertson has urged that:

[Legal] protection should extend to the use of gamete donation to overcome gametic infertility in one member of the couple, as in sperm and egg donation. . . . Use of a surrogate should also be presumptively protected, since it enables an infertile couple to have and rear the genetic offspring of both husband and wife in the case of gestational surrogacy, and of the husband in the case of full surrogacy. . . .⁸⁸

Robertson acknowledges that the only case in which his argument has been tested produced a decision with the opposite conclusion but, because the plaintiff was a prison inmate, argues that “it is not a strong precedent for limiting procreative choice in nonprison settings.”⁸⁹ He also acknowledges that the Supreme Court is unlikely to strike down a range of existing restrictions on nonmarital procreational choice — for example, laws against fornication, adultery, incest, and bigamy — that “have a pedigree and tradition as long as the practice of marital reproduction.”⁹⁰

⁸⁶ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same).

⁸⁷ ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 54, at 39–41; see also John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911 (1996); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986) [hereinafter Robertson, *Embryos & Families*]; John A. Robertson, *Noncoital Reproduction and Procreative Liberty*, in *THE ETHICS OF REPRODUCTIVE TECHNOLOGY* 249 (Kenneth D. Alpern ed., 1992); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983) [hereinafter Robertson, *Procreative Liberty*].

⁸⁸ ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 54, at 39–40.

⁸⁹ *Id.* at 37–38 & 420 nn.50–51 (discussing *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990)).

⁹⁰ *Id.* at 38.

However, Robertson fails to note that the Supreme Court has never employed his proposed test either when reviewing state laws limiting access to abortion and contraception, the context in which the procreative liberties doctrine developed, or when addressing parental rights more generally.⁹¹ Although the Court has held that state abortion and contraception regulations implicate a "zone of privacy created by several fundamental constitutional guarantees"⁹² and thus must be "narrowly drawn" to express only "compelling state interests,"⁹³ it has never mandated Robertson's "substantial harm to tangible interests" test as a basis for state regulation in this area. Indeed, in recent years, the Court has retreated from the position that "compelling" interests are required to justify government restrictions on procreational choice, holding that state abortion limitations are valid unless they impose an "undue burden" on a woman's right to terminate an unwanted pregnancy.⁹⁴ The Court has also consistently held that government may prefer one form of procreational choice over another in funding medical services.⁹⁵

Although the evidence is sparse, it seems probable that the procreative liberties doctrine would preclude explicit state restrictions on fam-

⁹¹ See, e.g., Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135 (1995) (arguing that the Constitution does not support Robertson's analysis); Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, in WHAT PRICE PARENTHOOD? ETHICS AND ASSISTED REPRODUCTION, *supra* note 17, at 84, 89 (noting that "Robertson's concern to promote the procreative initiator's interests is not adequately balanced . . . by a concern for the persons who will participate as the means to the stated reproductive goals" and urging that the "value of collaborative reproduction . . . needs to be weighed against the costs these practices may exact").

⁹² *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a statute criminalizing use of contraceptives by married couples was unconstitutional); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the privacy right relied on in *Griswold* and *Eisenstadt* was "broad enough to encompass a woman's decision to terminate a pregnancy through abortion"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the *Griswold* holding to unmarried couples and holding that "[i]f the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

⁹³ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (striking down state regulations that proscribed contraceptive advertising and limited the manner in which nonprescription contraceptives could be sold).

⁹⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). The "undue burden" test adopted in *Casey* had been proposed by Justice O'Connor in earlier abortion cases. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting). For criticism of the undue burden approach, see, for example, Martha A. Field, *Abortion Law Today*, 14 J. LEGAL MED. 3, 15 (1993); and Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025 (1994).

⁹⁵ See *Harris v. McRae*, 448 U.S. 297, 326-27 (1980); *Beal v. Doe*, 432 U.S. 438, 447 (1977); *Maher v. Roe*, 432 U.S. 464, 475-80 (1977).

ily size.⁹⁶ The Court has already noted that a birth control requirement and a birth control ban are logically equivalent;⁹⁷ a complete state ban on access to reproductive technology thus would also be constitutionally suspect, as it would deprive the infertile of their only chance at genetic parenthood.⁹⁸ Gender-based access restrictions, such as rules denying access to reproductive technology if a wife is post-menopausal but granting it if a husband is of post-menopausal age, might also constitute impermissible gender discrimination.⁹⁹

Nonetheless, given that traditional restrictions on choice of a sexual partner — prohibitions on prostitution, incest, fornication, statutory rape, adultery — all appear to be valid,¹⁰⁰ there is no obvious reason why restrictions on choice of a technological “partner” would not also be valid, including restrictions disallowing the sale of genetic mate-

⁹⁶ The Court's decisions focus almost exclusively on the negative claim. In the affirmative context, the leading decision is *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), in which the Court struck down a criminal statute requiring sterilization of those convicted of three or more felonies involving “moral turpitude.” *Id.* at 536. Although the *Skinner* Court described procreation as one of the “basic civil rights of man,” *id.* at 541, it ultimately decided the case on fairly narrow equal protection grounds, *see id.* at 541; *see also* ELLMAN, KURTZ & SCOTT, *supra* note 74, at 1191 (“The Supreme Court cases . . . do not themselves explicitly find a constitutionally-protected right to procreate . . .”) (internal citation omitted); CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 166–72 (1987) (arguing that the right not to reproduce does not necessarily imply a right to reproduce); Note, *Human Cloning and Substantive Due Process*, 111 HARV. L. REV. 2348, 2354 (1998) (“Despite the Court's occasional references to a broader principle of reproductive freedom, the Court has not truly tested a right to procreate.”).

⁹⁷ *See Griswold*, 381 U.S. at 497 (Goldberg, J., concurring) (“[I]f upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.”).

⁹⁸ One federal district court has held that the right to make reproductive decisions encompasses the right to “submit to a medical procedure that may bring about, rather than prevent, pregnancy.” *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), *aff'd without opinion*, 914 F.2d 260 (7th Cir. 1990).

⁹⁹ The Supreme Court has held that the preservation of traditional, gender-based family roles is insufficient to justify a gender-based classification. *See United States v. Virginia*, 518 U.S. 515, 540–46 (1996); *Orr v. Orr*, 440 U.S. 268 (1979); *Stanton v. Stanton*, 421 U.S. 7, 10 (1975).

¹⁰⁰ *See Griswold*, 381 U.S. at 498–99 (Goldberg, J., concurring) (“[T]he Court's holding today . . . in no way interferes with a State's proper regulation of sexual promiscuity or misconduct.”). The Supreme Court has not directly confronted the legality of partner restrictions. However, in *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981), it rejected an equal protection challenge to a California statutory rape law that imposed criminal liability only on males who engaged in sexual intercourse with a female under the age of 18, *see id.* at 466–67.

Prostitution is illegal in all the states except Nevada, which delegates the regulation of prostitution to county officials. *See* RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 155 (1996). In 1996, fornication was still a misdemeanor in 16 jurisdictions; in several others fornication was a crime if “open and notorious.” *See id.* at 99–102. Adultery remained a crime in 25 states. *See id.* at 103–10.

rial¹⁰¹ and imposing "time and manner" requirements.¹⁰² Nor does the Court's procreative liberties doctrine pose any apparent bar to state rules defining parental status. While Robertson and other advocates of a rights-based approach to technological conception have sometimes assumed that freedom to engage in a particular reproductive practice automatically implies recognition of parental status,¹⁰³ the procreational liberties doctrine in fact mandates no such thing. The Supreme Court has simply never held that the right to bear a child ensures the right to have one's parental status recognized. Instead, in another line of cases involving claims by unmarried fathers, the Court has made it clear that "the mere existence of a biological link" is inadequate to ensure parental rights.¹⁰⁴

Although the case law does not support Robertson's claim that current constitutional doctrine *does* mandate a showing of substantial harm to tangible interests of others as a precondition to state restrictions on use of reproductive technologies, one might still attempt to show that the Constitution *should* be interpreted to provide would-be parents with such protection.¹⁰⁵ Robertson himself does not offer to

¹⁰¹ Although the Supreme Court has not addressed the constitutionality of restraints on commercialism in the context of reproduction, it has upheld commercial restraints against a First Amendment challenge. Compare *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the First Amendment precludes state prohibition of possession of obscene material in the home), with *United States v. Reidel*, 402 U.S. 351 (1971) (ruling that the First Amendment does not preclude states from prohibiting the sale of obscene material).

¹⁰² Noting that "the right of privacy has never been interpreted . . . to protect a woman's choice of the manner and circumstances in which her baby is born," *Bowland v. Municipal Ct.*, 556 P.2d 1081, 1089 (Cal. 1976), a number of lower courts have already refused to extend procreational liberty to control of the birthing process. See, e.g., *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716 (7th Cir. 1975) (rejecting a constitutional attack on a hospital policy that prohibited fathers from participating in the delivery process); *Bowland*, 556 P.2d at 1089 (rejecting a challenge to state midwife regulation). The same approach would permit state restrictions on particular reproductive technology practices, such as the number of preembryos that may be implanted in an IVF cycle.

¹⁰³ See, e.g., ROBERTSON, CHILDREN OF CHOICE, *supra* note 54, at 40 (urging that the procreative liberty doctrine protects "use of a surrogate . . . since it enables an infertile couple to have and rear the genetic offspring of both husband and wife in the case of gestational surrogacy and of the husband in the case of full surrogacy") (emphasis added); 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, 383 (1991) (concluding that "[a]s the law currently exists, the legitimate exercise of the right of procreation includes the right to parent a child").

¹⁰⁴ *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

¹⁰⁵ Robertson suggests that "[t]he precise procreative interest at stake must be identified and weighed against the core values of reproduction. . . . if an important reproductive interest exists, then use of the technology should be presumptively permitted. Only substantial harm to tangible interest of others should then justify restriction." ROBERTSON, CHILDREN OF CHOICE, *supra* note 54, at 41. However, he is unclear about what triggers the level of constitutional protection he proposes. In urging protection for surrogacy, Robertson seems to assume that genetic relationship triggers a procreational right, while in urging protection for gamete donation, he seems to assume that the desire to have a child, whether genetically related or not, triggers that right. See *id.* at

make such a showing. Instead, his claims on behalf of reproductive technologies are based on their status as *equivalents* of coital reproduction; procreation should be protected, he argues, "whether . . . achieved coitally or noncoitally."¹⁰⁶

Our tradition of deference to individual decisions about coital procreation and parenting undeniably supports equivalent deference to individual choice in the use of technological conception. But deference does not imply abdication of any regulatory role. Indeed, parents who want to adopt, the "traditional" method of achieving parenthood noncoitally, face a maze of state regulations, including rules imposing waiting periods before an adoption is finalized, voiding parental consents obtained prenatally, permitting rescission of parental consent within stated time limits, and requiring adoption through an intermediary agency.¹⁰⁷ Under Robertson's view of the procreative liberties doctrine, all of these rules should fail.¹⁰⁸ Baby selling prohibitions would also be unconstitutional under Robertson's proposed standard, as children whose parents want to sell them are not likely to be better off remaining in parental custody.

Given the range of public values evident in this small sample of parentage restrictions — values that simply cannot be accommodated within Robertson's narrow, libertarian view of procreational rights — it is not obvious that his perspective is preferable to the more moderate approach our legal tradition has thus far followed, which allows states considerable latitude both in regulating technological conception and in defining the status of participants.

The important issue for a rights analyst thus is not *whether* the state may regulate technological conception, but *how* a regulatory regime should express the values that underlie the procreative liberties doctrine. Some of the regulatory questions posed by reproductive technology — use of a gestational surrogate, for example — simply do not arise with coital conception. Nor has the enforcement of rights waivers, which Robertson seems to assume that the Constitution mandates in the context of technological conception, ever been tested in the

38–40. More recently, Robertson has stressed the importance of genetic tie as a basis for procreational rights. See John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609, 618 (1999) (arguing that a strong case can be made that procreational liberties protect the use of cloning for the purpose of having a genetically related child in the event of a reproductive failure, but that the case for cloning to obtain a child with specific traits is "much weaker").

¹⁰⁶ ROBERTSON, CHILDREN OF CHOICE, *supra* note 54, at 39.

¹⁰⁷ For a more detailed account of typical adoption rules and practices, see *infra* pp. 889–92.

¹⁰⁸ Robertson himself notes that the expanded view of "collaborative reproduction" he advocates would "undermine the foundations of adoption law." ROBERTSON, CHILDREN OF CHOICE, *supra* note 54, at 143.

context of coital reproduction.¹⁰⁹ Because the boundaries of procreative liberty are often murky even in the classic case of coital conception, "rights talk" like that which Robertson offers is of little use in fashioning a workable legal regime that is sensitive to the range of public and private interests at stake, and neither he nor other rights theorists have as yet offered more. In sum, "it is not yet clear that believers in rights can provide a satisfactory justification for drawing the distinction between rights and other interests in one place rather than another."¹¹⁰

2. *Contract-Based Analysis.* — A number of commentators have proposed that the parental rights of those who conceive technologically should be governed by contract principles.¹¹¹ There are a number of variations on this basic claim, but Professor Marjorie Schultz has offered what is probably the most sophisticated and detailed argument. Relying on the claim that technological conception "dramatically extend[s] affirmative intentionality" by "eliminat[ing] uncertainty regarding procreative intention,"¹¹² Schultz urges that "[w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."¹¹³ Recognizing that intention-based parenthood has not been the norm outside the context of technological conception, Schultz asserts that "assisted reproduction differs from ordinary reproduction" in that ordinary reproduction poses greater difficulties in "severing intention about procreation

¹⁰⁹ The Supreme Court has held, for example, that the state may not condition a woman's right to an abortion on the consent of her husband, *see* *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-72 (1976); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833, 887-98 (1992) (striking husband notification requirement), but it has never addressed the question whether she might waive such a right in a preconception contract. It is not obvious that enforcement of the waiver is required in order to protect the husband's procreative liberties; it is also arguable that enforcement would infringe the woman's procreative liberties.

¹¹⁰ GLOVER, *supra* note 17, at 29. Moreover, "it would be difficult to find any claim confidently asserted to a right which could not be as confidently countered by a claim to another right." *Id.*; *see also* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 30, at 61 (concluding that "[n]either existing caselaw nor the underlying principles of the cases involving the right to privacy can logically be extended to provide constitutional protection to surrogate parenting"); R.M. Hare, *Abortion and the Golden Rule*, 4 PHIL. & PUB. AFF. 201, 203 (1975). *See generally* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (describing the limitations of rights-based analysis).

¹¹¹ *See, e.g.*, SHALEV, *supra* note 30, at 120-45; Hill, *supra* note 103, at 415-16; Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 549-70 (1994); Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323.

¹¹² Schultz, *supra* note 111, at 309.

¹¹³ *Id.* at 323. Schultz argues that intention should be a "default rule . . . that allows intention to govern unless and until policy restrictions on particular types of private arrangements are articulated, justified and adopted." *Id.*

... from other motivations."¹¹⁴ She also argues that "the newness of the issues presented by scientific changes virtually demands consideration of new legal approaches and rules," and that coital and technological conception present "differences in moral and factual legitimacy":¹¹⁵

The fairness of imposing a status-based parental regime is far weaker in instances of artificial or assisted reproductive techniques. The justification for such outcomes in ongoing relationships between coital partners derives, at least in part, from presumed intention. In . . . assisted reproduction the factual base for such presumptions about intention is often lacking.¹¹⁶

Because "the newness of the issues" offers no basis for choosing one particular parentage-determination rule over another, Schultz acknowledges that the case for a contractual approach ultimately hinges on its desirability and feasibility.¹¹⁷ On the desirability issue, she urges that "[o]ur society generally favors the fulfillment of individual purposes and the amplification of individual choice" and that private ordering plays a more important role in family law today than it did traditionally.¹¹⁸ On the feasibility issue, Schultz analyzes a broad array of enforcement issues and ultimately concludes that it would be feasible to enforce procreation agreements within limits.¹¹⁹

Schultz is undeniably right that parentage law has traditionally relied on presumed, rather than actual, intent. Procreation has been thought part of the state-imposed marriage contract, and even unmarried persons who engage in sexual intercourse have been presumed to consent to the risk of procreation. Indeed, courts have uniformly imposed parental responsibilities on men who were legally incapable of consenting to sexual intercourse¹²⁰ and those who had been tricked into fathering a child;¹²¹ they have refused to honor nonpaternity agreements whether made before or after the child's conception.¹²²

¹¹⁴ *Id.* at 324.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 324-26.

¹¹⁸ *Id.* at 327.

¹¹⁹ *See id.* at 355-69 (analyzing the propriety of contract remedies).

¹²⁰ A number of courts have rejected claims that the putative father was a victim of statutory rape and thus could not legally consent to sexual intercourse. *See, e.g.,* County of San Luis Obispo v. Nathaniel J., 50 Cal. App. 4th 842 (1996); Kansas *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993); Jevning v. Cichos, 499 N.W.2d 515 (Minn. App. 1993); *In re R.A.S.*, 826 S.W.2d 397 (Mo. Ct. App. 1992).

¹²¹ The most frequently cited cases are *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (1980), and *L. Pamela P. v. Frank S.*, 559 N.Y.2d 1 (1983). *See generally* Annotation, *Misrepresentation Regarding Sterility or Use of Birth Control*, 31 A.L.R.4TH 389 (1984); Diane M. Carlton, Note, *Fraud Between Sexual Partners Regarding the Use of Contraceptives*, 71 KY. L.J. 593 (1982-83).

¹²² *See, e.g.,* UNIF. PARENTAGE ACT § 6(d), 9B U.L.A. 303 (1973) (declaring invalidity of agreements regarding paternity); *Straub v. B.M.T.*, 645 N.E.2d 597, 598-601 (Ind. 1994) (holding that an agreement providing that a father would "not be held responsible financially or emotion-

Even in cases of adoption, in which legislatures have required actual consent both to relinquish and accept parental rights, the parties' intentions are insufficient to effect a rights transfer; a showing of compliance with other state requirements designed to protect the child's and parties' interests must also be made.¹²³

Schultz's claim that technological conception presents "differences in moral and factual legitimacy" that require a more important — indeed, determinative — role for contract rests on much weaker ground, however. Undeniably, it is easier to assess intention when conception occurs technologically than when it occurs sexually.¹²⁴ But it is not easier to assess intention in a case of technological conception than it is in a case of adoption. Nor does the pool of would-be parents who adopt differ markedly from those who conceive technologically: both groups include single individuals who want to parent without a partner and couples who already have genetically related children, but both are also dominated by couples who have tried and failed to conceive sexually.¹²⁵

Schultz's claim for contract thus comes down to the argument that reliance on intention is desirable. But she does not explain why reliance on intention is uniquely desirable for determining the parentage of technologically conceived children; although some areas of family law do increasingly rely on private ordering, parentage and parental obligation are not among them. Here, family law simply has not "favor[ed] the fulfillment of individual purposes and the amplification of individual choice."¹²⁶ Indeed, under current law, *no* contract regarding

ally" for any child born as a result of a relationship with the mother was contrary to public policy and void); *G.E.B. v. S.R.W.*, 661 N.E.2d 646, 650–51 (Mass. 1996) (holding that a child was not estopped from maintaining a paternity action even though her mother "acting on her own behalf and on behalf of a daughter born to her" and the defendant had eight years earlier signed a settlement agreement under which the defendant was to pay the mother \$25,000 in exchange for the mother's assent to a stipulation stating that the defendant was not the child's father); see also *Peregood v. Cosmides*, 663 So.2d 665 (Fla. App. 1995); *Estes v. Albers*, 504 N.W.2d 607 (S.D. 1993); *Wyoming ex rel. TRL v. RLP*, 772 P.2d 1054 (Wyo. 1989).

¹²³ See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 876–87 (2d ed. 1988) (describing legal issues arising out of adoption consent requirements). The same is true of AID, for which both consent of the mother's husband and compliance with statutory standards is invariably required before the husband will be recognized as the child's legal father. See, e.g., UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973) (mandating physician participation in AID).

¹²⁴ Despite advances in contraception, almost 60% of U.S. pregnancies are unintentional, a rate higher than that of any other developed country except France. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364 (1998).

¹²⁵ See ALFRED KADUSHIN & JUDITH A. MARTIN, *CHILD WELFARE SERVICES* 542–46 (4th ed. 1988) (describing characteristics of adoptive parents).

¹²⁶ Schultz, *supra* note 111, at 327. Several commentators have analyzed contrasting trends toward privatization and increased state intervention within the family. See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (forthcoming 2000) (manuscript at 197) (on file with the Harvard Law School Library) (explaining that "courts

a child's custody, support, or legal status is per se enforceable; unenforceability applies whether the contract was negotiated prenatally or postnatally, and whether or not there is clear evidence of pre-contract parental intentions.¹²⁷ Nor does Schultz address children's rights and interests, the basis for restrictions on parental contract rights.

Other contract proponents have also tended to ignore these basic questions. Professor John Hill, for example, argues in favor of an "intentional" definition of parenthood that would grant parental status to those who are the "first cause" of the procreative relationship.¹²⁸ His conclusion is based on the "moral significance of the intended parents' role as prime movers in the procreative relationship, [their reliance on the] preconception promise of the biological progenitors not to claim rights in the child, and the relative importance of having the identity of the parents determined from conception onward."¹²⁹ Because the last factor would support any clear status determination rule, Hill's argument comes down to the intended parents' reliance interest and "prime mover" role. But Hill again fails to offer a clear explanation of why intention and reliance should count for so much more here than

and legislatures are busy . . . reweaving . . . the public and private dimensions of family law. Sexual relationships are becoming more distinctly private, more a matter of personal preference and private bargaining Parent-child relationships in contrast are becoming more public, both in the sense that they are attaining greater visibility in their own right . . . and in the sense that the state has become more willing to enforce public expectations of parents"); Jane C. Murphy, *Rules, Responsibility, and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. (forthcoming 2000) (explaining that public regulation increasingly focuses on children and issues of physical protection, such as spousal violence).

¹²⁷ See UNIF. PREMARITAL AGREEMENTS ACT § 3(b), 9B U.L.A. 373 (1983) ("The right of a child to support may not be adversely affected by a premarital agreement."); ELLMAN, KURTZ & SCOTT, *supra* note 74, at 839 ("Long tradition in the domestic relations area would seem to ensure . . . that courts would not consider themselves bound by custody provisions they believed injurious to the child's interest. The law of separation agreements in every state is explicit on that point, and there is no reason why premarital agreements would be treated differently."); *see also* Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981) (custody); Combs v. Sherry-Combs, 865 P.2d 50 (Wyo. 1993) (child support).

¹²⁸ Hill, *supra* note 103, at 414. Although Hill offers a contract argument in favor of his intentionality approach, *see id.* at 415-16, he invariably describes his approach as based on intention, not contract. It is unclear whether Hill would extend his intention-based analysis to cases without a formal contract, for example those involving a gratuitous promise on which the intended parent relied.

