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The Technological Family: What's New and What's Not

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Over the past half-century, the processes of conception and prenatal development have emerged from the hidden recesses of the body into the glare of the laboratory. New technologies now make it possible to conceive a baby without sex and to both predict and witness the process of fetal development. A baby may have as many as six “parents”—sperm donor, egg donor, gestator, gestator’s husband, and a couple who has “commissioned” the pregnancy. Would-be parents can select their baby’s sex and, with prenatal tests and abortion, ensure that their baby is not born with congenital defects such as Down’s Syndrome or spina bifida.

Family law has begun to deal with some of the legal issues posed by our new ability to manipulate the reproductive process. What the developing law makes clear is that, while technology may powerfully affect the process of *becoming* a parent, it has not strongly affected the reality of *being* a parent. Nor has reproductive technology significantly altered courts’ assessment of what is relevant to the determination of parental rights and responsibilities. Indeed, while commentators continue to urge that the new technologies “are creating new kinds of family and social relationships. . .,”¹ the evidence instead suggests that technology itself has played no substantial role in expanding the range of family forms. Families have indeed changed over the past half-century, but the changes are social, not technological.

That is not to say that the new technologies do not have the potential to change our family life. First, the new methods of conception offer

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1. CANADA ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, 1 PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 41 (1993) [hereinafter PROCEED WITH CARE].

the possibility of purchased parenthood. Today's would-be parents can select and buy sperm, egg, and a human incubator for "their" baby just as they might choose furniture and hire an interior decorator to design the baby's room. While baby sale has been with us for a long while, the sale of reproductive capacity and material has not; moreover, baby sales have taken place in the black and gray market, not in the open or with the help of medical professionals. Second, the new technologies permit significant delay in the reproductive process. While sexual conception invariably produces a birth within 300 days or not at all, technological conception may involve sperm, ova, or preembryos that have been cryopreserved for years. Both commercial and delayed parenthood present difficult questions relating to the ownership of genetic material and the status of preembryos that may—or may not—become human lives. Courts and legislatures have only begun to grapple with these genuinely novel aspects of the technological revolution in reproduction. The balance of this essay briefly explores both faces of technological conception—what's new and what's not.

I. Technological Conception and Parenting: Novel Beginnings, Traditional Results

Louise Brown, the first child conceived through in vitro fertilization (IVF), noted in an interview given at age nineteen that she was "just an ordinary girl."² Of course, Louise's birth was not ordinary; as the first child ever conceived in a petri dish, it was worldwide 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 family relationships were thus extraordinarily ordinary. Louise may have felt particularly wanted because her parents went to such lengths to produce her, but there is no reason to suppose that Louise's experience as the child of a married couple who were both her biological and nurturing parents would in other respects differ from the experiences of children of married couples who conceive sexually.

Today, the vast majority of children conceived technologically are like Louise Brown. In 1996, slightly more than 20,000 babies were conceived using IVF technology in the United States. But only 1,100 of these babies were conceived using donated eggs; the rest were the

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

biological children of the women who gave birth to them.³ And, like the mother of Louise Brown, the vast majority of these women were married, had employed their husbands' sperm to produce a preembryo, and planned to raise the child in a marital family. Most technological births thus involve the most traditional of families; indeed, would-be parents typically seek access to the new technologies precisely because they want a "traditional" parent-child relationship, rather than one achieved through adoption or extramarital sex.⁴

Technological births like that of Louise Brown raise no legal questions whatsoever. No commentator has suggested, in cases like hers, that parentage should be determined any differently than it has been in cases where conception occurred sexually. Nor is there any obvious justification for reliance on an untraditional approach.

It is true, of course, that those who seek access to the new technologies do not invariably conform to the traditional family pattern I have just described. Even if the vast majority of IVF procedures involve married women employing their own eggs and husband's sperm, some involve "donated" eggs, sperm, or both. And experts estimate that as many as 40 percent of women who currently seek artificial insemination with donor sperm (AID) are single and lesbian.⁵ Unlike the case of

3. U.S. CENTERS FOR DISEASE CONTROL, 1996 NATIONAL ART FERTILITY REPORT nat. summ., § 1 (1999), <<http://www.cdc.gov/nccdphp/drh/art96>> (visited July 14, 1999) (based 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).

4. See Kenneth D. Alpern, *Genetic Puzzles and Stork Stories: On the Meaning and Significance of Having Children*, in THE ETHICS OF REPRODUCTIVE TECHNOLOGY 158 (Kenneth D. Alpern ed. 1992) (noting that, for most people, "adoption is a second choice" due both to the lack of "genetically based affinities of temperament, interest, or understanding . . . a genetically based 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 LYNDIA B. FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY 217-18 (1998); LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 242 (1994).

5. Gabrielle Wolf, *Frustrating Sperm: Regulation of AID in Victoria Under the Infertility Treatment Act 1995*, 10 AUST. J. FAM. L. 1, 28 n. 116 (1996) (quoting director of California sperm bank). See also Emma Cook, *So You Want a Baby But There's No Sign of Mr. Right*, THE INDEPENDENT, 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 Kinoshian, *And Baby Makes Two: These Days, More Thirty-Something Women Are Opting For Single Parenthood*, NEWSDAY, May 11, 1999 (providing anecdotal accounts of AID use by single women). There are no recent national data on births achieved using artificial insemination (AI), but a survey conducted by the U.S. Congress Office of Technology Assessment revealed that, during 1986-87, there were approximately 65,000 AI births, 30,000 of which involved donor semen (AID). At the time of the survey, 90% of AID users were married women who sought AID because of their husbands' infertility. U.S. CONGRESS, OFFICE OF TECH-

Louise Brown, such births do sometimes give rise to litigation and legal controversy. But they do not, in fact, produce genuinely novel family forms.

Take the most common untraditional case, that of a single woman utilizing AID. The result is a single mother who has no current relationship with her child's biological father, whose identity is probably unknown. Such a family is not obviously different than that of the single mother who conceived with an anonymous or semi-anonymous sexual partner: each child has an unknown and absent father, with whom the mother had an insignificant pre-birth relationship; each child lacks paternal relations and relationships. While women who conceive using AID may "replace" the absent father with other male figures or even a second "mother," so may women who conceive sexually. While it is true that single women seeking AID invariably intend to become parents, women who conceive sexually with an anonymous partner may also intend a pregnancy. Nor is it obvious, from the child's perspective, that pregnancy by accident or design is an important determinant of the parent-child relationship.

It is obvious, however, that single women's use of AID represents only a minor variation in a major social phenomenon. Births to unmarried mothers have increased dramatically in recent years; between 1970 and 1993, births to unmarried mothers