¹²⁹ *Id.* at 419. Hill does not describe how his approach works if the commissioning parents want to avoid reliance because the child that is born is somehow different (for example, born with a birth defect, or genetically related to the surrogate's husband instead of the intended mother's husband) from the one they wanted; *cf.* Stiver v. Parker, 975 F.2d 261, 263 (6th Cir. 1992) (declaring surrogate and husband legal parents despite a contract and the intention of the sperm donor and his wife to become legal parents, based on blood tests revealing that the "ordinary" surrogate's husband was the genetic father of the child born with severe handicaps).

they do elsewhere in the law of parentage,¹³⁰ or how an approach focused on adult intentions can be reconciled with children's interests.¹³¹

Only a few contract advocates, notably Professors Epstein and Posner, have gone so far as to argue that all current restraints on parental contract rights, including babyselling prohibitions, should be abolished.¹³² Professor Epstein, for example, urges that:

[t]he most that can be said is that money may create some kind of conflict of interest between parent and child, so that the sale will be made to a higher bidder when the child would be better off in the care of a lower bidder. Yet . . . the decisions made in the gray [adoption] market suggest that this concern is overblown One can find cases in which ostensible sales seem abusive per se But the use of these extreme examples should not discredit the general practice in its far more benign form.¹³³

Epstein ignores the historical evidence, which shows that adoption regulation arose precisely because market transactions did not adequately protect children's interests.¹³⁴ The fact that today's highly regulated adoptions generally produce good results, even if some money surreptitiously changes hands, hardly provides a testimonial to the merits of an unregulated contract regime. There is no reason to suppose that would-be parents utilizing technological conception to obtain a child more frequently possess inadequate parenting skills than would-be adoptive parents. But neither is there reason to suppose the

¹³⁰ Recognizing that uniform application of his intentionality principle would deny parental status to a significant minority (if not the majority) of persons who have traditionally been considered parents, Hill suggests that "[i]ntentionality [should] act[] as a trump . . . when conflicting claims are made by parties who have contributed biologically to the creation of the child." Hill, *supra* note 103, at 387.

¹³¹ Most other contract proponents have offered even more cursory justifications. For example, one author simply asserts that "the legislative regulation of artificial insemination relations implicitly acknowledges the intention of the sperm donor to dissociate biological from social fatherhood," SHALEV, *supra* note 30, at 120, concludes that prohibitions on surrogacy are inconsistent and paternalistic, *see id.* at 121-27, and accordingly rejects "[a]ny state-imposed restriction on access to reproductive technology beyond that of general contractual capacity," *id.* at 129.

¹³² See Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2330-34 (1995) (discussing the baby selling analogy and concluding that the "analogy to baby-selling . . . only strengthens the conclusion that surrogacy transactions should be legal"); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (urging the enforcement of baby-selling agreements); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989) (arguing in favor of surrogacy contract enforcement).

¹³³ Epstein, *supra* note 132, at 2333-34.

¹³⁴ For representative examples of reports on adoption abuses, see 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 140-42, 147-49 (Robert H. Bremner ed., 1971) (providing excerpts of early adoption abuses and responsive legislation that mandated investigatory procedures).

reverse; in each context, the vast majority of intended parents are able and well-motivated, but a few are not.¹³⁵

Nor is it obvious how contract advocates could demonstrate that their proposed approach adequately addresses the interests of children who will be the subject of parental agreements. Our legal system rarely tolerates a contract that binds a nonsignatory; only when a guardian or conservator is appointed for an incompetent may an unconsenting adult be contractually bound by someone else. In such a case, the guardian or conservator is bound to act as a fiduciary, not a self-interested actor.¹³⁶

While the legal system of the feudal era accorded a family patriarch the right to bind his children as he saw fit,¹³⁷ that time has long since passed. Today, parents' rights are thought to derive from — and to be limited by — their children's interests.¹³⁸ Family law has thus moved consistently in the direction of a child-centered view of parental entitlements.¹³⁹ It is ironic that a feudal vision of the parent-child relationship would be linked with our most sophisticated means of procreation, but that is exactly what contract enforcement as a determinant of parental status would accomplish.

Contract advocates have also failed to define the role that contract should play in regulating technological conception more generally: if contracts between, say, a would-be and surrogate mother for the birth and surrender of a child ought to be enforceable, should contracts between these parties and a surrogacy broker also be enforceable? Should contracts between would-be parents and fertility centers determine whether practices such as sex-selection and cloning are permissible? Enforcement of these contracts, too, would "fulfill[] individ-

¹³⁵ See, e.g., Tamar Lewin, *Man Accused of Killing Son Born to Surrogate Mother*, N.Y. TIMES, Jan. 19, 1995, at A16.

¹³⁶ On the obligations of a fiduciary, see RESTATEMENT (SECOND) OF TRUSTS §§ 170, 206 (1959); and GEORGE T. BOGERT, TRUSTS AND TRUSTEES §§ 543-543(V) (2d ed. 1993).

¹³⁷ See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6-7, 14-15 (1994); Garrison, *supra* note 23, at 49-50.

¹³⁸ For examples of child-centered perspectives on parental rights, see Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); John Bigelow, John Campbell, Susan M. Dodds, Robert Pargetter, Elizabeth W. Prior & Robert Young, *Parental Autonomy*, 5 J. APPLIED PHIL. 183 (1988) [hereinafter Bigelow]; James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); and Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

¹³⁹ See, e.g., Scott & Scott, *supra* note 138, at 2453-76 (discussing family law's evolution in the direction of a more explicit linkage between parental rights and responsibilities).

ual purposes and . . . amplifi[y] individual choice."¹⁴⁰ But then, so would the enforcement of *any* contract.

In fact, under modern contract law a wide array of contracts are unenforceable. Contract bars apply to transactions ranging from vote purchases to liability waivers on swimming pool admission tickets.¹⁴¹ In each of these contexts, individual intention is inadequate to achieve enforcement.¹⁴² Indeed, "we have never had and never shall have unlimited liberty of contract."¹⁴³ When a privately negotiated agreement violates public policy, it is void and unenforceable.¹⁴⁴

Given that our legal tradition precludes per se enforcement of all contracts concerning children, a proposal to grant per se enforcement to a single contract subset should be supported by a demonstration that this group is sufficiently different from the remainder to justify inconsistent treatment,¹⁴⁵ or, in the event that the contract advocate is willing to extend per se enforcement to all contracts governing children's care and status, a showing that this approach is preferable to the traditional one. Proponents of a contractual approach have not yet made such a showing.¹⁴⁶

¹⁴⁰ Schultz, *supra* note 111, at 327.

¹⁴¹ See, e.g., 18 U.S.C.A. § 241 (1999) (outlawing vote tampering); N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1989) (voiding "any contract, membership application, ticket of admission or similar writing, entered into between owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment . . . which exempts . . . owner or operator from liability for damages" resulting from the negligence of owner, operator, or agent).

¹⁴² Under the *Restatement of Contracts*, a contract is defined as "a promise . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (emphasis added).

¹⁴³ 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1376 (1952).

¹⁴⁴ See UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8), 9B U.L.A. 373 (1983) (allowing premarital contracts about "any . . . matter, including their personal rights and obligations, not in violation of public policy"); JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 1-11 (3d ed. 1987) (discussing "increasing legislative restrictions" on freedom to contract); E. ALLAN FARNSWORTH, CONTRACTS § 1.7 (1982) (discussing public policy restrictions on freedom of contract); see also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 100-03 (1983) (describing categories of "blocked exchanges" in the United States).

¹⁴⁵ Cf. Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1280 (1998) (arguing that the legal significance of surrogacy contracts "is a matter of ethical and social policy" and that "[c]ontract here accomplishes little in taking the relationships among the parties involved beyond the background of family law").

¹⁴⁶ For additional criticism of the contractual approach, see WILLIAM JOSEPH WAGNER, THE CONTRACTUAL REALLOCATION OF PROCREATIVE RESOURCES AND PARENTAL RIGHTS: THE NATURAL ENDOWMENT CRITIQUE 166 (1995) (concluding that "[p]roposals to apply contract to ordering human procreation fail to withstand normative evaluation because they effectively remove the meaning of relationships grounded in lineage and nurturance"); Bartlett, *supra* note 138, at 335-37 (arguing against contract enforcement based on harm to children); Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2377

Even if contract advocates had demonstrated the superiority of privately negotiated agreements to the traditional, regulated approach, contract enforcement would still be inadequate as a general principle to govern the parentage of technologically conceived children: in what is probably the majority of cases, there is no contract between the biological and intended parents to enforce, and it would be impractical to require one. Although such contracts are fairly common in surrogacy cases, they are rare in the far more numerous cases of AID and IVF. Sperm, ova, and preembryo donors typically transfer their rights to a sperm bank or fertility center, not to would-be parents. Although one might describe would-be parents as third-party beneficiaries of agreements between donors and intermediary agencies, the agreements are not, in fact, intended to benefit particular individuals. Indeed, an agreement may be concluded years before the ultimate user of donated material becomes a client of the intermediary. In these cases, contract analysis is strained at best.

Despite the limitations of contract analysis, contracts can and should play a limited role in parentage determination. Most states permit privately negotiated adoption contracts as long as the parties comply with state rules designed to ensure deliberation, voluntariness, and protection of children's interests.¹⁴⁷ And courts will seldom second-guess an agreement between parents dealing with custody or support unless one of the parents later questions the contract's capacity to meet the child's needs.¹⁴⁸ The challenge for policymakers is to adapt these traditional contract possibilities to the new context of technological conception. For example, a contract transferring a preembryo from its progenitors to its intended parents is like an adoption contract in some, but not all, respects. In fashioning rules to govern such a transfer, policymakers will almost certainly want to rely on adoption law in part. But in order to ensure that the interests of the parties, the public, and any children that may ultimately be born have been protected, they should also take account of the differences between adoption and preembryo transfer. A legal regime exclusively reliant on the terms of privately negotiated agreements is incapable of addressing these various concerns.

(1995) (same); and A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 J. L. MED. & HEALTH CARE 34, 40 (1988) (rejecting contract enforcement in surrogacy cases).

¹⁴⁷ In 1993, only six states required adoption through an authorized agency. See Mark T. McDermott, *Agency Versus Independent Adoption: The Case for Independent Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 146, 146.

¹⁴⁸ See CLARK, *supra* note 123, at 756-57 (noting a trend in favor of allowing separated couples to settle custody and financial issues by agreement and reporting that "within very broad limits any agreement reached is likely to be approved by the court to which it is presented").

3. *The Anticommodification Approach.* — A number of commentators on technological conception have relied, either wholly or partially, on the claim that reproductive capacity constitutes an attribute, like sexuality or a body part, that is so bound up with an individual's personhood that it should not be the subject of market transactions.¹⁴⁹ Perhaps the best known and most eloquent spokesperson for this perspective is Professor Margaret Radin, who argues that:

[m]arket-inalienability [of surrogacy] might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply. There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability will be monetized. Surrogates with "better" qualities will command higher prices in virtue of those qualities.¹⁵⁰

As critics of the anticommodification claim have noted, however, it is not so easy to articulate a clear definition of what is fundamental to personhood and what is not.¹⁵¹ "[H]eight, eye color, race, intelligence, and athletic ability" — which Radin fears might be monetized through commercial surrogacy — are already monetized in the employment market on a daily basis.¹⁵² Nor can we point to historical continuity in those aspects of personhood that are legally unmarketable.¹⁵³ Blood was marketable (although with price controls) until health concerns led to bans on payment.¹⁵⁴ Slavery was not outlawed by most European nations until the nineteenth century, and bride barter was widely prac-

¹⁴⁹ See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 168–90 (1993); RAE, *supra* note 30, at 59–66; Sara Ann Ketchum, *Selling Babies and Selling Bodies*, 4 *HYPATIA* 116, 120–23 (1989); Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1921–36 (1987); Barbara Katz Rothman, *Reproductive Technology and the Commodification of Life, in EMBRYOS, ETHICS, AND WOMEN'S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES* 95 (Elaine Hoffman Baruch, Amadeo F. D'Adamo, Jr. & Joni Seager eds., 1988). For general accounts of commodification, see, for example, MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Scott Altman, *(Com)modifying Experience*, 65 *S. CAL. L. REV.* 293 (1991); and Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 *PHIL. & PUB. AFF.* 71 (1990).

¹⁵⁰ Radin, *supra* note 149, at 1932.

¹⁵¹ See, e.g., Hill, *supra* note 103, at 412–13.

¹⁵² See ALAN HYDE, *BODIES OF LAW* 77 (1997) ("Most adults in our society survive, and are expected to survive, by selling their labor power, renting, if you like, their brains and bodies for specified times at specified rents.")

¹⁵³ Aristotle, for example, condemned most market transactions. See ARISTOTLE, *THE POLITICS* 49–50 (Carnes Lord ed. & trans., Univ. of Chicago Press 1984) (describing retail trade in general and usury in particular as highly objectionable).

¹⁵⁴ The classic work on blood donation and sale is RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970).

ticed in Europe until the modern era and continues in many parts of the world today.¹⁵⁵

In sum, although the anticommodification ethic appeals to widely shared public values — most of us would agree that there are some things which should not be bought and sold — it does not offer a clear method of determining which transactions fall on the wrong side of the proscriptive line. Commentators disagree about the desirability of commercial surrogacy and the sale of genetic material.¹⁵⁶ The anticommodification approach does not offer a clear methodology for determining which view is right. Moreover, because it is solely concerned with the commercial aspects of technological conception, the anticommodification ethic fails to provide guidance on many legal issues raised by the new reproductive technologies. Parental status questions, for example, fit uneasily within an anticommodification framework. Even if we take it as a given that surrogacy is wrong, the parentage of children born through illegal transactions must still be addressed; knowing that both parties are wrongdoers does little to resolve the issue.

The anticommodification ethic can be employed more successfully when used descriptively instead of prescriptively. It offers a unifying explanation for seemingly diverse legal prohibitions — against prostitution, indentured servitude, organ sale, slavery, and baby selling — that identifies their common aims and normative basis. Used as a unifying explanation, it still fails to offer a bright-line test for state policy on technological conception, but it does lend support to a policy that takes account of existing prohibitions that reflect an anticommodification bias. Thus, like the procreative rights doctrine and contract law, the anticommodification ethic might play a useful, limited role in developing rules for technological conception. But, on its own, it is an inadequate basis for policymaking.

B. Mixed Approaches to Regulation

In view of the deficiencies of top-down approaches — rights-based, contract-based, and anticommodification based — it should come as no surprise that real-world policymakers have rejected legislative

¹⁵⁵ See MOHINDERJIT KAUR TEJA, *DOWRY: A STUDY IN ATTITUDES AND PRACTICES* 11–26 (1993); HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE 1440–1870*, at 650 (1997).

¹⁵⁶ Members of some state-commissioned policy groups have been open about the lack of consensus on the issue of surrogacy and payment. See, e.g., WARNOCK COMMITTEE REPORT, *supra* note 18, at 46 (“The question of surrogacy presented us with some of the most difficult problems we encountered.”); GLOVER, *supra* note 17, at 76–77 (describing the disagreement over surrogacy among members of the European Union committee on reproductive technologies).

strategies reliant on a global theory, opting instead for more flexible methodologies.

1. *The "Ethic of Care" Analysis.* — The Canadian Commission on New Reproductive Technologies recently rejected a global approach in favor of what it termed an "ethic of care" analysis.¹⁵⁷ This approach to ethical issues was popularized by feminist thinkers, who have emphasized norms based on reciprocity and caring, with care:

held to encompass a range of characteristic dispositions, such as concern for the other not out of duty or obligation but out of feeling or sympathy; attention or attentiveness, sensitivity to the needs of others, and more strongly, taking the others' interests as equal to or more important than one's own . . . and an orientation to the common interest of the family or of those who are close or related to one.¹⁵⁸

Although the ethic of care approach commendably seeks to accommodate and balance the interests of the various individuals who might be affected by laws governing technological conception, it generally fails to deliver clear legal rules; its aim is a particularist approach that depends on facts about the individual case at hand.¹⁵⁹

Given its emphasis on particularity at the expense of universality, the ethic of care methodology is an odd choice to guide legislative decisionmaking. Recognizing that the ethic of care is "benign but ineffectual" as a means of devising clear legal standards, the Commission thus decided to flesh out the approach by adopting eight subsidiary principles "of special relevance to . . . [its] mandate."¹⁶⁰ The Commission explains neither the development of the eight principles nor their relationship to the ethic of care approach. The principles selected run the gamut from "respect for human life and dignity" and "equality" to "balancing individual and collective interests" and "appropriate use of resources."¹⁶¹ The principles are not weighted, and they frequently point in different directions. Supporting "individual autonomy," for example, will often preclude "protection of the vulnerable"; many

¹⁵⁷ PROCEED WITH CARE, *supra* note 19, at 49–51.

¹⁵⁸ Carol C. Gould, *Feminism and Democratic Community Revisited*, in DEMOCRATIC COMMUNITY 396, 404 (John W. Chapman & Ian Shapiro eds., 1993). Feminist thinkers have typically posited the maternal relationship as a normative model. See, e.g., NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION, 1–6 (1984); SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE, 127–39 (1989) (arguing that maternal thinking should inform societal values); Virginia Held, *Mothering Versus Contract*, in BEYOND SELF-INTEREST 287, 288–90 (Jane J. Mansbridge ed., 1990).

¹⁵⁹ See, e.g., NODDINGS, *supra* note 158, at 5 (rejecting "principles and rules as the major guide to ethical behavior [along with] the notion of universalizability. . . . Since so much depends on the subjective experience of those involved in ethical encounters, conditions are rarely 'sufficiently similar' for me to declare that you must do what I must do.").

¹⁶⁰ PROCEED WITH CARE, *supra* note 19, at 52.

¹⁶¹ *Id.* at 53. The remaining principles are "individual autonomy," "protection of the vulnerable," "non-commercialization of reproduction," and "accountability." *Id.*

commentators, including Robertson, would argue that support for autonomy is also inconsistent with "noncommercialization of reproduction."¹⁶²

Perhaps because the principles tug in so many directions, it is often hard to see their relationship to the Commission's proposed rules. Who would guess that a set of principles emphasizing equality and individual autonomy would require a ban on the donation of ova to a named recipient?¹⁶³ Or that they would both support AID use by virtually anyone seeking access to this technology and forbid IVF use except in "cases of diagnosed bilateral fallopian tube blockage?"¹⁶⁴ In sum, although many of the specific rules proposed by the Royal Commission seem sensible, their basis is often unclear. It would not be surprising if a different Commission, using the same principles, reached quite different results.

The ethic of care approach thus avoids the rigidity of the rights-based and contract-based approaches, but it does so at the expense of predictability. The Commission's need to augment the approach is understandable, but because the additional principles selected are vague and contradictory, particular rules favored by the Commission seem to be drawn from nowhere. Their justification is cursory; their consistency is questionable.

2. *The Reflective Equilibrium Model.* — Like the Canadian Commission, the Working Party formed to advise the European Community (EU) on technological conception rejected "solutions at the theoretical level."¹⁶⁵ But instead of the ethic of care methodology, it chose an approach reliant on the Rawlsian notion of "reflective equilibrium."¹⁶⁶ This approach requires the decisionmaker to begin with his or her "considered judgments," defined as those in which our moral

¹⁶² *Id.* at 53.

¹⁶³ *See id.* at 455–56, 485 (AID); *id.* at 569 (IVF).

¹⁶⁴ *Id.* at 485. The Commission leaves open the possibility of "[c]riteria for determining access to assisted insemination services . . . [that do] not discriminate on the basis of social factors such as sexual orientation, marital status, or economic status" but suggests none itself. *Id.* The Commission's criteria for access to IVF reflects its conclusion that "[f]allopian tube blockage is the only indication for which IVF has been demonstrated effective." *Id.* at 556. The Commission thus suggests that medical criteria exclusively determine IVF access but that AID access should be permitted based on nonmedical criteria; the same lesbian couple who sought access to AID to achieve parenthood would be precluded from employing IVF to share parenthood by severing genetic and gestational motherhood.

¹⁶⁵ GLOVER, *supra* note 17, at 30.

¹⁶⁶ *Id.* The reflective equilibrium approach is described in JOHN RAWLS, A THEORY OF JUSTICE 19–22, 46–53, 252–55 (1971), *see also* HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 178 (1994) (discussing "Rawls's notion of wide reflective equilibrium").

capacities are most likely to be displayed without distortion.¹⁶⁷ Considered judgments may occur at all levels of generality, "from those about particular situations and institutions through broad standards and first principles to formal and abstract conditions on moral conceptions."¹⁶⁸ Reflective equilibrium describes the process by which these judgments are compared and refined. It entails:

formulating general principles which seem plausible, and then seeing to what extent their application fits our intuitive responses to particular cases. Where there is conflict between intuition and theory, we need to reconsider both. . . . The hope is that, by a process of mutual adjustment, we may reach a state of equilibrium, where we have a stable set of principles and of intuitions, which are in harmony with each other.¹⁶⁹

The reflective equilibrium ideal bears some resemblance to traditional methods of legal analysis. "In deciding hard cases, judges and lawyers make an effort to bring their convictions, both general and particular, into some coherent order, and this is one way that they think through legal problems."¹⁷⁰ But it is a more demanding process than that in which judges and legislators typically engage:

The search for reflective equilibrium places a high premium on, first, the capacity to develop a complete understanding of the basis for particular judgments and, second, the development of both abstract and general principles to account for those judgments. If reflective equilibrium could ever be obtained, we would have both horizontal and vertical consistency in our judgments.¹⁷¹

Perhaps because reflective equilibrium is an ideal beyond the typical aspirations of policymakers, the Working Group's actual deliberations appear to have been considerably less principled than the reflective equilibrium ideal would suggest. Indeed, it is not always easy to discern any principles against which the Group contrasted its intuitions. For example, in describing its deliberations on surrogacy, the Group's report notes that:

[s]ome members of the committee are opposed to surrogacy *in principle*, because of what the practice does to the surrogate mother. The invasion of her bodily integrity, the disappointment of any hopes for friendship with the family who receive the child, the psychological trauma of giving up the baby, and the possibility of regrets for the rest of her life, add up to

¹⁶⁷ TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 20 (4th ed. 1994) (quoting John Rawls, *The Independence of Moral Theory*, in 48 *PROC. & ADDRESSES OF THE AM. PHIL. ASS'N* 5 (1974-75)).

¹⁶⁸ *Id.* at 21 (quoting Rawls, *supra* note 167, at 8).

¹⁶⁹ GLOVER, *supra* note 17, at 30.

¹⁷⁰ SUNSTEIN, *supra* note 22, at 17-18; cf. JOEL FEINBERG, *SOCIAL PHILOSOPHY* 34-35 (1973).

¹⁷¹ SUNSTEIN, *supra* note 22, at 32.

a very strong case against surrogacy. There is also the possibility of ill effects on the surrogate's own family, particularly on her own children.

Other members of the committee . . . are sufficiently impressed by the *needs* of infertile couples to think that some cases of surrogacy are beneficial.¹⁷²

At first blush, the statement suggests that some members of the Group focused on principles while other members focused simply on needs. But a closer look at the statement reveals that those opposed to surrogacy *in principle* in fact relied upon an intuitive cost-benefit appraisal as the basis for their opposition rather than a principle of general application, like the anticommodification ethic. Nor is there any suggestion that costs and benefits were evaluated in any systematic way: possibilities, traumas, and needs are all thrown into the decision-making mix without any effort to prioritize or even to factually assess the merits of the various claims.¹⁷³ Thus, while the reflective equilibrium ideal represents an extraordinarily structured, ambitious methodology, the approach actually utilized by the Working Group seems extraordinarily ad hoc and unambitious.

This gap between the ideal and the real suggests that the reflective equilibrium model may be too demanding for use in real-world decisionmaking. It is not obvious that lawmakers — who will rarely bring identical moral principles and factual assumptions to the bargaining table — have either the time or the will to realize the Rawlsian ideal. Nor does it seem necessary that lawmakers achieve complete consensus at the level of high-order moral principles; certainly we do not demand that they reflect this deeply in other contexts.

C. *The Interpretive Approach*

1. *The Model and Its Advantages.* — The multi-principle and reflective equilibrium models pioneered by the Canadian and EU groups represent improvements over single-principle approaches. Both permit

¹⁷² GLOVER, *supra* note 17, at 76–77 (emphasis added).

¹⁷³ The approach utilized by the Working Group thus resembles a rough form of utilitarian calculus. Such an approach is doomed to fail because we generally lack the empirical data necessary to assess welfare gain or loss and to make interpersonal welfare comparisons. In most instances, it is thus impossible to precisely assess whether a rule that enhances the welfare of some while reducing the welfare of others serves utilitarian goals. See, e.g., John Broome, *Utilitarian Metaphysics?*, in INTERPERSONAL COMPARISONS OF WELL-BEING 70, 82–84 (Jon Elster & John E. Roemer eds., 1991); John A. Weymark, *A Reconsideration of the Harsanyi-Sen Debate on Utilitarianism*, in INTERPERSONAL COMPARISONS OF WELL-BEING, *supra*, at 255, 296–97. The Working Group's deliberations reflect this problem: members of the Committee could not agree on whether the harms to the surrogate mother and her family were outweighed by the welfare gains of the infertile couple because there is no way of measuring, aggregating, or comparing these costs and benefits. Utilitarian analysis also has difficulty with rights claims. See GLOVER, *supra* note 17, at 27; David Lyons, *Utility and Rights*, in ETHICS, ECONOMICS, AND THE LAW 107, 113–18 (J. Roland Pennock & John W. Chapman eds., 1982).

the decisionmaker to consider evidence on a range of issues and to balance competing concerns. The reflective equilibrium model, at least when represented as an ideal, also incorporates a consistency requirement that is desirable in order to ensure fair treatment of similarly situated individuals. But as actually practiced by the Canadian and EU panels, both approaches seem overly reliant upon intuition. As a result, neither can provide a strong justification for any particular policy choice. The interpretive approach that I advocate in this section offers a means of avoiding these various deficiencies.

Like the methods pioneered by the Canadian and EU policy groups, the interpretive approach eschews reliance upon a single grand theme in favor of a multi-principle dialectic. But rather than high-level abstractions, it relies on specific legal principles and policies. The methodology could perhaps be described as a form of legal casuistry; certainly it bears a strong resemblance to the traditional process of analogical reasoning utilized by judges.

The example of judicial decisionmaking helps to differentiate the interpretive approach from both the top-down methodology and the intuitive approaches used by the Canadian and EU groups. Consider the well-known case of *In re Baby M*,¹⁷⁴ which triggered much of the current statutory law on surrogacy. As the case wound its way through the courts, there was an outpouring of commentary that relied on a variety of approaches. Some commentators dealt with the issues from the perspective of one or another top-down theory; more specifically, one group urged that enforcement was mandated by procreational liberties,¹⁷⁵ while another urged that enforcement was precluded by the anticommodification principle.¹⁷⁶ Other commentators used an intuitive, cost-benefit analysis; some, for example, asserted that the agreement should not be enforced because surrogacy is exploitative

¹⁷⁴ 537 A.2d 1227 (N.J. 1988).

¹⁷⁵ See Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 1, 58-68 (Supp. 1 1986); Robertson, *Embryos & Families*, *supra* note 87, at 954-67; Thomas S. Bradley, Note, *Prohibiting Payments to Surrogate Mothers: Love's Labor Lost and the Constitutional Right of Privacy*, 20 J. MARSHALL L. REV. 715, 729-33 (1987).

¹⁷⁶ See, e.g., Radin, *supra* note 149, at 1921-36; Barbara Katz Rothman, *Surrogacy: A Question of Values*, CONSCIENCE, May/June 1987, at 1, 2-4.

and demeaning to women,¹⁷⁷ while others urged that it is demeaning to women *not* to enforce such agreements.¹⁷⁸

By contrast, the New Jersey Supreme Court approached the case from the perspective of existing law, which forbids baby sales.¹⁷⁹ If a contract to sell a baby is unenforceable, the court reasoned, why should it matter that the baby was conceived through artificial insemination? Both baby selling in its "traditional" form and the contract at issue in *Baby M* involve relinquishment of parental rights in return for a fee. The biological relationships established using AI and IVF are not different from those established when children are conceived coitally; nor are the children themselves discernably different. Because the court found no essential difference between the two types of transactions, it concluded that the contract at issue in *Baby M* was invalid.¹⁸⁰

I do not mean to suggest by this example that issues arising from technological conception can always be resolved by reference to current law, or even that the application of current law will be obvious.¹⁸¹ Indeed, another state court, analyzing the legality of a surrogacy agreement under its baby-selling laws, determined that surrogacy did not offend the baby-selling ban, both because the practice was not within the contemplation of the legislature at the time the statute was enacted and because, in its view, the sole purpose of the ban was to "keep baby brokers from overwhelming an expectant mother or the

¹⁷⁷ See e.g., COREA, *supra* note 15, at 213-45; Capron & Radin, *supra* note 146, at 36; see also Virginia Held, *Non-Contractual Society: A Feminist View*, in SCIENCE, MORALITY & FEMINIST THEORY 111, 113 (Marsha Hanen & Kai Nielsen eds., 1987) ("To see contractual relations between self-interested . . . individuals as constituting a paradigm of human relations is . . . to overlook or to discount in very fundamental ways the experience of women."); Cyril C. Means, Jr., *Surrogacy v. the Thirteenth Amendment*, 4 N.Y.L. SCH. HUM. RTS. ANN. 445, 445-47 (1987) (urging that surrogacy violates the Thirteenth Amendment prohibition on involuntary servitude).

¹⁷⁸ See, e.g., SHALEV, *supra* note 30, at 101-04, 165-66 (arguing in favor of the contractual approach and concluding that "[i]f we are to transform our patriarchal reproductive consciousness, we cannot evade the burden of our personal human agency"); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 76 (1988).

¹⁷⁹ See *Baby M*, 537 A.2d at 1240-46; see also *In re Adoption of McFadyen*, 438 N.E.2d 1362, 1364, 1365 (Ill. App. Ct. 1982) (addressing a claim by a party attempting to use the language of surrogacy — or "surrogate insemination" — in the context of coital conception, described in one pleading as "artificial insemination by means of a surrogate donor's penis").

¹⁸⁰ See *Baby M*, 537 A.2d at 1245-46. A few commentators have agreed with the reasoning of the New Jersey Supreme Court, but concluded that both types of sales should be legalized. See Epstein, *supra* note 132, at 2330-34 (agreeing that a commercial surrogacy contract represents "the sale of a half-interest in a baby" and concluding that all types of baby sales should be legal).

¹⁸¹ Professor Martha Field, in a thorough, book-length treatment of surrogacy that represents a notable exception to the intuitionist and single-principle approaches, explores in detail the possible applications of contract law, baby-selling prohibitions, adoption law, and AID statutes. See FIELD, *supra* note 30, at 75-125 (1988); see also Marsha Garrison, *Surrogate Parenting: What Should Legislatures Do?*, 22 FAM. L.Q. 149, 153-71 (1988) (applying baby-selling prohibitions, adoption law, and AID statutes to surrogacy).

parents of a child with financial inducements to part with the child."¹⁸²

While the *Baby M* court's analysis seems better reasoned,¹⁸³ my primary point here is simply that the process engaged in by judges offers an excellent model for a lawmaking heuristic in the area of technological conception. The disagreement between these courts comes down to a dispute about whether a surrogacy contract is sufficiently like "classic" instances of baby selling so as to fall under the baby-selling ban. In comparison to a conflict between, say, the claims of contract and noncommodification, this is a narrow disagreement that turns on the central purpose of a specific legislative enactment and offers the opportunity for close case comparisons instead of broad, theoretical disagreement. It is also subject to fact-based resolution; for example, the *Baby M* court rejected the argument that the surrogacy contract was simply for gestational services and thus did not offend the baby-selling ban based on the fact that the "surrogate" mother received no money unless and until she turned over her child.¹⁸⁴ In the end, reasonable people may still disagree, but their disagreement will be cabined and focused.

The interpretive model holds these same advantages over an intuition-based or cost-benefit assessment. The competing claims that surrogacy contract *enforcement* is demeaning to women and that surrogacy contract *nonenforcement* is demeaning to women represent broad value assertions rather than statements of fact. Such claims cannot be subjected to empirical analysis, nor can disagreements about them be resolved or even narrowed.

Because of these various advantages of the interpretive model, one or another variant of the methodology has found favor with several groups charged with developing policy in areas where feelings run high, but consensus on general principles is lacking. For example, a

¹⁸² *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211 (Ky. 1986).

¹⁸³ The Kentucky court's analysis is cursory and ignores the fact that surrogacy, like classic instances of baby selling, conditions a child's adoption on payment to her parent(s). The *Baby M* court entertained "no doubt whatsoever that the money [was] being paid to obtain an adoption," 537 A.2d at 1240, and rejected the argument that surrogacy did not produce harms of the sort the legislature intended to avert:

It strains credulity to claim that . . . surrogacy . . . amount[s] to something other than a private placement adoption for money.

. . . The evils inherent in baby-bartering are loathsome for a myriad of reasons. . . .

Baby-selling potentially results in the exploitation of all parties involved. . . . The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.

Id. at 1241-42 (citation omitted). For a similar analysis, see *R.R. v. M.H.*, 689 N.E.2d 790, 796-97 (Mass. 1998).

¹⁸⁴ See *Baby M*, 537 A.2d at 1241.

commission appointed by the federal government to develop guidelines for criminal sentencing ultimately rejected reliance upon both high theory and intuition in favor of an approach based heavily upon past practice.¹⁸⁵ The commission considered the possibility of devising guidelines based on a deterrence model of punishment; it also considered guidelines based on a "just deserts" principle: "Why didn't the Commission sit down and really go and rationalize this thing and not just take history?" In the words of the Commission's chairperson, "we couldn't. We couldn't because there are such good arguments . . . pointing in opposite directions."¹⁸⁶

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research similarly found that "the one thing [on which its members] could not agree . . . was *why* they agreed. . . . Instead of securely established universal principles, . . . [t]he locus of certitude in the commissioners' discussions . . . lay in a shared perception of what was *specifically* at stake in particular kinds of human situations."¹⁸⁷ In contrast to the Sentencing Commission, this group did not eschew reliance on principles altogether. Instead, "transcripts of the commission's deliberations show a constant back-and-forth movement from principle to case, and from case to principle."¹⁸⁸ The principles relied on by the group were not, however, broad high-level theories, but the more specific principles employed by bioethicists in resolving individual cases. The Commission's methodology thus strongly resembled the traditional process of judicial decisionmaking.

2. *Legislation or Litigation?* — If the process I have in mind strongly resembles that used by judges, would it be best simply to let judges make law on a case-by-case basis? The pace with which reproductive technology has advanced suggests caution before enacting a comprehensive regulatory scheme. But as we have seen, reproductive technology is now a "mature" area of medical practice and, certainly with respect to parental status, the legal issues are clear.

Legislation also holds many advantages over a case-by-case approach to law making. A statutory standard can provide clearer and more detailed notice of relevant legal requirements. Moreover, because judges can only decide the cases before them, they are incapable of

¹⁸⁵ See Stephen A. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28-31 (1988).

¹⁸⁶ SUNSTEIN, *supra* note 22, at 9; see also Breyer, *supra* note 185, at 31-32.

¹⁸⁷ ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 18 (1988).

¹⁸⁸ BEAUCHAMP & CHILDRESS, *supra* note 167, at 98.

charting a consistent policy over a broad range of legal issues.¹⁸⁹ For example, one court has recently ruled that sperm is heritable¹⁹⁰ while another tribunal, interpreting the federal Social Security statutes, has ruled that a child conceived after the sperm donor's death is not a "survivor" of the decedent.¹⁹¹ Both decisions represent plausible interpretations of the statutes in question, but they fail to provide a coherent policy on posthumous conception. Finally, legislators can and should take account of a range of practical concerns that judges will seldom be able to address: problems of feasibility, efficiency, noncompliance, and political acceptability can be addressed far more explicitly in shaping a legislative enactment than in crafting a judicial opinion. Because of these various advantages of a legislative approach, statutory standards to govern the legal parentage of technologically conceived children seem preferable to continued case-by-case adjudication.

An analogous case is that of life-sustaining medical technology. Techniques that sustain life even when the patient has no hope of regaining consciousness emerged contemporaneously with reproductive techniques aimed at creating life. The new end-of-life treatments likewise raised a host of new legal questions. In most states, these issues were dealt with on a case-by-case basis for a number of years before statutory enactments arose. But with end-of-life technology, statutory regulation — setting standards for so-called "advance directives,"¹⁹² requiring hospitals to promote such directives through

¹⁸⁹ See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 123-50 (1994) (analyzing the limitations of courts as policymaking entities); cf. *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980) ("Because the issue [of end-of-life decisionmaking for an incompetent] is fraught with complexity and encompasses the interests of the law, . . . medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum . . .").

¹⁹⁰ See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993).

¹⁹¹ See Joseph Wharton, "*Miracle*" *Baby Denied Benefits*, A.B.A. J., Feb. 1996, at 38. The Social Security Commissioner ultimately reversed the decision and awarded benefits. See *Girl to Get Benefits in Death of Father Before Conception*, N.Y. TIMES, Mar. 12, 1996, at A13.

¹⁹² States began to statutorily authorize "living wills" in the late 1970s; today, all 50 states and the District of Columbia have adopted living will statutes. See BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, *HEALTH LAW* 1106 (3d ed. 1999). At least 33 states and the District of Columbia have enacted legislation permitting individuals to create "durable powers of attorney" applicable to the termination of life-sustaining treatment (LST). See JUDITH AREEN, PATRICIA A. KING, STEVEN GOLDBERG, LAWRENCE GOSTIN & ALEXANDER MORGAN CAPRON, *LAW, SCIENCE AND MEDICINE* 1188 (2d ed. 1996). Of the states without statutes specifically authorizing durable LST powers, "all have general durable power of attorney statutes which could be interpreted to authorize a durable power of attorney for health care"; in a number of these states, court decisions or attorney general opinions specify that the general statute applies to LST. *Id.*

patient education,¹⁹³ authorizing family members to make medical care decisions when advance directives are unavailable¹⁹⁴ — now occupies much of the field in which case-by-case decisionmaking was formerly necessary.¹⁹⁵ There is every reason to believe that the field of reproductive technology would profit from a similar approach. Indeed, it is ironic that legislatures have devoted so much attention to the regulation of dying, while conception is in most states subject to virtually no statutory law.

3. *The Value and Meaning of Consistency.* — As we have seen, technological conception raises a number of parental status questions; a related issue, like that which arises in the case of adoption, concerns the technologically conceived child's right to information about his or her genetic progenitors. In developing new law applicable to these various issues, the interpretive model requires consistency with current law, public policy, and public values. Once these requirements have been met, the model permits a more flexible approach to legislation that takes account of the various parties' interests as well as practical and political constraints.

Consistency may, at first blush, seem too narrow a virtue for policymaking in an area that, like technological conception, is both novel and controversial. After all, pursuit of consistency "can require us to support legislation we believe would be inappropriate in the perfectly just and fair society and to recognize rights we do not believe people would have there."¹⁹⁶ A consistent result will not necessarily be an ideal result, or one that we would choose if we were beginning life in a brave new world without precedents or past practices.

Clearly, it is one or another vision of the ideal that has stimulated most of the global theorists writing about technological conception. Professor Schultz, for example, who has eloquently made the case for a contract-based approach to parentage determination, has also eloquently urged contract as a governing principle in other areas of family life such as marriage;¹⁹⁷ Schultz seems to prefer the world of private ordering and

¹⁹³ The Patient Self-Determination Act was passed as part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. The key provisions are contained in 42 U.S.C. §§ 1395cc(a)(1)(Q), 1395mm(c)(8), 1396a(a)(57)–1396a(a)(58), 1396a(w) (1994). For a summary of the Act's requirements, see FURROW, GREANY, JOHNSON, JOST & SCHWARTZ, *supra* note 192, at 1114–15.

¹⁹⁴ See FURROW, GREANY, JOHNSON, JOST & SCHWARTZ, *supra* note 192, at 1115–17 (describing current family consent statutes).

¹⁹⁵ See CURRAN, HALL, BOBINSKI & ORENTLICHER, *supra* note 14, at 626 (reporting that "[a]bout half of the states" now have statutes governing termination of medical treatment for patients without advance directives).

¹⁹⁶ DWORKIN, *supra* note 22, at 176–77 (discussing the "integrity of the law").

¹⁹⁷ See Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982).

promise keeping offered by contract law to the world of responsibility and status offered by family law. For commentators like Schultz, technological conception offers the opportunity to achieve the ideal in at least one category of cases.

But by adopting a new ideal in one restricted case category, the policymaker risks what Professor Ronald Dworkin has aptly described as “checkerboard” law:

Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this “strict” liability on manufacturers of automobiles but not on manufacturers of washing machines? Do the people of Alabama disagree about the morality of racial discrimination? Why should their legislature not forbid racial discrimination on buses but permit it in restaurants?¹⁹⁸

Even those of us who strongly support one side in the debate over strict liability or racial discrimination would typically reject compromises “that treat similar accidents or occasions of racial discrimination . . . differently on arbitrary grounds.”¹⁹⁹ We say that “a state that adopts these internal compromises is acting in an unprincipled way” and that “[t]he state lacks integrity because it must endorse principles to justify part of what it has done that it must reject to justify the rest.”²⁰⁰

Policymakers may find the claims of contract — or reproductive liberty or the anticommodification ethic — sufficiently appealing that they will want to enhance its role in parentage law. But such a shift should be made in all similarly situated cases and not restricted to an arbitrary subset. Checkerboard rulemaking violates the ethical norm that like cases receive like treatment; it denies “what is often called ‘equality before the law.’”²⁰¹

A consistency requirement does not demand that the law remain static. It merely requires the policymaker to follow a coherent, uniform approach to legal change. In recent years, many of family law’s most fundamental assumptions have been challenged; commentators have urged courts and legislatures to rethink even such basic categories as marriage and the family unit.²⁰² These challenges to tradition reflect recent shifts in our family life and the pluralistic nature of our society, which must accommodate differing visions of the good if it is to thrive. Family law

¹⁹⁸ DWORKIN, *supra* note 22, at 178.

¹⁹⁹ *Id.* at 179.

²⁰⁰ *Id.* at 183–84.

²⁰¹ *Id.* at 185.

²⁰² See WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* (1996) (arguing in favor of legal recognition of same-sex unions); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 101–25 (1995) (arguing that the law should recognize the mother-child dyad as the basic family form).

has repeatedly demonstrated the capacity to respond to such challenges; a consistency requirement demands only that it do so in a principled way.

Proponents of novel parental status rules for technological conception have typically assumed, of course, that the new methods of baby making are sufficiently different from sexual conception to justify a new approach. And technological conception does clearly differ from sexual conception in terms of *mechanics* — sperm and ovum are combined in different ways. But washing machines also differ from automobiles, and restaurants from buses. We want to treat washing machines like automobiles for purposes of a manufacturer liability law because the values and policy goals that determine the choice of a liability rule apply equally to both washing machines and automobiles; we want to treat restaurants like buses for purposes of a racial discrimination law for the same reasons. “Even though we recognize that there are, in a literal sense, differences of one kind or another, we suppress these differences or inexactitudes, because the points of convergence are far more important . . . than the points of divergence.”²⁰³

For purposes of a parental status rule, the differences between sexual and technological conception are like the differences between restaurants and buses — they are irrelevant to the values and policy goals that underlie the choice of a decision-making standard. Parentage law regulates the formation of family *relationships*, not the mechanics of conception. The law has never cared whether sperm and ovum met in a fallopian tube or in the uterus; there is no obvious reason why it should care if sperm and ovum meet in a petri dish. What matters are the relational interests that ultimately result. And there is simply no evidence that technological conception is creating genuinely new family forms.

Consider the case of Louise Brown, the first child conceived through IVF. In an interview given at age nineteen, Louise noted that she was “just an ordinary girl.”²⁰⁴ Of course, Louise’s birth was not ordinary; given her conception in a petri dish, it was world-wide news. Indeed, the very fact that Louise was interviewed nineteen years later is testament to the extraordinariness of her birth. But while Louise was conceived in vitro, she was conceived using the sperm and ova of her married parents who had failed to conceive a child sexually, parents who planned to raise Louise after her birth and who in fact did so. Louise’s parental relationships were thus extraordinarily ordinary.

²⁰³ Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1218 (1998). Professor Schauer explains that:

[C]laims of identity, likeness, exactness, and sameness . . . are not ordinarily claims of literal equality in all respects, or even in all potentially relevant respects, but rather they are claims that people *should be* treated the same in some number of respects because they are the same in *some*, but clearly not in all, respects.

Id. at 1219.

²⁰⁴ Ruth Deech, *Infertility and Ethics*, 9 CHILD & FAM. L.Q. 337, 338 (1997).

Louise may have felt particularly wanted because her parents went to such lengths to produce her, but there is no reason to suppose that the relationship of Louise and her parents would in other respects differ from those of other married couples and their sexually conceived children. In cases like Louise Brown's, no commentator has suggested that legal parentage should be determined any differently than it is in cases of sexual conception. And because the end result — the parent-child relationship — is the same as that of sexual conception, consistency demands similar treatment.

Of course, many cases of technological conception involve donated eggs, sperm, or both; women who employ AID and IVF may also be single.²⁰⁵ It is in these cases that reproductive rights and contract advocates have argued for new legal approaches. But what distinguishes these cases from that of Louise Brown is not the use of technology — identical reproductive techniques are involved — but the use of genetic material from an individual outside the family that plans to raise the child. Biological “outsiders” are hardly a novelty, however; family law regularly contends with marital infidelity,²⁰⁶ casual sex, and “parents” whose relationships derive from nurture rather than nature. If mechanics are irrelevant in determining the parentage of Louise Brown, it is hard to see why they should be relevant in these outsider situations.

Take the case of Erez, an African-American toddler recently profiled in the *New York Times Sunday Magazine*. Erez's family includes his gay, male, white parents (one of whom adopted the toddler when “well past 40” and before he met the other) plus “a company of extras,” including “gay uncles, career-track women, stranded grannies, and loving if hired hands” who baby-sit and serve as a larger, extended “shadow family.”²⁰⁷ Somewhere in the background, of course, are Erez's biological parents, who relinquished him for adoption. Erez's family — biological, adoptive, and functional parents with some racial and gender anomalies thrown into the mix — represents a genuine departure from our traditional family norms. But that departure is not dependent on technology. Nor is there evidence that the families which arise from technological conception involve more variable or profoundly different relationships than those which arise from sexual conception, adoption, and shared family life.

²⁰⁵ See *supra* note 9.

²⁰⁶ Experts variously estimate the rate of nonmarital paternity among births to married women. See Serge Brédart & Robert M. French, *Do Babies Resemble Their Fathers More Than Their Mothers? A Failure to Replicate Christenfeld and Hill (1995)*, 20 *EVOLUTION & HUM. BEHAV.* 129, 130-31 (1999) (summarizing research reports and noting estimates of extramarital paternity of 6% to 30% in southern England and 10% in rural Michigan).

²⁰⁷ Jesse Green, *Orbiting the Son*, *N.Y. TIMES*, Aug. 8, 1999, § 6 (Magazine), at 66.

Because the law of parental status regulates relationships and the same relational possibilities are available in cases of technological and sexual conception, the mechanical differences between these methods of conception should not be determinative. To fashion novel parental status rules for technological conception alone risks outcomes reliant on discordant values that have been rejected for the rest of our families. Indeed, disparate rules may raise serious equal protection problems. For example, in resolving the parentage of a child born through a gestational surrogacy arrangement, one court recently held that it was bound, under the Equal Protection Clause, to determine motherhood under standards consistent with those applied to fatherhood.²⁰⁸ Given that parenthood is a constitutionally protected status,²⁰⁹ differences in parental status rules should be justified by more than differences in conception mechanics.

Current law governing the status of those who conceive sexually and those who adopt thus becomes crucially important: unless there is a justifiable basis for distinguishing technological conception from these other methods of achieving parentage, fairness demands that status be determined by similar legal standards.

III. THE LAW OF PARENTAL STATUS: WHO IS A LEGAL PARENT? HOW IS PARENTAGE DETERMINED?

Our legal tradition has long determined parentage based on both biological and social factors.²¹⁰ When assigning parental status to someone other than a biological progenitor, courts and legislatures have relied on several policy goals. The most important of these aims — today as much as in earlier times — has been ensuring that children have at least one, and preferably two, legal parents who are responsible for their care and support. This policy goal has been paramount because it has been thought to serve the interests of both children and the public. Thus, although concerned with parental rights as well as obligations, the law of parentage ultimately reflects legislative and judicial judgments about children's physical and emotional needs. Parentage law also reflects public fiscal concerns, which have favored rules ensuring, to the extent possible, that parents rather than the

²⁰⁸ See *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994). For criticism of *Soos*, see Alexander Morgan Capron, *Horton Hatches the Egg*, 25 HASTINGS CENTER REP. 30 (1995).

²⁰⁹ See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²¹⁰ See WAGNER, *supra* note 146, at 201 (noting that “[i]n both the recent and distant past, the primary tension within the law of the family has been between rights and duties arising from genetic and gestational relationships . . . and a perceived need to ground rights and duties in the external social form of the family”); Schiff, *supra* note 111, at 532 (noting that the “weight that the law accords to biology is influenced heavily by favored social policies, such as the desirability of the nuclear family and the importance to the child of having nurturing, committed parents”).

public bear the cost of childrearing. Finally, parentage law reflects current family ideology, which may support rules promoting some family forms over others.

A. *The Marital Presumption of Legitimacy*

The primary rule governing the parentage of children born to a married woman is the marital presumption of legitimacy. While the common law permitted rebuttal of the presumption only by proof that a husband was incapable of procreation or had no access to his wife during the relevant period,²¹¹ the presumption is typically rebuttable today in a wider range of circumstances.²¹² Because sophisticated blood and DNA tests now make it possible to prove or disprove paternity with a very high degree of reliability,²¹³ the rules governing when and by whom the presumption may be rebutted will determine the outcome of most cases.

In order to protect the marital family, many states severely restrict a putative father's opportunity to assert his paternity. For example, the Uniform Parentage Act, adopted in nearly half of the states, permits rebuttal of the marital presumption by clear and convincing evidence but grants standing to commence such an action only to the

²¹¹ See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442-45 (1765) ("[G]enerally, during the coverture access of the husband shall be presumed, unless the contrary can be shewn; which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, *praesumitur pro legitimatione*."). Under Lord Mansfield's Rule, first enunciated in *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777), neither spouse was permitted to testify to nonaccess by the husband. The source of restrictions on rebutting the presumption was the desire to protect children from the stigma and legal disadvantages of illegitimacy, coupled with the hope of promoting marital harmony, "a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate." Michael H. v. Gerald D., 491 U.S. 110, 125 (1989); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 202 (1985).

²¹² See LESLIE J. HARRIS, LEE E. TEITELBAUM & CAROL A. WEISBROD, FAMILY LAW 1077 (1996). In many states, the presumption has been codified. Section 4 of the Uniform Parentage Act restates the presumption; it, or a close variation, has been adopted in 17 states. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.02A cmt. d, reporter's note at 82 (Council Draft No. 5 1998) [hereinafter ALI PRINCIPLES] (listing states). The more recent Uniform Status of Children of Assisted Conception Act (USCACA), USCACA § 3, 9B U.L.A. 195-96 (1999), also incorporates the presumption by specifying that the husband of a woman (other than a surrogate mother) who bears a child through assisted conception is deemed to be the father if he fails to challenge his paternity within two years after discovering the child's birth. See *id.* Older state statutes incorporating the presumption of legitimacy are collected in Jean E. Goldstein, Recent Case, "Children Born of the Marriage" — *Res Judicata Effect on Later Support Proceedings*, 45 MO. L. REV. 307, 308 n.5 (1980).

²¹³ See David H. Kaye, *DNA Paternity Probabilities*, 24 FAM. L.Q. 279, 292-304 (1990); D.H. Kaye, *Presumptions, Probability and Paternity*, 30 JURIMETRICS J. 323, 337-42 (1990); Jeffrey W. Morris & David W. Gjertson, *The Scientific Status of Parentage Testing*, in 1 MODERN SCI. EVIDENCE § 19-2.0 (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, eds. 1997).

child, the mother, and her husband unless, during the child's minority, the putative father has "receive[d] the child into his home and openly [held] out the child as his natural child";²¹⁴ the presumption may be rebutted only "if the action is brought within a reasonable time after obtaining knowledge of relevant facts."²¹⁵ State courts have upheld such restrictions against constitutional challenges,²¹⁶ and, in *Michael H. v. Gerald D.*,²¹⁷ a plurality of the Supreme Court held that the states may prefer the interests of the mother's husband to those of the biological father, even if the biological father has lived with the mother and their child in a family unit.²¹⁸

Even when a paternity challenge is brought by a party with standing, courts have typically avoided a finding of husband nonpaternity when it would conflict with the child's interests. There are any number of cases in which divorce courts, usually relying on estoppel or laches principles, have refused to permit the mother's husband to litigate the paternity issue²¹⁹ or denied the mother the opportunity to contest the presumption when she had acquiesced in her husband's establishment of a paternal relationship with her child;²²⁰ following divorce, courts have relied on *res judicata* or collateral estoppel principles to bar subsequent paternity contests.²²¹ Judges have also struck down spousal (non)paternity agreements that conflict with the child's inter-

²¹⁴ UNIF. PARENTAGE ACT §§ 4, 6(b), 9B U.L.A. 298-99, 302 (1973).

²¹⁵ *Id.* § 6(a)(2), 9B U.L.A. 302.

²¹⁶ See, e.g., *In re Paternity of C.A.S.*, 468 N.W.2d 719, 727 (Wis. 1991) ("The best interests of the children are the ultimate and paramount considerations in this case, and reflect a strong public policy of this state."); *A v. X*, 641 P.2d 1222 (Wyo. 1982) ("[A] child has a right to legitimacy and that right is one the State is bound to protect during minority.") (internal quotation marks omitted), *cert. denied*, 459 U.S. 1021 (1982).

²¹⁷ 491 U.S. 110 (1989) (plurality opinion).

²¹⁸ See *id.* at 129 ("Where . . . the natural father's unique opportunity [to establish a parental relationship] conflicts with the similarly unique opportunity of the husband of the marriage[,] it is not unconstitutional for the State to give categorical preference to the latter.")

²¹⁹ See generally ALI PRINCIPLES, *supra* note 212, § 3.02A cmt. d, reporter's note at 83 (citing cases and noting that "[m]ost states find husbands estopped from challenging paternity under certain facts").

²²⁰ See *In re Marriage of Gallagher*, 539 N.W.2d 479, 482 (Iowa 1995) (holding that a mother's husband might be able to claim custody of a two-year-old child with whom he had developed a parent-child relationship, in which he had learned that another man was the child's father during the pendency of the divorce action); *In re Marriage of Ross*, 783 P.2d 331, 338-39 (Kan. 1989) (holding that a court may not order blood tests to determine paternity in an action brought by a mother when disruption of the child's established relationship with the mother's former husband was not in the child's interests); *Pettinato v. Pettinato*, 582 A.2d 909, 912-13 (R.I. 1990) (holding a mother estopped from challenging her husband's paternity, because she had told him that he was the child's father); *In re Marriage of D.L.J. & R.R.J.*, 469 N.W.2d 877, 879-81 (Wis. Ct. App. 1991).

²²¹ See Goldstein, *supra* note 212.

ests.²²² The combined effect of the marital presumption and these various bases for avoiding a nonpaternity finding is that children of married couples will almost invariably have two parents with care and support obligations.

B. Nonmarital Parenting

Under the common law, concern for children's interests was tempered by the risk of erroneous paternity adjudications²²³ and the desire to channel childbearing within the confines of marriage. The result was rules that penalized nonmarital children and rigidly cabined the paternity claim. As late as the 1960s, most states denied a nonmarital child the right to inherit from his or her father, the right to bear the father's name, and the right to public benefits based on the parental relationship; paternity actions were also subject to very short statutes of limitation and evidentiary restrictions.²²⁴ Unmarried fathers had no more rights than did their children. Consent of the child's mother alone was sufficient to permit the child's adoption, and paternity statutes frequently provided the unwed father with no opportunity to establish his paternity.²²⁵

Beginning in the late 1960s, the Supreme Court initiated wholesale revision of these laws. In a lengthy series of decisions, the Court struck down "nearly all forms of legal discrimination against nonmarital children."²²⁶ During the same period, the Court established new rights for unmarried fathers. In *Stanley v. Illinois*,²²⁷ it held that an unmarried father was entitled to a hearing on his fitness as a parent before his children could be placed in state custody.²²⁸ And, in a series of later cases pitting unmarried fathers against mothers' husbands, the Court ruled that a father may block an adoption by a stepparent if he

²²² See, e.g., *Casbar v. DiCanio*, 666 So. 2d 1028, 1030 (Fla. Dist. Ct. App. 1996) ("[P]arents may not contract away the rights of their children to support.")

²²³ See Richard O. Arther & John E. Reid, *Utilizing the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 213, 215, 217 (1954) (reporting that in a six-year study of 312 disputed paternity cases in Chicago, 57% of the witnesses who had testified to having intercourse with the complainant for the purpose of establishing that the mother had had multiple sexual partners during the period of conception admitted having lied, while 41% of mothers admitted having lied in denying intercourse with another man).

²²⁴ See CLARK, *supra* note 123, at 149-72 (describing common law rules and Supreme Court decisions on illegitimacy).

²²⁵ During this period, "the law hardly considered the possibility that an unmarried father might seek to assert paternity rather than escape it, and procedures for such actions were often not available." ELLMAN, KURTZ & SCOTT, *supra* note 74, at 1063.

²²⁶ HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 293 (4th ed. 1998).

²²⁷ 405 U.S. 645 (1972).

²²⁸ See *id.* at 658.

"demonstrates a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child."²²⁹

The Supreme Court's decisions on nonmarital parenting demonstrated that paternity law could constitutionally focus on children's interests and allow a minor child to assert a paternity claim at any time under any circumstances but permit an unmarried father to block his child's opportunity to experience two-parent care only after demonstrating a willingness to offer the child a meaningful relationship himself. In recent years, paternity law has increasingly conformed to the child-focused pattern laid out by the Supreme Court. In most states, an unmarried father may establish his paternity without limitation if the mother is unmarried and plans to raise the child alone,²³⁰ but if the mother marries and her husband is prepared to adopt, the father must demonstrate the ability to provide his child with a meaningful relationship to retain his parental rights. And, in many states, if the mother consents to the child's adoption by others, only willingness to assume custody and all related obligations will suffice to ensure an unmarried father's retention of parental status.²³¹

At the same time, both the state and federal governments have enacted laws to facilitate paternity establishment by children and their mothers. For example, federal legislation now mandates paternity statutes of limitation extending to 18 years after the child's birth, genetic testing in contested paternity cases,²³² and streamlined case processing.²³³ State legislatures have been active in pursuit of similar goals.²³⁴

²²⁹ *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (internal quotation marks omitted)); see also *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that a statute permitting an unwed mother, but not an unwed father, to prevent a child's adoption simply by withholding her consent violated the Equal Protection Clause). For commentary on the rights of unmarried fathers and the Supreme Court case law, see Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984); Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991); and Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995).

²³⁰ See UNIF. PARENTAGE ACT §§ 4, 6, 9B U.L.A. 298-99, 302-03 (1973).

²³¹ See ELLMAN, KURTZ & SCOTT, *supra* note 74, at 1402 ("If the mother consents to adoption and prospective adoptive parents are ready to undertake responsibility for the child, the father generally must demonstrate that he is ready to step in to assume full parental responsibilities.").

²³² See Family Support Act of 1988, Pub. L. No. 100-485, § 111, 102 Stat. 2343, 2349 (1988).

²³³ For a detailed description of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 paternity requirements, see Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 532-35 (1996).

²³⁴ Some states have recognized "in-hospital" paternity establishment, which researchers have found can significantly improve paternity establishment rates. See Freya L. Sonenstein, Pamela A. Holcomb & Kristin S. Seefeldt, *Promising Approaches to Improving Paternity Establishment Rates at the Local Level*, in CHILD SUPPORT AND CHILD WELL-BEING 31, 52 (Irwin Garfinkel, Sara S. McLanahan & Philip Robins eds., 1994). Other states have allowed paternity es-

Legislative interest in paternity establishment has been driven by a swift and substantial rise in nonmarital parenting; almost a third of U.S. births now occur outside of wedlock, as compared to 11% as recently as 1970.²³⁵ This trend troubled policymakers for two reasons. First, children in single-parent households have a higher rate of poverty and welfare dependence than any other segment of the American population.²³⁶ Second, as compared to their peers in two-parent families, children in single-parent households are more likely to experience serious childhood and adult problems, including poor health, delinquency, behavioral problems, low educational attainment, and early childbearing.²³⁷ Concern about the impact of single parenting on children and its corollary public costs has prompted not only paternity law reform, but also comprehensive revision of child support standards and enforcement mechanisms.²³⁸

Although the drive to provide nonmarital children with two-parent families thus stems in part from public fiscal concerns, it is also connected to a broader movement aimed at providing children of separated parents with some of the less tangible benefits available to those in intact families. This movement has been fueled by evidence suggesting that, although the lower incomes of single parents appear to be the most important factor in producing poor outcomes for their children,²³⁹ lower quality parent-child relationships that result from parental conflict, stress, and absence, also play a role.²⁴⁰ It also reflects a

tablishment by affidavit or moved the voluntary paternity establishment process out of the courts altogether. See KRAUSE, ELROD, GARRISON & OLDHAM, *supra* note 226, at 1009.

²³⁵ See *supra* note 9.

²³⁶ See 1998 STATISTICAL ABSTRACT, *supra* note 9, at 478 tbls.758-59, 480 tbl.762; see also FRANK LEVY, DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION 185 (1987).

²³⁷ For summaries of the research, see DONALD J. HERNANDEZ, AMERICA'S CHILDREN: RESOURCES FROM FAMILY, GOVERNMENT, AND THE ECONOMY 58-64 (1993); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 19-38 (1994); S. Wayne Duncan, *Economic Impact of Divorce on Children's Development: Current Findings and Policy Implications*, 23 J. CLINICAL CHILD PSYCHOL. 444, 451-53 (1994); and Sara McLanahan, *The Consequences of Single Motherhood*, in SEX, PREFERENCE, AND FAMILY 306, 307-11 (David M. Estlund & Martha C. Nussbaum eds., 1997).

²³⁸ See Legler, *supra* note 233, at 527-28 (explaining changes in paternity establishment law and noting that "[p]erhaps the major catalyst for change in paternity law has been the change in social perspective on the importance of paternity establishment. As policymakers began to pay attention to the mushrooming number of out-of-wedlock births during the 1980s, [establishing paternity was seen as a way to alleviate some of the poverty [associated with single parenting] because it opened the door to the possible receipt of child support").

²³⁹ See McLANAHAN & SANDEFUR, *supra* note 237, at 3 (reporting that "[l]ow income — and the sudden drop in income that often is associated with divorce — is the most important factor in children's lower achievement in single-parent homes, accounting for about half of the disadvantage"); see also *id.* at 79-94; Duncan, *supra* note 237, at 444 (reviewing research).

²⁴⁰ See, e.g., McLANAHAN & SANDEFUR, *supra* note 237, at 95-115 (reviewing evidence); Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, THE FUTURE OF

growing consensus that it is "the right of every child . . . to have the ties of nature maintained, wherever possible, with the parents who gave it life."²⁴¹ Both the popular press²⁴² and policymakers²⁴³ cite fatherlessness as an important public concern, and family law has increasingly "focus[ed] on [filling] children's 'need' for continuing close relationships with both parents."²⁴⁴

Many of the new laws focus on providing children whose parents live apart with more active and less conflict-ridden relationships. All states, for example, now permit joint custody following divorce,²⁴⁵ and a few have established presumptions in favor of it.²⁴⁶ Some states have mandated that some or all divorcing couples with children participate in parent education programs.²⁴⁷ Others have established mediation programs aimed at reducing custody litigation and fostering amicable settlements.²⁴⁸ Still others have enacted "friendly parent"

CHILDREN, Spring 1994, at 143, 143 (reviewing the evidence and concluding that children's adjustment to divorce depends on a number of factors, including "the amount and quality of contact with noncustodial parents, the custodial parents' psychological adjustment and parenting skills, the level of interparental conflict that precedes and follows divorce, the degree of economic hardship to which children are exposed, and the number of stressful life events that accompany and follow divorce"); Michael E. Lamb, *Fathers and Child Development: An Introductory Overview and Guide*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 1, 11-13 (Michael E. Lamb ed., 3d ed. 1997) (reviewing evidence).

²⁴¹ *In re K.*, 1 W.L.R. 431, 437 (1990) (interpreting speeches in the House of Lords).

²⁴² See, e.g., DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 1 (1995) (arguing that "[f]atherlessness is the most harmful demographic trend of this generation").

²⁴³ See, e.g., YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 18 (Robert I. Lerman & Theodora J. Ooms eds., 1993) (quoting a former Secretary of the U.S. Department of Health and Human Services as saying that "the greatest family challenge of our era is fatherhood").

²⁴⁴ Scott Coltrane & Neal Hickman, *The Rhetoric of Rights and Needs: Moral Discourse in the Reform of Child Custody and Child Support Laws*, 39 SOC. PROBS. 400, 402 (1992); see also CARBONE, *supra* note 126 (describing the trend toward joint, egalitarian parenthood).

²⁴⁵ Although joint custody is permissible in all states, it is still disfavored in a few. See, e.g., *Hildebrand v. Hildebrand*, 477 N.W.2d 1, 5 (Neb. 1991) (holding that courts must conduct a hearing to determine whether joint custody is in the best interests of the child even if parents have agreed to it).

²⁴⁶ See, e.g., CAL. FAM. CODE § 3080 (West 1994); CONN. GEN. STAT. ANN. § 46b-56a(b) (West 1995); KAN. STAT. ANN. § 60-1610(a)(4)(A) (1994); N.M. STAT. ANN. § 40-4-9.1 (Michie 1999).

²⁴⁷ See Marcy L. Wachtel, *Divorce Counseling: For the Sake of the Child*, LEGAL TIMES, May 24, 1993, at 29 (listing California, Connecticut, Florida, Georgia, Indiana, Minnesota, and Texas as having mandatory parent education programs); Junda Woo, *More Courts Are Forcing Couples to Take Divorce-Education Class*, WALL ST. J., Oct. 1, 1993, at B8 (noting that some divorce courts in Kentucky, Illinois, New Jersey, Ohio, Georgia, and elsewhere mandate divorce-education lessons).

²⁴⁸ Some states now mandate pretrial mediation for certain types of child-related disputes. See, e.g., CAL. FAM. CODE § 3178 (West 1999) (mandating mediation for disputes over parenting plans, custody, and visitation); FLA. STAT. ANN. § 44.102(2)(b) (West 1998) (mandating mediation under some circumstances for custody, visitation, or other parental responsibility disputes); NEV.

provisions that require courts deciding custody cases to consider the ability of each parent to encourage and support the child's relationship with the other.²⁴⁹ Although these various measures are diverse, they exhibit a common emphasis on ensuring that children have meaningful care, as well as financial support, from both of their parents.²⁵⁰

The net result of these various reforms is to extend the two-parent model, once applied only to marital parenting, to the separated family as well. This shift reflects the fact that, although marriage is increasingly seen as a matter of "personal choice and private bargaining," the parent-child relationship is now seen as a matter of public concern: "[T]he state has become more willing to enforce public expectations of parents [and to promote a] revitalized definition of parenthood [that] turn[s] on the newly emerging norms of egalitarian parenting and parental obligation."²⁵¹

C. Adoption Law

While the purpose of ancient adoption laws was to meet the needs of would-be adoptive parents,²⁵² American adoption laws have perennially been structured to meet the needs of adoptive children.²⁵³ Al-

REV. STAT. ANN. § 3.500 (Michie 1998) (mandating mediation under some circumstances for custody and visitation disputes). Some commentators have argued that mandatory mediation is injurious to the interests of mothers and children. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 766 (1988) (arguing that, in mediation, "allegations of mistreatment, abuse, or neglect on the part of husbands toward either their wives or children are trivialized, masked, or lost amid the psychological rhetoric that reduces mothers' desires to have custody and control of their children to pathology").

²⁴⁹ See, e.g., COLO. REV. STAT. § 14-10-124 (1987); ILL. COMP. STAT. ANN. § 750 para. 5/602(a)(7) (Smith-Hurd 1993); IOWA CODE ANN. § 598.41(3) (West 1996). For an argument in favor of friendly parent provisions, see Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 283-84, 288 (1987).

²⁵⁰ See ELLMAN, KURTZ & SCOTT, *supra* note 74, at 673 (noting that "[t]he continued involvement of both parents in their children's lives after divorce is expressed as a policy goal under many custody laws"); June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1145 (1999) ("The overwhelming thrust of American family law has been the effort to secure both parents' continuing involvement with their children.").

²⁵¹ CARBONE, *supra* note 126, at 197-98. Some commentators have argued that the current policy emphasis on two-parent care is misguided. See, e.g., FINEMAN, *supra* note 202, 101-25 (arguing that the mother-child dyad should be considered the basic family form and that current family policy reinforces patriarchal values); Linda McClain, "Irresponsible" *Reproduction*, 47 HASTINGS L.J. 339, 372-419 (1996) (critiquing recent legislative initiatives aimed at promoting two-parent care and reducing single mothers' welfare dependence). In this article, I take no side in this debate.

²⁵² For example, in ancient Rome, adoptions were often arranged to provide an heir to perpetuate the family line. See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 446 (1972).

²⁵³ Because the common law did not permit adoption, U.S. adoption laws are entirely statutory. See *id.* at 443; Louis Quarles, *The Law of Adoption — A Legal Anomaly*, 32 MARQ. L. REV. 237,

though early adoption laws typically contained no requirements for an adoption other than the consent of the child's biological parents and a judicial finding that the adoption was "fit and proper,"²⁵⁴ reports of abuses produced detailed regulatory requirements, including prehearing investigations of would-be adoptive parents by child welfare officials, sealed records and, in some states, trial placements with further investigation before finalization of the adoption order.²⁵⁵ Adoption agencies, which in many states were statutorily designated as the only source of adoptive children, often imposed additional requirements: all stressed a stable marital relationship, and many refused applications from would-be parents over a designated age.²⁵⁶

Today, changed social mores coupled with shifts in the number and characteristics of children available for adoption²⁵⁷ have altered many aspects of adoption practice. Independent (nonagency), international, transracial, and older child adoptions have all increased markedly,²⁵⁸ while secrecy is increasingly replaced with open records and even open

237 (1949). The first American adoption statutes were enacted in Texas and Massachusetts in the mid-nineteenth century; by 1929, every state had one. See KADUSHIN & MARTIN, *supra* note 125, at 535.

²⁵⁴ The "fit and proper" requirement was contained in the Massachusetts adoption law, which became a model for many of the other state adoption laws passed during or shortly after the Civil War. See KADUSHIN & MARTIN, *supra* note 125, at 535.

²⁵⁵ For representative examples of reports on adoption abuses, see 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 140-42, 147-49 (Robert H. Bremner ed., 1971) (providing excerpts from descriptions of early twentieth-century adoption abuses and legislation mandating investigatory procedures). In 1891, Michigan became the first state to require investigations of prospective adoptive parents. See *id.* at 147. By 1938, laws requiring a prehearing investigation and report by a local child welfare agency had been enacted in twenty-four states. See KADUSHIN & MARTIN, *supra* note 125, at 536. A sealed record requirement was first introduced in Minnesota in 1917 and soon became universal; the requirement was apparently urged by social workers in child-placing agencies, who believed that assuring biological and adoptive parents' anonymity would both foster the integration of the child into the adoptive family and prevent the stigma of illegitimacy from tainting the child's future. See Burton Z. Sokoloff, *Antecedents of American Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 17, 21-22.

²⁵⁶ See David B. Harrison, Annotation, *Age of Prospective Adoptive Parent as Factor in Adoption Proceedings*, 84 A.L.R.3D 665 (1978).

²⁵⁷ Between 1970 and 1986 the number of nonrelative adoptions in the United States declined by approximately 40%. See Kathy S. Stolley, *Statistics on Adoption in the United States*, THE FUTURE OF CHILDREN, Spring 1993, at 26, 28-29, fig.1.

²⁵⁸ Experts estimate that independent adoptions — in which the birth parents either make the placement themselves or use an intermediary, such as a doctor or lawyer, to find adoptive parents — now constitute approximately 30% of nonrelative adoptions. See McDermott, *supra* note 147, at 151 n.3. International adoptions now comprise one-fifth to one-sixth of all nonrelative adoptions in the United States and a somewhat larger proportion of infant adoptions. See Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, THE FUTURE OF CHILDREN, Spring 1993, at 89, 90. The reduced supply of healthy white infants available for adoption has also significantly increased the number of transracial and older-child adoptions. See KADUSHIN & MARTIN, *supra* note 125, at 539 (describing the increase in older child adoptions); Arnold R. Silverman, *Outcomes of Transracial Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 104, 106-07 (describing the increase in transracial adoptions).

adoptions, in which the adoptive child retains some form of contact with her biological family.²⁵⁹ Although some of these changes simply reflect imbalance in the supply of and demand for healthy, same-race adoptive infants,²⁶⁰ others — in particular the trend toward openness — have also been prompted by concern for children's needs.

Most states now have registries that enable adoptees to obtain nonidentifying information such as parental medical histories upon request and to obtain identifying information based either on good cause or the biological parent's consent.²⁶¹ These statutes recognize the fact that some adult adoptees, whether to ascertain a genetic health risk or simply because they feel a need to know about their origins, want information relating to their biological parents.²⁶² Indeed, based upon studies showing harm to children who learn about their origins accidentally²⁶³ and benefits to those who grow up in open families,²⁶⁴ experts now recommend openness instead of secrecy even during an

²⁵⁹ See Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1028-39 (1995) (describing and comparing various state statutes). Some state courts have also approved open adoption without statutory authorization. See generally Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R.4TH 218 (1990) (describing case law).

²⁶⁰ Although estimates vary, some experts believe that more than a million couples seek to adopt the approximately 30,000 white infants available each year. See Cynthia Crossen, *Hard Choices: In Today's Adoptions, the Biological Parents Are Calling the Shots*, WALL ST. J., Sept. 14, 1989, at A1; see also Stolley, *supra* note 257, at 37 (estimating that the number of women seeking to adopt surpasses the annual number of unrelated-child adoptions by a ratio of 3.3 to 1).

²⁶¹ See Andrews & Elster, *supra* note 7, at 176-77 (classifying state laws and providing statutory references); Joan Heifetz Hollinger, *Adoption Law, THE FUTURE OF CHILDREN*, Spring 1993, at 43, 53 tbl.1 (classifying state records laws and reporting that, in 1993, 19 states had laws under which adoptees and birth parents could register their mutual consent to meet one another as a basis for opening sealed records, six states had laws requiring mutual consent without a registry, 17 had statutes providing for search and consent through a confidential intermediary, and three states had laws authorizing the adult adoptee to obtain access to her birth records merely upon request).

²⁶² A survey of 300 adult adoptees found that approximately one-third thought about searching for their biological parents "all the time" or "often." CHILDREN'S HOME SOCIETY OF CALIFORNIA, *THE CHANGING FACE OF ADOPTION* 20 (1977); see also LOIS RAYNOR, *THE ADOPTED CHILD COMES OF AGE* 100 (1980) (reporting that 22% of British adoptees desired contact with their biological families).

²⁶³ See CLAYTON H. HAGEN, BARBARA H. NICHOLSON, EVELYN IVERSON & GAYLE ADELSMAN, *THE ADOPTED ADULT DISCUSSES ADOPTION AS A LIFE EXPERIENCE* 20-21 (1968) (recounting feelings of adoptees "who were not told voluntarily by their parents that they were adopted"); JEAN M. PATON, *THE ADOPTED BREAK SILENCE* (1954) (same).

²⁶⁴ See H. DAVID KIRK, *SHARED FATE: A THEORY OF ADOPTION AND MENTAL HEALTH* 36-81 (1964); LESLIE M. STEIN & JANET L. HOOPES, *IDENTITY FORMATION IN THE ADOPTED ADOLESCENT: THE DELAWARE FAMILY STUDY* (1985); William Feigelman & Arnold R. Silverman, *Adoptive Parents, Adoptees, and the Sealed Record Controversy*, 67 SOC. CASEWORK 219 (1986); see also Knut W. Ruyter, *The Example of Adoption for Medically Assisted Adoption, in CREATING THE CHILD, supra* note 17, at 177-78 (citing Norwegian studies finding benefits in adoption openness, "especially in terms of the development of self identity and social adaptation").

adoptee's childhood. Adoption experts also argue that "[c]hildren are entitled to know of their true origins."²⁶⁵

While the trend toward openness reflects a shift in our perceptions of what is beneficial to children, adoption policy continues to be driven by the view that "the child's welfare, her needs, and her interests are the basic determinants of good adoption practice," and that "[h]omes should be selected for children, rather than children selected for homes."²⁶⁶ Efforts are still made to "match" children and adoptive parents on the premise that similarities between adoptive and biological parents will benefit the child, and although the number of unmarried adoptive parents has increased, age, marital status, and sexual orientation are still used as factors in adoption decisionmaking;²⁶⁷ agency policies also typically provide that single applicants will be considered "only for the placement of special-needs children."²⁶⁸

Contemporary adoption law deviates from the law applicable to sexual conception in a number of important ways. Most fundamentally, adoption law addresses problems of rights transfer and parental assignment, issues that do not arise when parental status is derived from biology. Adoption law also regulates the child's relationships with two potentially competing sets of parents; in this sense it shares common ground with custody and visitation law, although adoption presents additional issues not present in the latter context.

Despite these differences, adoption law manifests the same policy values evident elsewhere in parentage law: across the field of marital, nonmarital, and adoptive relationships, courts and legislatures have taken steps to ensure that children have two parents with obligations of care and support, and that children's interests take precedence over those of their parents.

D. Children's Interests v. Parental Rights

The same preference for children's interests is evident in many areas of family law. One such area is the law of parental agreements, in which courts have long held that contracts regarding children's care,

²⁶⁵ KADUSHIN & MARTIN, *supra* note 125, at 576; accord Ruyter, *supra* note 264, at 178. Courts, however, have thus far refused to recognize any constitutional right to know one's origins. See, e.g., *In re Roger B.*, 418 N.E.2d 751, 757 (Ill. 1981) (holding that adoptees do not have a fundamental right to examine their adoption records).

²⁶⁶ KADUSHIN & MARTIN, *supra* note 125, at 533.

²⁶⁷ See CLARK, *supra* note 123, at 910. A few states have adoption statutes that explicitly forbid adoption by homosexuals. See, e.g., FLA. STAT. ANN. § 63.042(3) (West 1991); see also Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5TH 54 (1995).

²⁶⁸ KADUSHIN & MARTIN, *supra* note 125, at 551 (quoting Child Welfare League of America standards, which provide that "[i]n exceptional circumstances, when the opportunity for adoption for a specific child might not otherwise be available, a single parent (who may be unmarried, widowed, or divorced) should be given consideration").

custody, and support are voidable; whether made before or after marriage, or before or after the child's birth, such an agreement will be honored only if it comports with the best interests of the child.²⁶⁹ A post-divorce custody or support agreement is similarly modifiable until the child's majority if circumstances change and the agreement fails to protect the child's interests.²⁷⁰

Parenthood itself is increasingly seen as a functional status, rather than one derived from biology or legal entitlement.²⁷¹ This new, child-centered perspective has led courts to limit the rights of parents who have failed to accept responsibility for their children and to grant "parental" rights to nonparents who have done so in their stead.²⁷² It has also produced a shift in litigation involving children, with the child increasingly viewed as a rights-bearing party entitled to legal representation, and not just the subject of a proceeding.²⁷³ Today — perhaps

²⁶⁹ See sources cited *supra* notes 122-23.

²⁷⁰ See KRAUSE, ELROD, GARRISON & OLDHAM, *supra* note 226, at 712-14 (reviewing custody modification standards); *id.* at 967-68 (reviewing support modification standards); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 760-84 (1985). Some courts permit modification of a custody agreement even without a change of circumstances based on the best interests of the child. See, e.g., *Elmer v. Elmer*, 776 P.2d 599, 603 (Utah 1989) ("[T]he res judicata aspect of the rule must always be subservient to the best interests of the child.").

²⁷¹ See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7-28 (1973); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 690-94 (1993); Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1090 (1996); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209, 241-44 (1978); Polikoff, *supra* note 12, at 468-73; Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1643-50 (1991).

²⁷² Some states have gone much further in this direction than others. See ALI PRINCIPLES, *supra* note 212, § 2.21 cmt. a, reporter's note at 413-15 (surveying cases and statutory standards); see also ELLMAN, KURTZ & SCOTT, *supra* note 74, at 724-28 (summarizing cases and statutes); KRAUSE, ELROD, GARRISON & OLDHAM, *supra* note 226, at 700-02, 710-11 (same). For commentary favoring the recognition of functional parents, see Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 902-19 (1984); and David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

²⁷³ Pursuant to the federal Juvenile Justice & Delinquency Prevention Act, 42 U.S.C. § 5657 (1982), *repealed by* Anti-Drug Act of 1988, § 7263(a)(2)(c), 102 Stat. 4181, 4443 (1988), a Justice Department advisory committee recommended standards for the administration of juvenile justice providing that a child should have independent legal counsel "in any proceeding at which the custody, detention, or treatment of the juvenile is at issue." NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE* § 3.132, at 273 (1980). Although most states have not gone this far in providing children with legal counsel, the provision of counsel is on the increase and the scholarly commentary is generally favorable. See, e.g., Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute: A Unique Legal Situa-*

more so than at any time in our history — courts and commentators hold that parents' rights are secondary to children's interests.²⁷⁴

The emergence of a two-parent, child-centered family policy is not unique to the United States. Recent revisions of Australia's family law are premised, in part, on the view that "children have the right to know and be cared for by both their parents regardless of whether their parents are married, separated, have never married, or have never lived together."²⁷⁵ Family law reformation in the United Kingdom was premised on similar assumptions.²⁷⁶ And the United Nations Convention on Rights of the Child has explicitly recognized that *both* parents share responsibility for the upbringing and development of their children.²⁷⁷

Public opinion appears to be highly supportive of these policy trends. Most Americans report that children need "both a father and mother" and that children are better off in a two-parent household.²⁷⁸

tion, a Necessarily Broad Standard, the Child's Constitutional Rights, the Role of the Attorney Whose Client Is the Child, 19 FAM. L.Q. 53, 57-58, 64-67, 73-77 (1985); George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard*, 27 FAM. L.Q. 365, 378-80 (1993).

²⁷⁴ See, e.g., Scott & Scott, *supra* note 138, at 2453-76 (discussing family law's evolution in the direction of a more explicit linkage between parental rights and responsibilities).

²⁷⁵ Australian Family Law Reform Act of 1995, ch. 60B(2)(a); see also AUSTRALIAN FAMILY LAW COUNCIL, PATTERNS OF PARENTING AFTER SEPARATION REPORT: A REPORT TO THE MINISTER FOR JUSTICE AND CONSUMER AFFAIRS § 2.39, at 17 (1992) (advocating change in family law based on the premises that most children want and need contact with two parents, and that the well-being of children is advanced by their maintaining links with both parents over time). Researchers who investigated public attitudes have reported strong support for the shift in Australian law. See Kathleen Funder, *The Australian Family Law Reform Act (1995) and Public Attitudes to Parental Responsibility*, 12 INT'L J.L. POL'Y & FAM. 47, 59 (1998) (reporting that all surveyed groups — the general population, resident parents, and nonresident parents — voiced "strong assent to shared responsibility for the care, contact, and financial responsibility for children"). More than 95% of respondents indicated that children should "always" or "mostly" be in contact with married parents, while 90% so indicated when the parents were separated or divorced, and more than 60% did so when the parents had never lived together. See *id.* at 56 fig.2. Approximately 90% indicated that children should "always" or "mostly" be supported by both parents when their parents were married, separated, or divorced, and 75% so indicated when parents had never lived together. See *id.* at 57 fig.4.

²⁷⁶ See *In re K.*, 1 W.L.R. 431, 432-37 (C.A. 1989) (interpreting provisions of the Children's Act of 1989).

²⁷⁷ See UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD at art. 18(1), U.N. Doc. No. A/44/736, 1989. Article 7 also bestows on a child the "right . . . , as far as possible, to know and be cared for by his or her parents." *Id.* at art. 7.

²⁷⁸ Sheila B. Kamerman & Alfred J. Kahn, *The Formation of Families, in FAMILY CHANGE AND FAMILY POLICIES IN GREAT BRITAIN, CANADA, NEW ZEALAND, AND THE UNITED STATES* 312, 331 tbl.3 (Sheila B. Kamerman & Alfred J. Kahn eds., 1997) (showing U.S. responses to International Value Surveys in 1981-83 and 1990-93 and reporting that in the latter survey 72% of U.S. respondents agreed that a "child needs both father and mother," as compared to 61% in 1981-83); see also Voter/Consumer Research for the Family Research Council, *National Telephone Survey of 1100 Adults*, Sept. 1993 [hereinafter Family Research Council Survey] (finding that in response to the statement "[i]t is better for a child to be born into a two-parent family than

Almost nine out of ten respondents to one survey agreed that "[i]t is important for fathers to spend as much time with their children as mothers,"²⁷⁹ while more than two-thirds of another group strongly favored joint custody of young children following divorce over sole custody by either parent.²⁸⁰ Americans also continue to rank family obligations as the most important obligations,²⁸¹ even when children are financially better off than a nonresidential parent, they typically believe that the nonresidential parent should be obligated to help support them.²⁸²

IV. APPLYING FAMILY LAW TO TECHNOLOGICAL CONCEPTION

A. Broad Themes and Specific Principles

Contemporary parentage law offers two general themes to guide policymaking in the area of technological conception: children's interests come first and two-parent care is generally preferable to that of one parent alone. Parentage law also offers some concrete rules and principles to guide the policymaker.

to a single mother," 63% "strongly" agreed, 20% agreed "somewhat," 7% disagreed "somewhat," 6% disagreed "strongly," and 4% reported that they were neutral or had no opinion).

²⁷⁹ Research & Forecasts for Ethan Allen, Inc., *National Telephone Survey of 2000 Adults*, Nov. 1985 (finding that 69% "strongly" agreed, while 20% agreed "somewhat"); see also Family Research Council Survey, *supra* note 278 (noting that 94% of respondents reported that both parents "are equally responsible" for "[t]ucking a child in bed," while 76% thought both equally responsible for "[t]aking care of a child who is sick or injured").

²⁸⁰ See Princeton Survey Research Associates for Troika Productions & Lifetime Television, *National Telephone Survey of 600 Adults*, Mar. 1991 (noting that "[i]n a typical divorce case," 68% thought "it is better to give [joint] custody of young children," while 14% favored the mother, 1% the father, and 17% indicated that they were undecided).

²⁸¹ See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 105 (1991) (citing Mark Mellman, Edward Lazarus & Allan Rivlin, *Family Time, Family Values*, in REBUILDING THE NEST 73, 83 (David Blankenhorn, Steven Bayme & Jean Bethke Elshain eds., 1990)) (describing the results of a survey commissioned by the Massachusetts Mutual Life Insurance Company, in which most respondents ranked "[b]eing responsible for your actions" and "[b]eing able to provide emotional support to your family" as their most important personal values).

²⁸² See Barbara R. Bergmann & Sherry Wetchler, *Child Support Awards: State Guidelines vs. Public Opinion*, 29 FAM. L.Q. 483, 491 (1995) (reporting that the respondents in a Maryland survey would award support, albeit at lower average levels than required by the state guidelines, when the nonresidential household had a lower income than the custodial parent); Nora Cate Schaeffer, *Principles of Justice in Judgments About Child Support*, 69 SOC. FORCES 157, 170 (1990) (reporting that 84% of respondents presented with a scenario in which the mother earned \$1500 per month, had remarried, and was supporting one child, while the father earned \$1000 per month and had not remarried, would award child support, as would 57% of those presented with a scenario in which the mother earned \$1500 monthly and the father only \$500 monthly); Princeton Survey Research Associates for Newsweek, *National Telephone Survey of 753 Adults*, Jan. 1995 (reporting that 93% of survey respondents agreed that "it is morally wrong . . . for a father not to fulfill his financial obligations to his biological child").

First, biological relationship should be neither a necessary nor a sufficient condition for obtaining and retaining parental status: unmarried fathers who fail to act like parents can lose their parental rights; committed functional parents may displace uncommitted biological parents; and a stepfather may obtain parental rights (and trump the rights of a committed unmarried father) based on his socially preferred marital relationship with the child's mother.

Second, outside the context of marriage, parental rights should presumptively be assigned to biological parents: in no case other than that of an unmarried father does another claimant have standing to block a biological parent's assertion of parental status; and, if he promptly asserts his rights, even an unmarried father can trump the claims of a prospective adoptive parent able to offer the child greater advantages.

Third, no contracts concerning parental rights and obligations should be per se enforceable: all such contracts, whether pre-marital, post-marital, pre-conception, or post-conception, are now voidable based on the child's interests. In the adoption context — the only one in which the issue has been tested — waivers of parental rights are unenforceable, even without a showing of the child's interests, if they fail to comply with state standards.

Fourth, within limits, the state may prefer "desirable" to "undesirable" parental relationships: a committed functional parent may, in some instances, override the claims of an uncommitted biological parent; if the mother is married and plans to raise the child herself in the marital household, even a committed father might be denied his parental status in the face of a claim by her husband. Similarly, although an unmarried mother alone cannot block her child's father from asserting his parental status even if he has long failed to "act as a father" to his child, adoptive parents may deprive the father of parental rights if they can make the same showing.

B. Three Easy Cases

Although the broad themes and specific principles that can be gleaned from contemporary family law will not resolve every question related to the parentage of technologically conceived children, they can easily resolve some of them.

1. *Married Couples and AID.* — If husbands who agree to act as fathers to their wives' extramarital children (and wives who acquiesce in the arrangement) are thereafter foreclosed from denying the husbands' paternity — the result achieved by the marital presumption and estoppel principles — they should be similarly foreclosed when wives become pregnant through AID with their husbands' consent. AID statutes conferring parental status on a consenting husband, which have now been adopted in most states, simply apply traditional family law principles to the AID context. Given that the relational in-

terests are no different here than in a case of extramarital pregnancy, the same standards should apply; in both cases, the estoppel approach serves to ensure two-parent care in a socially preferred (marital) relationship. Moreover, the case for binding a husband and wife is perhaps even stronger in the AID context than in that of sexual conception because the husband's consent is less likely to have been based on factors such as a desire to preserve the marriage.

2. *Married Couples and IVF with Donated Eggs.* — If a husband's consent to AID is sufficient to secure his parental status, a wife's consent to IVF with donated eggs should suffice as well.²⁸³ The marital presumption does not, of course, apply directly here because the sexual analog — an unfaithful husband who, with his wife's consent, plans to rear his extramarital child in the marital household — is so rare that there is no "traditional" law on the issue. But the basic relational facts are the same as in a case of AID or extramarital conception by a wife: in each instance, a married couple has decided to rear a child to whom only one is biologically related; whether the child is conceived sexually or technologically, the couple must cope with the issue of secrecy and the stress associated with their differing relationships to the child.²⁸⁴ Applying the AID rule to the IVF context would ensure that the child has two legal parents in a socially preferred (marital) relationship. Such an adaptation would also ensure gender neutrality with respect to the marital legitimacy presumption, which may be constitutionally required.²⁸⁵

²⁸³ Thus far, only a few states have statutory law on this issue. See FLA. STAT. ANN. § 742.11 (West 1997) (creating an irrebuttable presumption of parenthood for children conceived by means of either AID or IVF with donated eggs, "provided that both husband and wife have consented in writing"); N.D. CENT. CODE § 14-18-04 (1991); OKLA. STAT. tit. 10, § 554 (1991); TEX. FAM. CODE ANN. § 151.102 (West 1996) (same as Florida); VA. CODE ANN. § 20-158(A)(1)-(2) (Michie Supp. 1999) (providing that "[t]he gestational mother of a child is the child's mother," and "[t]he husband of the gestational mother of a child is the child's father" if he consents "to the performance of assisted conception").

²⁸⁴ These stresses are significant. Although the evidence suggests that most married AID users plan to maintain secrecy, see, e.g., David M. Berger, Abraham Eisen, Jack Shuber & Kenneth F. Doody, *Psychological Patterns in Donor Insemination Couples*, 31 CAN. J. PSYCHIATRY 818, 821 & tbl.1 (1986) (reporting that, in a questionnaire survey of donor-insemination applicants, "the large majority [(70%)] endorsed keeping the procedure secret from the DI child"); Julian N. Robinson, Robert G. Forman, Anne M. Clark, Declan M. Egan, Michael G. Chapman & David H. Barlow, *Attitudes of Donors and Recipients to Gamete Donation*, 6 HUM. REPROD. 307, 308 (1991) (reporting that in a British survey, "85% [of recipients of donor sperm] stated that they would conceal the nature of their offspring's conception"), the Canadian Royal Commission on New Reproductive Technologies concluded that "secrecy [about AID] places great strains on families." PROCEED WITH CARE, *supra* note 19, at 464. Some fathers interviewed by the Commission said that "they felt fraudulent about how they fit into the family narrative," and some mothers indicated that "they felt they were 'living a lie.'" *Id.*

²⁸⁵ To withstand constitutional scrutiny, sex-based classifications must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (per curiam) (quoting *Craig v. Boren*, 429 U.S. 190,

3. *Surrogacy*. — In a case like *Baby M*, the “surrogate” mother is in fact no surrogate at all: she is the child’s genetic and gestational parent. An agreement under which the “surrogate” transfers her interest in the child to another is thus nothing more than an adoption contract. As such, its legality should be dependent on the parties’ compliance with state adoption requirements, including babyselling prohibitions and restrictions on prenatal rights transfer. States should clarify the mother’s parental status, specifying that the surrogate is the child’s legal mother unless and until she transfers her parental rights pursuant to state adoption law. The child’s legal father should be determined under the rules applicable to sexual conception. Thus, if the surrogate mother is unmarried or state law permits an unmarried putative father to challenge the paternity of the mother’s husband, the sperm donor should be able to establish his parental rights; but if the mother is married and state paternity law denies a putative father standing to challenge her husband’s paternity, he should not.²⁸⁶

C. *A Case Resolvable Based on Available Research Findings*

Technologically conceived children have the same informational needs as adopted children. Both groups require information on genetically-based health risks and, as adults, may want to learn more about their biological parents or even establish contact with them. Because current adoption laws recognize the informational needs of adopted children,²⁸⁷ the informational needs of technologically conceived children should be recognized to the same extent. As the Canadian Royal Commission succinctly put it:

[t]he goals of adoption record keeping are based on a concern for the best interests of the child. Full adoption records, kept on file for generations, mean that genetically transmitted health problems can be identified and traced; two family members can be prevented from marrying or conceiving a child unknowingly; and adoptive families can have enough information about the child’s biological background for their own psychological needs. Record-keeping practices in the field of DI [(donor insemination)] should have similar goals.²⁸⁸

The states are beginning to move in this direction. While few require sperm banks and fertility centers to collect or maintain donor

197 (1976)) (internal quotation marks omitted). The Supreme Court has held that the preservation of traditional, gender-based family roles is an insufficient justification for a gender-based classification. See *United States v. Virginia*, 518 U.S. 515, 540-46 (1996); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975).

²⁸⁶ See *supra* p. 886. The *Baby M* court gives short shrift to the paternity issue.

²⁸⁷ See sources cited *supra* note 261.

²⁸⁸ PROCEED WITH CARE, *supra* note 19, at 469.

information,²⁸⁹ at least eighteen have now adopted legislative standards that permit AID children to obtain available information based on satisfaction of a "good cause" or similar standard.²⁹⁰

The informational interests of adoptees and technologically conceived children are virtually indistinguishable. Although some commentators have argued that technologically conceived children have fewer informational needs because they are less likely to discover the facts of their origin or to experience a sense of rejection by a donor parent,²⁹¹ we know that some technologically conceived children do want such information, and want it badly.²⁹² Moreover, only a small fraction of adoptees ultimately seek the identity of their biological parents.²⁹³ No one has ever supposed that the relative infrequency of requests is a good reason for ignoring the needs of adopted children who do want information about their biological families; there is no obvious reason to take a different approach to the informational needs of technologically conceived children.

Nor do parental privacy interests significantly differ depending on whether a child is adopted or technologically conceived. While those who become parents using AID or IVF seem less likely to tell their child about her origins than do those who adopt, adoption information access rules nowhere require adoptive parents to tell their child that she was adopted. Applied to technological conception, this approach would equally permit AID and IVF parents to maintain secrecy if they so wish.

²⁸⁹ See *supra* note 7. Experts also note that the "lack of [AID] donor recordkeeping is perhaps unparalleled anywhere in medical practice." Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 500 (1983); see also Robert D. Nachtigall, *Secrecy: An Unresolved Issue in the Practice of Donor Insemination*, 168 AM. J. OBSTETRICS & GYNECOLOGY 1846, 1846 (1993).

²⁹⁰ See Andrews & Elster, *supra* note 7, at 138.

²⁹¹ See J.K. Mason, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 221-22 (2d ed. 1998).

²⁹² See Margaret R. Brown, *Whose Eyes Are These, Whose Nose?*, NEWSWEEK, Mar. 7, 1994, at 12 (describing an adult AID child's desire for information about her biological father); Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995, § 6 (Magazine), at 28 (offering anecdotal accounts of AID children who want information about their biological fathers); Karen M. Thomas, *The Donor Connection: Families Are Chipping Away at the Taboos and Secrecy that Once Surrounded Artificial Insemination*, DALLAS MORNING NEWS, Nov. 23, 1997, at 1F (same).

²⁹³ See William Feigelman & Arnold R. Silverman, *Adoptive Parents, Adoptees, and the Sealed Record Controversy*, 67 SOC. CASEWORK 219 (1986) (reporting that 15% of the children of surveyed adoptive parents had asked to see their adoption records, and 4% had contacted birth families); John Triseliotis, *Obtaining Birth Certificates*, in ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 34, 48 (Philip Bean ed., 1984) (reporting that during 1980-82, adoptees' applications for access to birth records represented approximately 0.3% of adopted adults in England and Wales and 0.7% in Scotland and estimating that, if these percentages held constant, 21% of all adoptees might apply for birth records during their adult years). The proportion of adoptees who think about requesting information appears to be considerably higher. See *supra* note 262.

With respect to biological parents, any differences in privacy interests favor the biological parents of an adoptive child. Although less true today, parents relinquishing children for adoption have often done so because of the stigma attached to illegitimate birth; there is no such stigma attached to sperm or egg donation.

Because the interests of children and their parents do not significantly differ depending on whether a child was adopted or technologically conceived, the argument against extending adoption registries to technologically conceived children relies primarily on the fear that loss of guaranteed donor anonymity would seriously reduce the number of AID and IVF donors.²⁹⁴ Donor decisionmaking is not a significant issue in the adoption context because parents who relinquish children for adoption almost invariably do so because of an unplanned birth and inability to provide adequately for the baby themselves. In the case of sperm and egg donation, however, potential loss of anonymity might conceivably have a significant impact on donor decisionmaking.

The available evidence on this point cannot be conclusively interpreted — surveys have not assessed donor attitudes in a standard manner and most rely on small samples at a single donation site — but virtually all researchers have reported that half or more of respondent donors would be willing to provide identifying information to their children at the age of majority.²⁹⁵ Moreover, because state adoption

²⁹⁴ See Elizabeth L. Gibson, *Artificial Insemination by Donor: Information, Communication and Regulation*, 30 J. FAM. L. 1, 28–32 (1991–92); Richard J. Doren, Comment, *The Need for Regulation of Artificial Insemination by Donor*, 22 SAN DIEGO L. REV. 1193, 1206 (1985).

²⁹⁵ On ovum donors, see John Leeton & Jayne Harman, *Attitudes Towards Egg Donation of Thirty-Four Infertile Women Who Donated During Their In Vitro Fertilization Treatment*, 3 J. IN VITRO FERTILIZATION & EMBRYO TRANSFER 374, 375–76 (1986) (reporting that, of 34 women who donated eggs without expectation of payment, approximately half would not mind if the child contacted them later); and NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 368–69 (1998) (citing an unpublished study finding that 70% of surveyed ovum donors were willing to meet a child produced with their donated eggs at adulthood). On sperm donors, see Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 661 (1991) (noting that 75% of the surveyed donors at a California sperm bank were willing to provide identifying information to their child at the age of majority); Ken R. Daniels, *Artificial Insemination Using Donor Semen and the Issue of Secrecy: The Views of Donors and Recipient Couples*, 27 SOC. SCI. MED. 377, 379–81 (1988) (reporting that surveyed donors at six New Zealand AID programs were almost equally divided over whether the child has a right to identifying information about them); Patricia P. Mahlstedt & Kris A. Probasco, *Sperm Donors: Their Attitudes Toward Providing Medical and Psychosocial Information for Recipient Couples and Donor Offspring*, 56 FERTILITY & STERILITY 747, 749–52 (1991) (noting that 96% of surveyed donors at two artificial insemination centers in Texas and Louisiana were willing to share nonidentifying medical and psychosocial information with recipient families and that 60% expressed a willingness to meet with or to provide identifying information to their child at age 18); and Robyn Rowland, *The Social and Psychological Consequences of Secrecy in Artificial Insemination by Donor (AID) Programmes*, 21 SOC. SCI. MED. 391, 395 (1985) (indicating that 60% of surveyed Australian donors indicated that they would be willing to have their AID children contact them after

registry laws typically require consent by the biological parent or a showing of need as a precondition to record access,²⁹⁶ donors would confront only the possibility, not the certainty, that their identities would ultimately be disclosed. The Swedish experience also suggests that a new legal regime in which anonymity is not guaranteed might simply alter the characteristics of the donor pool. Although sperm donations initially declined after the Swedish law abolishing donor anonymity went into effect, they soon returned to prior levels with sperm donors typically older and more often married than previously.²⁹⁷

Given these research findings, the risk of a significantly reduced supply of donated sperm and ova does not appear serious enough to reject the extension of adoption information access rules to technologically conceived children.²⁹⁸ The handful of jurisdictions that offer all adult adoptees full access to identifying information about biological parents might want to consider a cause or consent-based access standard for technologically conceived children to ensure that donor numbers are not seriously reduced, but other jurisdictions should be able

reaching the age of majority), *see also* MORGAN & LEE, *supra* note 82, at 163 (explaining that only one-third of the donor respondents in a British poll were opposed to the release of identifying information and that the other two-thirds were in favor of release or "reserved their position"); Robinson, Forman, Clark, Egan, Chapman & Barlow, *supra* note 284, at 30 (reporting that a majority of the active sperm donors (n=52) at two British artificial insemination centers were willing to release their medical records with or without identifying information, but only 15% of surveyed potential donors would donate if their anonymity were not maintained); Robin Herman, *When the "Father" Is a Sperm Donor: A New Look at Secrecy*, WASH. POST, Feb. 11, 1992, Health at 10 (reporting that some American sperm banks offer donors a choice between anonymity and openness and that directors of these banks claim that it is no more difficult to recruit donors for open programs than for those guaranteeing anonymity). *But see* Bjørn Pedersen, Anders Faurskov Nielsen & Jørgen Glenn Lauritsen, *Psychosocial Aspects of Donor Insemination: Sperm Donors — Their Motivations and Attitudes to Artificial Insemination*, 73 ACTA OBSTETRICA ET GYNECOLOGICA SCANDINAVICA 701 (1994) (noting that 76% of active donors (n=26) at a Danish infertility clinic were willing to provide nonidentifying, phenotypic information to recipients and offspring, but only 20% expressed a willingness to continue donating if the current rules of anonymity were revoked); Mark V. Sauer, M. Tan Gorrill, Kirsten B. Zeller & Maria Bustillo, *Attitudinal Survey of Sperm Donors to an Artificial Insemination Clinic*, 34 J. REPROD. MED. 362, 363 (1989) (reporting that 71% of donor respondents (n=42) at a California clinic favored anonymity).

²⁹⁶ *See* sources cited *supra* note 261; *see also* Pamela Smith, *Regulating Confidentiality of Surrogacy Records: Lessons from the Adoption Experience*, 31 U. LOUISVILLE J. FAM. L. 65, 78-93 (1992-93) (surveying state laws on the accessibility of adoption records and analyzing the application of "good cause" standards).

²⁹⁷ *See* MORGAN & LEE, *supra* note 82, at 163-64. French law allows sperm donations only from married men who have already fathered children; consent of the donor's spouse is also mandated. *See* Law No. 94-653 of July 29, 1994, J.O., July 30, 1994, p. 11056; PHC 1994, L673-2; *see also* Byk, *supra* note 84, at 348-49. Despite these restrictions, shortages of donated sperm have not developed.

²⁹⁸ In light of the inadequacy of current donor recordkeeping, such laws should also mandate the collection and maintenance of donor information in a central registry.

to extend their adoption information access laws to technologically conceived children without modification.

D. Three Harder Cases

The four cases just assessed using the interpretive approach are relatively easy ones for two reasons: the application of contemporary parentage law principles is straightforward and the results comport with legislative trends.

The case of a single woman using AID is harder to resolve because the application of parentage law principles does not harmonize with the legislative trend on this issue. Unmarried women who conceive a child sexually may neither prevent the child's biological father from asserting his parental rights nor preclude the child from establishing the father's paternity; the interpretive approach thus suggests that single women who use AID should be similarly foreclosed from blocking paternity claims by and against the sperm donors. But although most states have no statutory law on this issue, those that do deny sperm donors all parental rights and responsibilities.²⁹⁹

There are also cases in which traditional parentage law offers less than certain guidance because a particular reproductive technique produces a fairly novel legal issue. Gestational surrogacy is one such case. Because the separation of gestation and genetic tie is impossible when a child is conceived sexually, gestational surrogacy presents a situation that courts simply did not confront prior to the advent of technological conception. The fact that genetic tie is the prime determinant of fatherhood suggests that biology should also take precedence over gestation in determining motherhood, but there are numerous cases — those involving the marital presumption of legitimacy, equitable estoppel, laches — in which biology is given less weight.³⁰⁰ The case of a donated preembryo (or both donated sperm and ova) presents similar problems. If a married woman gestates such a preembryo, at least two states currently assign parental rights to the gestational "mother" and her husband.³⁰¹ But as neither marriage partner is genetically related to the child, the marital presumption is not strictly applicable in such a case. Because the couple has in essence adopted prenatally,³⁰² adoption law may be more relevant. The rules applicable to gestational surrogacy must also be considered because the wife's gestation of the child represents the couple's only role (other than

²⁹⁹ See Kristin E. Koehler, Comment, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 332 & nn.79-80 (1996).

³⁰⁰ See *supra* pp. 884-85.

³⁰¹ See FLA. STAT. ANN. § 742.11 (West 1997); TEX. FAM. CODE ANN. § 151.103 (West 1996).

³⁰² Of course, both AID and IVF with a husband's sperm can also be analogized to prenatal adoption, but the relevant analogy is a stepparent adoption. See *infra* section IV.D.3.

commissioning and paying the various other contributors) in producing the child's birth.³⁰³

This section provides a more detailed analysis of these three harder and more controversial cases.

1. *Paternity of Children Born through AID to Single Women.*

(a) *Sexual vs. Technological Conception: Can Different Rules Be Justified?* — Because contemporary parentage law encourages two-parent care even in the case of nonmarital childbirth, it would appear that two-parent care should also be encouraged when a single woman conceives using AID. Women who choose to become parents without partners do so for varied reasons and become pregnant in varied ways. But the end result is the same. Whether the mother conceives using AID or with an anonymous or semi-anonymous sexual partner, her prebirth relationship with the father is insignificant,³⁰⁴ and her child will lack a paternal relationship and relations. Women who conceive using AID may "replace" the absent father with other male figures or even a second "mother," but so may women who conceive sexually. And while women who use AID invariably intend to become pregnant, women who conceive sexually with an anonymous partner may also intend to have a child.³⁰⁵ In sum, because the mechanics of conception are largely irrelevant to the relational realities of nonmarital parent-child relationships, there is no obvious reason why paternity laws should mandate different results when women conceive using AID and when women conceive sexually.

Statutory identification of sperm donors as the legal fathers of children conceived by single women using AID would not require a major shift in the law; after all, the majority of state legislatures have dealt with this issue simply by avoiding it.³⁰⁶ In these states, a known

³⁰³ See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (determining the legal parentage of a child born to a gestational surrogate with donated sperm and ova).

³⁰⁴ Experts estimate that approximately a quarter of nonmarital children are born to cohabiting couples. See Larry L. Bumpass & James A. Sweet, *Children's Experience in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 FAM. PLAN. PERSP. 256, 256 (1990); Andrew J. Cherlin, *The Weakening Link Between Marriage and the Care of Children*, 20 FAM. PLAN. PERSP. 302, 303 (1988). Nor do the fathers of nonmarital children typically play a responsible role in child rearing; less than 30% of them are even obligated to pay child support. See LYDIA SCOON-ROGERS & GORDON H. LESTER, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, at 6-7, 12 tbl.F (Bureau of the Census, U.S. Dep't of Commerce, Series P60-187, 1995) [hereinafter 1991 CHILD SUPPORT REPORT] (reporting that 27% of never-married mothers had been awarded child support in 1991).

³⁰⁵ See LINDA GORDON, PITIED BUT NOT ENTITLED 34 (1994) (positing that "a higher proportion of single mothers today enter that situation with some degree of volition").

³⁰⁶ Only 15 states have enacted legislation dealing with AID use by unmarried women. See *supra* note 52.

sperm donor may sue or be sued to establish the paternity of his child.³⁰⁷

Although sperm donors who favor anonymity frequently cite the fear of future legal responsibilities as a primary basis for their preference,³⁰⁸ AID paternity actions have, in fact, been commenced by sperm donors themselves. All reported cases have involved known donors, and litigation has typically occurred either because the mother refused to honor an informal visitation agreement with the donor or because the donor has decided, after the child's birth, that he wanted to play a role in the child's life.³⁰⁹ The cases illustrate two important points. First, a man confronted with the fact of his fatherhood may feel quite differently than the same man contemplating the possibility of paternity.³¹⁰ Second, although facially neutral, the law discriminates in practice between sperm donors who give directly to users and those who give to sperm banks. Because sperm banks provide anonymity to both donors and recipients, paternity litigation is effectively foreclosed; women who want parenthood without partnership are thus driven to banks and away from known donors.³¹¹

It would, of course, be possible to abandon two-way anonymity when AID is employed by a single woman and subject both AID parents to potential claims by the other, as in the known donor cases. It would also be possible to proscribe AID for women without partners. Either of these approaches would be consistent with the law applicable to sexual conception: the latter approach, like the marital presumption of legitimacy, would virtually ensure that AID children have two legal parents; the former, like the law now applicable to sexual conception outside of marriage, would permit but not require paternity establishment by the mother, father, or child. Laws that sever donor responsi-

³⁰⁷ In some states restrictive standing rules may preclude a paternity suit even by a known sperm donor. See UNIF. PARENTAGE ACT §§ 4, 6, 9B U.L.A. 298-99, 301-03 (1973) (denying a putative father standing unless he has attempted to marry the mother, received the child into his home and held him out as his child, or filed a written acknowledgement of paternity that the mother has not disputed within a reasonable period of time).

³⁰⁸ See Rowland, *supra* note 295, at 394 (noting that 60% of donors would not object to contact with their offspring provided that they were not financially liable for them); Doren, *supra* note 294, at 1211.

³⁰⁹ See Yaworsky, *supra* note 38, at 320-29.

³¹⁰ An identical pattern is evident in adoption challenges, which in recent years have frequently been brought by men who seem to have been fairly cavalier about paternity risk, but who mounted full-scale efforts to establish a parental relationship once aware that they had become fathers. See, e.g., *In re Juvenile Action No. JS-8490*, 876 P.2d 1137, 1139-41 (Ariz. 1994); *In re Kelsey S.*, 823 P.2d 1216, 1217-18 (Cal. 1992); *In re M.N.M.*, 605 A.2d 921, 922 (D.C. 1992); *In re Doe*, 638 N.E.2d 181, 182 (Ill. 1994); *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992); *Robert O. v. Russell K.*, 604 N.E.2d 99, 100-01 (N.Y. 1992).

³¹¹ See Stacey, *supra* note 43, at 121 (noting that "the AIDS epidemic and the emergence of child custody conflicts . . . led many lesbians to prefer the legally sanitized, medical route to anonymous donors").

bility or mandate donor-user anonymity, on the other hand, are inconsistent with traditional parentage law and policy because they ensure that some technologically conceived children will have only one legal parent.

Outside the United States, most legislatures have favored the proscriptive approach. Although some countries (like the majority of American states) have simply failed to address the problem,³¹² of those with legislation on AID use by single women, the vast majority have adopted rules that require sperm banks to make AID available only to married women and those with a long-term, heterosexual cohabitant who has consented to the procedure.³¹³ The United Kingdom does have laws that both explicitly grant single, noncohabiting women access to sperm banks and sever the parental rights of sperm bank donors,³¹⁴ but single women's access to sperm banks is also qualified by a requirement that "[a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father)."³¹⁵

Is there a convincing justification for the adoption of paternity rules for AID that are inconsistent with the paternity rules applicable to sexual conception? Perhaps because most countries have dealt with single women's use of AID through access rules, most of the commentary fails to focus on this central issue. The Canadian Royal Commission, for example, recently recommended that single women without partners have full access to AID and that all sperm donors' rights and responsibilities be severed — but failed even to mention that adoption of its recommendations would lead to one-parent families. Instead, it urged that:

³¹² In some of these countries, professional medical standards largely preclude AID use by single women. In Italy, for example, there is no legislation governing AID use, but guidelines of the Association of Italian Medical and Dental Surgeons, binding on its 300,000 members, ban the provision of AID to lesbian women. See Bruce Johnston, *Italians Bar the Elderly from Fertility Treatment*, DAILY TELEGRAPH (London), Apr. 4, 1995, at 12.

³¹³ See Nielsen, *supra* note 84, at 310 (surveying European law and reporting that, in 1996, "[t]he main rule seems to be that single women and lesbians may not benefit from medically assisted conception" and describing Spain and Denmark as exceptions). The three Australian provinces that have passed legislation on the issue have imposed similar restrictions. See Infertility Treatment Act, 1995, chs. 8, 195 (Vict.); Human Reproductive Technology Act, 1991, ch. 23(c) (W. Austl.); Reproductive Technology Act, 1988, ch. 13 (S. Austl.).

³¹⁴ See MORGAN & LEE, *supra* note 82, at 142-44.

³¹⁵ Human Fertilisation & Embryology Act, 1990, ch. 37, § 13(5) (Eng.). A House of Lords amendment to restrict the provision of services to married couples was defeated by one vote. See MORGAN & LEE, *supra* note 82, at 142. It has been estimated that as few as six out of sixty British centers offer AID to single women. See GILLIAN DOUGLAS, LAW, FERTILITY AND REPRODUCTION 122 (1991).

[f]ew women or couples are likely to choose [AID] without having given it a great deal of thought or without having considered what the lifelong implications of their choice will be. It will never be an easy decision or one that is taken lightly For these reasons, we believe that relatively few women, with or without a male partner, are likely to choose this way of having a child; the availability of donor insemination is therefore unlikely to imply major social change, because it will not change how the vast majority of children are conceived and families are formed.³¹⁶

Some commentators favoring the Canadian approach have emphasized the fact that, given the rise of divorce and nonmarital parenting, "there is no guarantee that children who have two heterosexual legal parents will grow up in 'stable' households anyway."³¹⁷ Others have noted that single parents can sometimes adopt.³¹⁸ Still others have urged that the "adverse effects of being raised in father-absent homes . . . do not constitute a reason against performing [donor insemination] for single women unless they severely interfere with the child's opportunity for development."³¹⁹ Finally, some have argued that the Canadian approach is justified because "the risk that sperm donation to unmarried women will increase welfare costs is very slight[, and o]ne could reasonably conclude that this risk does not justify the reduction in reproductive options for single women that imposing rearing costs on sperm donors would create."³²⁰

However, all of these arguments ignore the central issue: outside the AID context, our legal system grants no parent, male or female, the right to be a sole parent. Children of divorced and never-married parents may well experience parental absence, but they nonetheless can claim two parents and two sets of biological relatives — grandparents,

³¹⁶ PROCEED WITH CARE, *supra* note 19, at 471-72. For a similar view, see CARSON STRONG, ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE 95-96 (1997); see also GLOVER, *supra* note 17, at 61-62 (recommending that lesbian women's access to technological conception should be a matter of individual conscience for doctors and others); Henry, *supra* note 51, at 286-87 (arguing that AID statutes should be reformed to protect the parties' pre-insemination intentions); Schiff, *supra* note 111, at 527 (same).

³¹⁷ Gabrielle Wolf, *Frustrating Sperm: Regulation of AID in Victoria Under the Infertility Treatment Act 1995 (Vict)*, 10 AUSTL. J. FAM. L. 71, 81-82 (1996); see also DOUGLAS, *supra* note 315, at 122 (suggesting that children born to single women after artificial insemination may be less likely than children from other one-parent families to experience poverty or the trauma of their parents' breaking up).

³¹⁸ See Note, *Reproductive Technology and Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 683-84 (1985) (arguing that "because state legislatures have permitted single persons to adopt children, denying such persons the right to become parents by other means seems inconsistent").

³¹⁹ STRONG, *supra* note 316, at 95; see also GLOVER, *supra* note 17, at 62 ("We take the view that the restriction of liberty involved in any legal ban on reproductive help to lesbian couples could only be justified by grounds for believing that harm would be done by that help. Because the view that the children would be worse off than others is itself speculative, losses to others as a result of their disadvantages are even more speculative.")

³²⁰ ROBERTSON, CHILDREN OF CHOICE, *supra* note 54, at 128.

uncles, aunts, cousins — whom they can identify as family and with whom they may establish ties.³²¹ Adoptive children all begin life with parental claims against both a biological mother and father; indeed, if the father has standing, he must consent to the child's adoption. Adoption agencies seek to ensure that children continue to enjoy the care of two parents, allowing single-parent adoptions only in the case of hard-to-place children who are otherwise unlikely to be adopted at all.³²² The choice of a single parent here represents not the view that one parent is as good as two, but the view that one parent is better than none at all. Such cases simply cannot justify a policy that will invariably deprive technologically conceived children of two legal parents.

The arguments for single-parent AID also misunderstand the basis for state policy favoring two-parent child care. As we have seen, the policy derives from the view that children are typically better off when they have the opportunity to know and experience care from both of their parents, a view that most Americans maintain³²³ and that finds support in the available evidence.³²⁴ For children conceived sexually, a two-parent preference thus does not depend on a showing of actual harm to the child or the mother's failure to fully consider the consequences of one-parent rearing.³²⁵ Nor does it depend on poverty or receipt of public assistance; although the threat of rising welfare costs has certainly been an important factor in invigorating paternity law, the paternity establishment rules apply to all cases of coital conception, regardless of wealth.³²⁶ A rich single mother who conceives sexually — a Madonna or Mia Farrow, for example — cannot unilaterally rid herself of her child's father simply by demonstrating lack of need or disinterest in child support. There is no obvious reason why a woman employing AID, rich or poor, should be able to do so either. After all, child support is just one issue that turns on paternity establishment. Once either party has established a parental relationship, the child is entitled to all benefits — visitation, inheritance from the parent and his biological relatives, maintenance of a wrongful death action, receipt of Social Security and other survivor's benefits — derived from that status.³²⁷

³²¹ See *supra* pp. 885–89.

³²² See sources cited *supra* notes 278–82.

³²³ See *id.*

³²⁴ See *supra* pp. 887–88.

³²⁵ See *id.*

³²⁶ Paternity cooperation rules, which require public assistance applicants to cooperate in establishing paternity and securing support, necessarily apply only to public assistance recipients. See Legler, *supra* note 233, at 535.

³²⁷ See *supra* pp. 885–86. Of course, if the father fails to come forward promptly to act as a father toward his child, the state need not, under *Lehr v. Robertson*, 463 U.S. 248 (1983), recognize

While most of the justifications for the minority Canadian approach to single women's use of AID miss the point, it is certainly true that either proscription or sperm donor responsibility would reduce single women's reproductive options. Some commentators have thus argued that the Canadian approach is justified because "[h]olding sperm donors responsible for the costs of rearing offspring would reduce the opportunities of unmarried women to obtain sperm from physicians or sperm banks, thus relegating them to turkey baster inseminations with sperm that has not been screened for infectious diseases."³²⁸ Although the claim that sperm donor responsibility would relegate single women to the use of sperm unscreened for disease is clearly wrong — with either a known or anonymous donor, women can utilize private physician assistance to obtain laboratory screening tests³²⁹ — sperm donor responsibility would reduce the number of donors available to single women. Donor responsibility would also reduce the number of single women who choose AID, as women who select this method of conception typically do so, at least in part, precisely to avoid the possibility of conflict with a "mate" who wants visitation rights and a role in the child's life.³³⁰

The fact that donor responsibility would likely reduce the numbers of both donors and users is not a sufficient reason to absolve donors of parental responsibility, however. Women who want to parent alone would undoubtedly find unprotected sexual intercourse more attractive and have a wider choice of sexual partners if men who fathered children sexually could forgo parental rights and responsibilities. But parentage law and policy has firmly opposed such an expansion of parenting possibilities. And while respect for procreative liberties suggests

his parental status, *see id.* at 267–68 (holding that a father who had never established a relationship with his child could be accorded different legal rights than the mother).

³²⁸ ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 54, at 128; *see also* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 295, at 347 (“[T]he likelihood that notifying semen donors of their potential rights and responsibilities as biological parents would deny unmarried women access to safe semen is a compelling reason . . . to allow semen donors to relinquish their parental rights and responsibilities regardless of the marital status of the woman who ultimately uses the semen.”).

³²⁹ *See* STRONG, *supra* note 316, at 86–87 (noting that “single women . . . approach physicians with requests for DI [to] seek . . . assurance that appropriate testing of the sperm . . . has been performed”). Cryopreservation, which ensures that a sperm sample does not carry diseases such as the AIDS virus, can also be obtained through sperm banks by known donors. For an example, *see Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993). Casual, unprotected sexual intercourse does, of course, entail a risk of transmissible disease. Thus, to the extent that women who prefer AID with an unknown donor choose unprotected intercourse rather than AID with a known donor, disease risks would increase.

³³⁰ *See* FENWICK, *supra* note 68, at 271–77; MELISSA LUDTKE, *ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA* 128–31 (1997) (describing the decisionmaking process of a woman who settled on AID); COOK, *supra* note 9, at 5 (describing how many single professional women are choosing to become mothers through AID); WISBY, *supra* note 11, at 1.

that government should not countermand the decision to bear a child, it hardly mandates state acquiescence in one parent's wish to deny the existence of the other.³³¹

It is also true, as some commentators have noted, that sperm donor responsibility might produce more parental conflict and litigation than a regime under which sperm donors have no rights or responsibilities.³³² But the risk of conflict is identical in cases of conception with an anonymous or semi-anonymous sexual partner. Nor is the possibility — or even the reality — of parental conflict a sufficient basis for severing parental rights in any other context. Instead, as we have seen, the states have enacted rules designed to foster parent-child contact and reduce conflict levels.³³³ This approach is grounded in research demonstrating that, although serious parental conflict does pose risks to children's emotional health and development,³³⁴ so does parental absence.³³⁵ Parents who have never played a role in their child's life are undoubtedly less important than those who have been loved and lost. But the fact that children adopted at birth — and AID children — sometimes go to extraordinary lengths to learn about and meet their paternal relatives strongly evidences the power of genetic connection.³³⁶

³³¹ For similar conclusions based on unfairness to the child, see Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735, 739-40 ("If [a donor whose sperm is used for artificial insemination] is thereby a biological father, he has all the duties of any other biological father. It is morally irrelevant that (1) the donor does not want to act as a father, (2) those who collect his sperm as medical brokers do not want him to act as a father, (3) the woman whose ovum he is fertilizing does not want him to act as a father, and (4) society is prepared to excuse him from the obligations of acting as a father."); and Herbert T. Krimmel, *The Case Against Surrogate Parenting*, in WHAT PRICE PARENTHOOD?, *supra* note 17, at 54, 54 (arguing that to "intentionally deprive the child of a mother or a father . . . is fundamentally unfair to the child").

³³² See NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 295, at 334 ("Some people . . . argue that a semen donor's efforts to establish a relationship with his biological child may intrude on the child's existing family structure.")

³³³ See *supra* pp. 888-89.

³³⁴ See PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 204 (1997) (reporting that divorce appears not to have negative long-term consequences for the well-being of children whose parents had a high-conflict marriage); Amato, *supra* note 240, at 151 (citing studies showing that children "in high-conflict two-parent families are at increased risk for a variety of problems").

³³⁵ For descriptions of the research findings, see MICHAEL RUTTER, MATERNAL DEPRIVATION REASSESSED 31-80 (2d ed. 1981); Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 563-72 (1983-84); and Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 455-60 (1983).

³³⁶ See DAVID M. BRODZINSKY, MARSHALL D. SCHECHTER & ROBIN MARANTZ HENIG, BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 71-82, 101-18, 139-48, 158-62, 170-74 (1992) (describing adoptees' searches for their biological parents); Marshall D. Schechter & Doris Bertocci, *The Meaning of the Search*, in THE PSYCHOLOGY OF ADOPTION 62 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (same); Brown, *supra* note 292, at 12 (demonstrating the "anger and confusion" that can attend an AID child's not knowing her biological father); Orenstein, *supra* note 292, at 28-35, 42, 50, 58 (describing the effects of anonymous donation

Single AID users are undeniably a sympathetic group. Some are women who would like to marry and share parenting responsibilities but have failed to find a mate and feel that time is running out; others are lesbian women who wish to share parenting responsibilities with a female partner, a partner with whom they cannot possibly conceive.³³⁷ All are women who deeply want a child.

But there are many would-be parents who equally deserve our sympathy. Those who seek fertility treatments and those who seek to adopt also desperately want children; many undergo extreme financial and emotional hardship for the chance to be a parent. Except for those willing to adopt a hard-to-place child who would otherwise have no parent at all, none of these would-be parents is legally entitled to parent alone.

There is simply no logical basis for a one-parent policy applicable only to single AID users. The only interests ultimately served by such a policy are those of the single woman who wants a child but does not want that child to have a father. As much as we may sympathize with single AID users in their desire to bear children, there does not appear to be a valid basis for granting them an entitlement possessed by no other parents.

(b) *Proscription or Sperm Donor Responsibility?* — As we have seen, a two-parent policy might be applied to AID either through a proscriptive law or through a law mandating identity exchange and establishing donor responsibility. Either approach would appear to meet constitutional requirements. A sperm donor responsibility rule would simply restate what has long been true for sexual conception: a man who fathers a child born to an unmarried woman will be adjudicated the child's legal father if a paternity action is commenced in a timely matter by a party with standing.³³⁸ Such a rule would undeniably affect the determination of parentage; but given that parthenogenesis is not currently a human reproductive option,³³⁹ it would not restrict procreative choice. Even a rule requiring a single woman to apply for AID jointly with another adult who has consented to be her child's le-

on AID children). Adoptees and AID children wish to learn about their biological families to gain both a sense of personal history and a better understanding of their genetic identity, which can strongly influence not only appearance, but also psychological health and cognitive ability. See Gerald E. McClearn, Boo Johansson, Stig Berg, Nancy L. Pedersen, Frank Ahern, Stephen A. Petrill & Robert Plomin, *Substantial Genetic Influence on Cognitive Abilities in Twins 80 or More Years Old*, 276 SCI. 1560, 1562 (1997) (reporting that 62% of general cognitive ability in late life is attributable to genetic factors).

³³⁷ For accounts of single women's motivations for using AID, see FENWICK, *supra* note 68, at 271-77; LUDTKE, *supra* note 330, at 3-19, 102-61; and Cook, *supra* note 9, at 5.

³³⁸ See *supra* pp. 885-86.

³³⁹ See 15 ACADEMIC AMERICAN ENCYCLOPEDIA 99-100 (1980) ("Parthenogenesis is the development of an unfertilized egg into an adult organism.").

gal father³⁴⁰ would intrude upon procreative choice considerably less than a fornication ban, which appears to be constitutionally valid.³⁴¹ Given our legal tradition's longstanding preference for marital parenting and the economic and social risks associated with single parenting,³⁴² a joint application requirement should also withstand constitutional scrutiny.

Although both proscription and donor responsibility appear to be constitutionally viable, the two approaches offer very different advantages and disadvantages. The principal advantage of the proscriptive approach is effectiveness; because donor responsibility would merely preserve the possibility of establishing donor paternity, it could not ensure two-parent care to the same extent as would a proscriptive rule. The greater efficacy of proscription is undoubtedly a major reason for its success internationally. But because AID can be performed privately without medical assistance, even proscription would fail to ensure two-parent care in all cases. Some women undoubtedly would evade the law; others would engage in casual, unprotected sexual intercourse with the hope of conceiving a child.

Given that consistency is a central aim of the interpretive approach, one can also make a strong case that a proscriptive approach would go too far. As we have seen, contemporary family law strongly encourages unmarried women to establish the paternity of their children, but does not mandate it. Nor does current law require single mothers to provide substitute fathers if they fail to establish the biological father's paternity. Indeed, in 1991, almost three-quarters of never-married mothers surveyed by the U.S. Census Bureau reported

³⁴⁰ Under a proscriptive regime, the rulemaking authority would need to decide whether a single AID applicant could satisfy the two-parent requirement by securing consent to serve as a parent from another woman. The issue is of particular importance given the significant number of lesbian couples who wish to raise a child together. Because same-sex couples cannot marry, neither the marital presumption of legitimacy nor the statutes assigning fatherhood to the consenting spouse of a woman who conceives using AID apply. In states permitting adoption by the mother's lesbian partner, see, e.g., *In re Tammy*, 619 N.E.2d 315, 315-17 (Mass. 1993); *In re Jacob & Dana*, 660 N.E.2d 397, 400-01 (N.Y. 1995); see also Sonja Larson, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5TH 54 (1995), there is no obvious reason why a lesbian or gay partner should not satisfy a two-parent AID requirement. In other states, however, any adoption by a homosexual is illegal. See *supra* note 267. In these states consistency would require disallowing a gay partner under the AID statute.

³⁴¹ It is less clear whether the state could restrict AID access to married couples. While a statute may discriminate based on marriage if the classification is rationally related to a legitimate governmental objective, see *Califano v. Jobst*, 434 U.S. 47, 52-53 (1977), a married-couple restriction would seem to run afoul of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which struck down a statute criminalizing the use of prescription contraceptives by unmarried individuals, see *id.* at 454-55. If the state cannot legitimately deny access to a means of avoiding pregnancy based on marital status, it seems to follow that the state cannot deny access to a means of achieving pregnancy based on marital status.

³⁴² See *supra* pp. 887-88.

that they had not obtained support awards from their children's fathers,³⁴³ and almost half reported as a reason for inaction that they "had not pursued" or "did not want" an award.³⁴⁴ Just as it seems unfair to grant to single women who conceive using AID privileges not granted to single women who conceive sexually, it seems equally unfair to impose on them more rigorous requirements.

It is true that public policy tolerates unmarried women's failure to establish the paternity of sexually conceived children largely because it is powerless to do anything about it. AID offers a context in which dual parenting could far more reliably be enforced. Relying on this fact and family law's strong policy preference for dual parenting, some lawmakers may find that a proscriptive rule is justified. But given that almost a third of U.S. births now occur outside of marriage,³⁴⁵ a donor responsibility approach seems, on balance, more consistent with the rules that actually govern sexual conception.

2. *Gestational Surrogacy.* — The case of gestational surrogacy is unique: in contrast to the reproductive techniques examined thus far, there is no sexual analog to this particular form of technological conception. Because pregnancy and birth are relatively public and undisputed, the law has rarely confronted the question of legal motherhood at all. When it has — as in the case of babies stolen or mistakenly switched in the hospital — courts have not typically distinguished gestation from genetic tie for the simple reason that, for a child conceived sexually, they are inextricably linked.

Courts have often resolved fatherhood claims, of course. Outside of marriage, paternity was traditionally determined based on sexual access to the mother.³⁴⁶ Blood tests have made it possible to separate sexual access and genetic tie as determinants of fatherhood, and genetic tie is clearly the winner. If a mother has had multiple sexual partners during the period of conception, the partner genetically related to her child will be declared its legal father, even if another partner had far more frequent sexual intercourse with her. But men do not give birth and, as the marital presumption demonstrates, genetic tie

³⁴³ See 1991 CHILD SUPPORT REPORT, *supra* note 304, at 13-17 tbl.1, 34-36 tbl.6 (showing that 56% of all eligible mothers and 27% of never-married mothers had support orders). Even when they obtain awards, never-married mothers, as a group, receive relatively low levels of support. See *id.* at 19-21 tbl.2 (showing mean 1991 income from child support of \$1534 for never-married mothers and \$3011 for all parents).

³⁴⁴ *Id.* at 13-17 tbl.1 (reporting that, in 1991, 34.6% of custodial mothers who had not been awarded child support said that they "did not pursue a child support award," 13.9% that they "did not want child support," 20.5% that they were "unable to locate the other parent," and 16.1% that the "other parent [was] unable to pay").

³⁴⁵ See 1996 STATISTICAL ABSTRACT, *supra* note 9, at 76 tbl.93 (showing that in 1996, 32.4% of U.S. births were nonmarital).

³⁴⁶ See *supra* note 211 and accompanying text.

has been ignored when important policy interests are at stake.³⁴⁷ Moreover, the Supreme Court has held that, even with a proven genetic tie, an unmarried father's rights need not be recognized if he has failed to grasp the "opportunity . . . to develop a relationship . . . and accept . . . some measure of responsibility for the child's future."³⁴⁸

The policies that have prompted courts to disregard biology when adjudicating paternity — supporting marriage, promoting two-parent care, and protecting the child's established relationships — do not appear relevant in the case of gestational surrogacy, however, at least if the case is adjudicated at or near the child's birth. At this point, there are no established relationships to protect and the decisionmaker may confront two marriages, two competing families offering dual parent care, and two "mothers" prepared to accept responsibility for the child.³⁴⁹ Because none of the policy-based exceptions to genetic parentage determination apply to a gestational surrogate, the interpretive approach suggests that her claims should be rejected.³⁵⁰

This conclusion is buttressed by the fact that use of gestation as the determinant of motherhood would introduce a gender-specific element into parentage law. Just as this seems undesirable in the case of AID and IVF, it also seems undesirable here. Indeed, one can make an argument that the Equal Protection Clause mandates a similar approach

³⁴⁷ See *supra* pp. 883–84. Estoppel and res judicata principles have been used to achieve the same result when the effect of examining genetic connection would be to deprive the child of an established paternal relationship or support. See *supra* pp. 884–85.

³⁴⁸ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

³⁴⁹ Professor Janet Dolgin has suggested that to base legal parentage on genetic tie in gestational surrogacy cases would stand "in marked contrast to the message about the importance of gestation underlying the unwed father cases." DOLGIN, *supra* note 7, at 128. But the unwed father cases in fact convey no message about gestation; instead, they focus on parental responsibility. See *supra* pp. 885–86.

³⁵⁰ Commentators favoring an intention or contract-based approach to parentage determination have reached the same result for different reasons. See SHALEV, *supra* note 30, at 120–45; Hill, *supra* note 103, at 413–20; Schiff, *supra* note 111, at 549–70; Schultz, *supra* note 111, at 323; Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1245–58 (1997). The contract approach poses the same problems here as it does when used as a general decisionmaking standard. See *supra* pp. 859–66. The case of gestational surrogacy also underscores some of the practical problems inherent in a contract-based approach. For example, what if blood tests revealed that the gestational "surrogate" is in fact the genetic mother and the intended mother does not want an unrelated child? If the contract is then treated as unenforceable because the parties had in mind a child genetically related to the initiating mother, it is hard to see what practical advantages an intention-based or contract-based approach provides over one focused squarely on genetic tie. See *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992) (holding, based on blood tests revealing that the "surrogate" mother's husband was the child's genetic father, that the surrogate and her husband were the legal parents of a severely handicapped child wanted by neither the sperm donor nor the surrogate).

to maternity and paternity determinations;³⁵¹ the fact that a gestation-based approach to maternity relies on traditional stereotypes of female nurturance only lends weight to this argument.³⁵²

Some commentators have nonetheless urged a gestation-based standard. While the arguments in favor of such an approach are various, none rely on claims of procreative right (it is not obvious who possesses it) or contract (any contract would specify the genetic mother as legal mother). Instead, commentators favoring the gestational mother have relied on factual assumptions about the mother-child bond.

One argument in favor of the gestational mother is based on the claim that, while men's perceptions of parenthood are determined by genetic tie, "[f]or women, what makes the child ours is the nurturance, the work of our bodies."³⁵³ Women's and men's experiences of pregnancy and birth are undeniably different. But the evidence simply does not support the assertion that women uniformly identify motherhood with pregnancy. Some pregnant women experience the fetus as alien and invasive,³⁵⁴ while adoptive mothers typically feel strongly attached to "their" children, even though they did not nurture them prenatally.³⁵⁵ And women who give birth to extremely premature infants — infants who may be maintained in an incubator for as long as a third of the gestational period — do not seem to feel any less motherly because of their limited gestational role. More importantly, whatever some women may feel about motherhood, women who make use of gestational surrogates clearly connect motherhood with genetic tie: that

³⁵¹ See *Soos v. Superior Court*, 897 P.2d 1356, 1360 (Ariz. Ct. App. 1994) (holding that the Equal Protection Clause requires genetic determination of maternity in a case of gestational surrogacy).

³⁵² The Supreme Court has held that the preservation of traditional, gender-based family roles is an insufficient basis for justifying a gender-based classification. See *United States v. Virginia*, 518 U.S. 515, 540-46 (1996); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979); *Stanton v. Stanton*, 421 U.S. 7, 10 (1975).

³⁵³ BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* 44 (1989).

³⁵⁴ See ANN OAKLEY, *WOMEN CONFINED: TOWARD A SOCIOLOGY OF CHILDBIRTH* 207-13 (1980); John T. Condon & Carolyn Corkindale, *The Correlates of Antenatal Attachment in Pregnant Women*, 70 *BRIT. J. MED. PSYCHOL.* 359, 369-71 (1997); Margaret Erickson, *Predictors of Maternal-Fetal Attachment: An Integrative Review*, 3 *ONLINE J. KNOWLEDGE SYNTHESIS FOR NURSING* 1 (1996); Myra Leifer, *Changes Accompanying Pregnancy and Motherhood*, 95 *GENETIC PSYCHOL.* 55, 89-93 (1977).

³⁵⁵ See Femie Juffer & Lizette G. Rosenboom, *Infant-Mother Attachment of Internationally Adopted Children in the Netherlands*, 20 *INT'L J. BEHAV. DEV.* 93 (1997) (reporting that attachment levels of adoptive mothers did not differ significantly from those of biological mother controls); Leslie M. Singer, David M. Brodzinsky, Douglas Ramsay, Mary Steir & Everett Waters, *Mother-Infant Attachment in Adoptive Families*, 56 *CHILD DEV.* 1543 (1985) (reporting no significant differences in the quality of attachment in adoptive and biological parent-child relationships).

is why they have elected this method of becoming a parent. Nor are these women unusual. Adoptive and AID children search for biological parents because, at least in our culture, concepts of parenthood, family, and identity are strongly linked to biological connection;³⁵⁶ indeed, a prime factor responsible for the rapid growth in use of reproductive technologies has been the desire for genetically related children.³⁵⁷

A second argument in favor of the gestational mother relies on her crucial physical role in bringing the fetus to term.³⁵⁸ But this argument ignores the fact that the genetic mother's role is also crucial; without her ovum, there would be no fetus to gestate. And while gestation is undeniably an important form of care — no incubators capable of sustaining a fetus over the nine month period of gestation are yet available — that care has not, at birth, induced affection or dependency from the child.

A third argument focuses on the gestational mother's feelings of attachment and loss.³⁵⁹ But we have no evidence that the genetic mother will feel less attached to her biological child than will the gestational mother to the child she has carried, or that the genetic mother's sense of loss at the prospect of not being able to rear her child will be less profound.³⁶⁰ Even if it could somehow be shown

³⁵⁶ See Hill, *supra* note 103, at 419 (“[A] fundamentally biological conception of parenthood is ingrained deeply in the ethos of our culture [and] influence[s] our most profound intuitions concerning the nature of parenthood and parental rights.”); James L. Nelson, *Genetic Narratives: Biology, Stories, and the Definition of the Family*, 2 HEALTH MATRIX 71, 71–83 (1992) (discussing the significance of genetic ties); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 214–23 (describing the cultural importance of genetic connection). For a sociological account of the role of genetic tie in the American view of kinship, see DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* (2d ed. 1980).

³⁵⁷ See Kenneth D. Alpern, *Genetic Puzzles and Stork Stories: On the Meaning and Significance of Having Children*, in THE ETHICS OF REPRODUCTIVE TECHNOLOGY 147, 158 (Kenneth D. Alpern ed., 1992) (noting that, for most people, “adoption is a second choice” due to the lack of “genetically based affinities of temperament, interest, . . . understanding[, and] physical resemblance to the parents[, and because] an adopted child, it is generally felt, is just not, in the fullest sense, one's own; one is not a *real* parent of the child”); see also FENWICK, *supra* note 68, at 217–18; KAPLAN & TONG, *supra* note 15, at 242; Hill, *supra* note 103, at 389.

³⁵⁸ See, e.g., NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 30, at 351 (“[E]ven without a genetic connection, a birth mother has a strong biological tie to her child as a result of nurturing the child in her womb.”); George J. Annas, *Baby M: Babies (and Justice) for Sale*, 17 HASTINGS CTR. REP. 13 (1987) (arguing that the “gestational mother . . . contributes more to the child than the ovum donor does in the same way she contributes more to the child than a sperm donor does”); Rothman, *supra* note 149, at 97–98, 244–45 (describing gestation as social and noting the significance of the prenatal social relationship between the fetus and gestational mother).

³⁵⁹ See Rothman, *supra* note 149, at 97–98.

³⁶⁰ Most of the evidence comes from studies of women who give children up for adoption — women who are both genetic and gestational mothers. See Anne B. Brodzinsky, *Surrendering an Infant for Adoption: The Birthmother Experience*, in THE PSYCHOLOGY OF ADOPTION, *supra* note 336, at 295, 306–10; Eva Y. Deykin, Lee Campbell & Patricia Patti, *The Post-Adoption Expe-*

that gestation induced a stronger sense of loss than did genetic connection, this factor should not determine parental rights. Both when granting parental rights to a nonparent and when denying a biological parent the opportunity to evade parental obligations, parentage law has been centrally concerned with the child's needs, not the parent-claimant's feelings.³⁶¹ There is no obvious reason to apply a different approach to the problem of gestational surrogacy.

A final argument in favor of recognizing the gestational surrogate as legal mother is based on deterrence: some commentators have argued that recognition of the genetic mother as the child's legal mother would encourage gestational surrogacy, while recognition of the gestational mother would discourage it.³⁶² But if the legislature does decide to outlaw gestational surrogacy, recognition of the gestational surrogate as legal mother is neither necessary nor sufficient to eliminate the practice. It is unnecessary because, in contrast to "ordinary" surrogacy, gestational surrogacy invariably involves IVF, which requires the participation of licensed medical personnel who will rarely be willing to risk their licenses by performing illegal procedures.³⁶³ It is insufficient because, given that most gestational surrogates do not attempt to retain custody of the children they have borne, many women who want genetically related children will find the risk of a legal claim by the surrogate acceptable.

rience of Surrendering Parents, 54 AM. J. ORTHOPSYCHIATRY 271, 278-80 (1986); Leverett Millen & Samuel Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55 AM. J. ORTHOPSYCHIATRY 411, 413-18 (1985); Edward K. Rynearson, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139 AM. J. PSYCH. 338, 340 (1982).

These women often experience long-term emotional difficulties, interpersonal conflict, and even post-relinquishment infertility. The sense of loss that accompanies such a relinquishment typically extends over a lengthy period; in one study, 65% of relinquishing mothers had initiated a search for their children and 96% had considered searching. See Deykin, Campbell & Patti, *supra*, at 274. There is also evidence suggesting that feelings of loss are exacerbated when a child's surrender is involuntary. See *id.* (reporting that relinquishing parents were more likely to search for a lost child when relinquishment was motivated by nonvolitional factors such as family pressure).

³⁶¹ See *supra* pp. 886, 892-94.

³⁶² See NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 30, at 351 (favoring the gestational surrogate because, under the N.Y. surrogacy prohibition, "a birth mother . . . may not relinquish her parental rights and responsibilities before the child is born"); Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275, 291 (1992) (concluding that gestational surrogates should be recognized as legal parents because, "[o]nce parentage laws strip the pregnancy of any legal significance for determination of maternity, the market will reduce the uniquely female capacity to gestate a fetus to a paid service").

³⁶³ An analogous case is that of organ sale, which is illegal in the United States. See 42 U.S.C. § 274(e) (1994). Because transplants require a licensed surgeon, illegal organ sales rarely, if ever, take place, despite lengthy waiting lists for organs and the existence of organ markets in other countries.

Pregnancy and childbirth are extraordinary experiences, both physically and emotionally. They are perhaps so bound up with personhood that, like sex and kidneys, their sale ought not be allowed. The question of whether gestational surrogacy should be permissible is simply beyond the scope of this article; I take no position here on this important issue. But if the practice is allowed and parenthood must be determined, it appears, on balance, that genetic tie should take precedence over gestation. To rely on gestation as the determinant of motherhood and genetics as the determinant of fatherhood would undesirably introduce a gender-specific element in the determination of parentage. None of the policy values that have been thought significant enough to trump biology in determining fatherhood apply to gestational surrogacy, nor is there reason to believe that the gestator's sense of loss and parenthood is stronger than that of the genetic progenitor. Perhaps most importantly, the gestator's contributions to fetal development, while vital, do not induce the sort of attachment that has led courts to protect children's established relationships. Courts refusing to return a mistakenly switched baby to a genetic parent have done so because years have passed and relationships formed; gestational surrogacy presents no such case.³⁶⁴

3. *Donated Preembryos.* — The policies underlying contemporary parentage law clearly support state rules assigning parental rights both to a husband who has consented to his wife's artificial insemination with donated semen and to a wife who has agreed to IVF with a donated ovum and her husband's sperm. Such rules would reinforce the marital presumption of legitimacy and the traditional policy emphasis on marital childbearing; they would promote two-parent childrearing; and they would ensure that the marital presumption is applied in a gender-neutral manner.

The husband who consents to becoming the father of a child born through AID and the wife who consents to becoming the mother of a child conceived with a donated egg and her husband's sperm are in many respects like husbands and wives who agree to adopt stepchildren. But when conception is achieved using a donated preembryo or donated sperm and ovum, neither the woman who gives birth nor her husband is genetically related to the child. Such a case is analogous not to a stepchild adoption, but to the adoption of an unrelated child.

³⁶⁴ See, e.g., *Mays v. Twigg*, 543 So. 2d 241 (Fla. Dist. Ct. App. 1989). In *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), the Calverts relied on the switched baby cases: "Assuming this . . . child were confused with a number of other children in the hospital nursery . . . only Crispina Calvert could, by blood tests, prove her maternal connection to the child." Respondents' Brief at 45, *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (No. S023721), quoted in DOLGIN, *supra* note 7, at 146.

In most states, stepchild adoptions are subject to different rules than unrelated-child adoptions. Evaluation of an adopting stepparent typically is not required, both because the biological parent — who is not subject to state evaluation — has “selected” the adoptive parent and because the child’s living arrangements will remain constant, whether or not the adoption is finalized.³⁶⁵ By contrast, the adoption of an unrelated child typically is highly regulated. In a few states, such an adoption may not be effected except through a licensed state adoption agency; in all states, judicial review and approval is required.³⁶⁶

The adoption analogy suggests that parentage determination in the case of a donated preembryo should not be the same as in a case of AID or IVF with husband sperm (IVF-H). If genetic tie is used to determine legal motherhood in cases of gestational surrogacy, the argument for treating preembryo donation differently from AID and IVF-H becomes even stronger: if both gestation and intention are inadequate to establish legal motherhood in the surrogacy context, consistency suggests that these factors should not determine legal parentage in the case of a donated preembryo.

But while use of a donated preembryo and adoption of an unrelated child are in many respects similar, there are also substantial differences between these two methods of becoming a parent, differences that counsel against extending current adoption rules to the preembryo context. First, a preembryo is not a child or even a fetus in utero that will in the natural course of events mature into a child. The preembryo may never become a life in being; it has no legal status whatsoever.³⁶⁷ Second, many donated preembryos are “spares” created for the potential future use of the couple whose sperm and ova were used to produce them.³⁶⁸ “Spare” preembryos are not always used by their creators, who sometimes donate them for the use of others.³⁶⁹

³⁶⁵ See UNIF. ADOPTION ACT § 4 cmt., 9 U.L.A. 103 (1999); Joan Heifetz Hollinger, *Adoption Law, THE FUTURE OF CHILDREN*, Spring 1993, at 43, 44 (noting that “[i]ntrafamily adoptions are the least regulated type of adoption”).

³⁶⁶ See Hollinger, *supra* note 365, at 48 & n.31 (summarizing state adoption laws and reporting that, in 1993, five states disallowed nonagency adoption placements and that “[i]n both direct and agency placements, a further prerequisite to the approval of an adoption is at least one favorable evaluation of the placement during the time between placement and the entry of a final decree”).

³⁶⁷ The exception is Louisiana, which provides that an in vitro fertilized ovum is a legal person. See LA. REV. STAT. ANN. § 9:121-9:133 (West 1992).

³⁶⁸ The creation of extra preembryos ensures that, if the couple wants to attempt a subsequent IVF procedure, they can do so without the expense, inconvenience, and potential health risks associated with ovum retrieval. See Blair H. Smith & Ian D. Cooke, *Ovarian Hyperstimulation: Actual and Theoretical Risks*, 302 BRIT. MED. J. 127 (1991) (describing medical risks). But see Andrea L. Bonnicksen, *Embryo Freezing: Ethical Issues in the Clinical Setting*, in WHAT PRICE PARENTHOOD?, *supra* note 17, at 28-29 (questioning benefits of preembryo storage).

³⁶⁹ See Davidoff, *supra* note 63, at 139-46; Owen, *supra* note 63, at 500-06.

Because of these differences, rules commonly applied in unrelated-child adoptions adapt poorly to the preembryo context. Provisional adoptive placements and post-birth home studies, for example, seem quite out of place in a preembryo donation case. So do rules that prohibit pre-birth consent or mandate post-birth consent ratification. In the adoption setting, such consent requirements are designed to ensure that a rights waiver is informed, reflective, and uncoerced. But in the preembryo context, such requirements would pose an extraordinary array of problems. For example, a post-birth consent requirement would not only necessitate maintaining contact with the preembryo's progenitors over what might be a period of several years, but subject users of donated preembryos to extraordinary risks: a woman who used a donated preembryo to become pregnant would confront the possibility of giving birth, only to face relinquishing the child.

Use of donated preembryos also presents policy issues that do not arise when a couple adopts an unrelated child. For example, a couple might use preembryo donation to engage in eugenic manipulation by choosing sperm and egg donors with traits they deem particularly desirable.³⁷⁰

In sum, neither AID statutes nor adoption law should simply be extended to married couples using IVF with donated preembryos. To ensure consistency with the law applicable to sexual conception, preembryo legislation should not rely on intention as the determinant of parental status. And, assuming that the legislature has rejected gestation as the basis for parental status in cases of gestational surrogacy, it should also reject gestation as a determining factor here. Legislative standards should also be sensitive to the interests of all parties.

These various requirements leave room for a variety of regulatory regimes. One legislature might specify with some particularity the notices and forms to be used when consent to donation is obtained, but otherwise assimilate preembryo donation to AID; another might simply require preimplantation donor consent;³⁷¹ yet another might couple one or another donor consent requirement with various recipient mandates, for example, a preimplantation home study by an adoption agency. The novelty of the issues posed by preembryo donation and

³⁷⁰ See, e.g., Ruth Bashinsky & William Sherman, *50 G Bounty for Human Eggs: As Prices Increase, So Do Questions of Ethics*, DAILY NEWS, June 14, 1999, at 22 (reporting that, in 1998, a couple placed ads in student newspapers at a number of prestigious universities offering \$50,000 for eggs from a donor at least 5 feet, 10 inches tall, who had scored at least 1,400 on her SAT exams); Gina Kolata, *Researchers Report Success in Method to Pick Baby's Sex*, N.Y. TIMES, Sept. 9, 1998, at A1 (reporting that sex selection is possible).

³⁷¹ Such a requirement would help to deter embryo "theft." It would also help to ensure that consent to donation is current and reflective; for example, the couple who had signed a standardized donation form at the time of an initial IVF procedure may wish to withdraw their consent if they have failed to have a child through IVF themselves.

the fact that both adoption and AID differ from preembryo donation in important ways suggest that legislative standards should reflect both areas of law but imitate neither.

E. What the Interpretive Approach Offers and What It Does Not

The package of legislative standards that I have outlined would assimilate technological conception within contemporary parentage law. The proposed standards would base parental status on current family policy and widely shared public values instead of the circumstances of a child's conception. The suggested reforms pose no problems of feasibility or cost-effectiveness. In most states they would not even require a major revision of current law; indeed, consistency is best assured with minimal revision.

The reforms suggested by the interpretive approach are also fairly comprehensive. In contrast to the global approaches examined in Part II, the interpretive approach can be applied to all of the parental status issues arising from technological conception. It is notable that the arguments made for and against extending adoption registries to technologically conceived children, permitting single women's use of AID, and recognizing a gestational surrogate as legal mother — the bulk of the "harder" cases we have examined — typically rely on various facts or assumptions rather than a global theory. The reason for this pattern is straightforward: a claim of reproductive rights can resolve none of these problems,³⁷² and contracts are typically employed only in the case of gestational surrogacy (gestational surrogacy is also the only case in which money typically changes hands). By contrast, the interpretive approach can not only be utilized in all cases, but it also offers a means of determining which facts, assumptions, and interests are relevant; even when it fails to generate determinate answers, it can guide the decisionmaker toward a reasoned analysis of the problem.

In addition to these merits, the interpretive approach offers the benefit of neutrality. It treats all would-be parents equally, without regard to their choice of a method for becoming a parent. It does not depend on any particular vision of family life or parental prerogatives, except insofar as that vision has been accepted elsewhere within family law and policy.

In recent years, family law and policy have been hotly debated, not only in legislative chambers but also in academic journals, on the campaign trail, during the daytime talk shows, and over the family

³⁷² A right to procreate cannot realistically be stretched to entail a right to confidentiality or to divest the other progenitor of his procreational rights. With gestational surrogacy, an additional problem is identification of the rights-holder.

dinner table. Debate on issues like parental rights, nontraditional family forms, and gender roles has been both impassioned and divisive. The proposals I offer are not based on the view that either side in the "war" over the family has got it right. I offer no brief for or against single parenting, gay parenting, surrogate parenting, or married parenting. While the approach I have offered is conservative in that it supports reliance on tradition, it does not assume that current law should remain static; if, for example, the law recognizes two-mother parenting in the context of adoption, then there is no obvious reason why it should not also recognize two-mother parenting in the context of technological conception.³⁷³ In this article, I do not argue for or against such an outcome. My point is simply that parentage law should chart a consistent course, without regard to the manner of a child's conception.

Some commentators on technological conception have seen in these new methods of family formation "the opportunity for . . . experiment [with] status-based parental responsibility [rules]."³⁷⁴ Their views on the law's direction here are colored by their dissatisfaction with the law's direction elsewhere. The approach I have suggested does not assume that contemporary standards are ideal, or that they should not be debated and revised. As families and their needs change, so must family law. And, in a pluralistic society like ours, division and debate are to be expected and welcomed.

Because the interpretive approach takes no sides in the debate over the family, it does not offer to resolve family law's most divisive issues. Some will find it anemic and prefer an approach that is grounded in a strong view of family form and function. But there is no obvious justification for legal experimentation based solely on the manner in which sperm and ovum are combined. We have no reason to think that children of a "surrogate" mother who has consented to their adoption by a stepmother will experience remarkably different feelings than those with a "regular" mother who has so consented, or that children of a single woman conceived with sperm in a syringe will experience the absence of a father in a profoundly different way from those born as the result of a casual "one-night stand." To the extent that legislatures categorize individuals and apply different standards by category, those categories should have a rational basis that reflects relevant public policy goals and the experiences of the affected individuals. Categori-

³⁷³ See *supra* p. 912.

³⁷⁴ Schultz, *supra* note 111, at 398 (urging that "[a] narrow experiment with chosen rather than imposed responsibility could hardly come off worse than the dismal realities of abdication and non-compliance that now confront us" and that intention-based parentage "has the potential to create more gender-neutral avenues to parenthood").

zation based on the mechanics of conception does not meet this standard.

In sum, although the reforms I have outlined would neither revolutionize nor preserve the traditional family, they would do much to assimilate technological conception within contemporary family law and to ensure consistent treatment of both parents and children. We would gain a good deal from these modest statutory revisions.

CONCLUSION

While medical science has revolutionized the process of conceiving a child, it has not fundamentally altered the desires of would-be parents or the relationships of children with those who care for them. Many, perhaps most, of those who employ technological methods of conceiving a child do so because they want a child genetically related to at least one member of a planned family. Indeed, although recourse to technological conception sometimes reflects the desire for an unconventional family form, often it is merely the next step after medical treatments to facilitate sexual conception have failed. When technological conception employs genetic material from within the planned family unit, its results are virtually identical to those of sexual conception. Like Louise Brown, children so conceived may feel gratified at their parents' persistence, but are otherwise "ordinary" children with "ordinary" relationships. Parents may have strong feelings about their difficulties in conceiving a child but, in the end, they are "ordinary" parents.

When technological conception employs genetic material from outside the planned family unit, however, it presents issues similar to those that arise in other separated or "blended" families. All children with unknown biological progenitors have informational needs; some — whether adopted, technologically conceived, or simply abandoned — may experience a sense of parental rejection and a need to find out more about their biological parents. Social "parents" — stepparents, adoptive parents, husbands whose wives have conceived during an extramarital affair, husbands whose wives have employed AID, single AID users, single women who conceive through casual sex — will often wish to exclude from their families the "intruders" who are also their children's genetic parents. And genetic parents — those who relinquish children for adoption, "surrogate" mothers, sperm and egg donors — may experience an unexpected level of interest in their children and profound grief at the prospect or reality of losing them.

Because a child's relationships and needs do not ultimately depend on the manner of her conception, there is every reason to harmonize the law of sexual and technological conception. Such an approach would ensure consistency in our treatment of families. It would avoid the fruitless sloganeering that has all too often characterized discussion

of technological conception. And it would focus attention on family policy, rather than technological novelty.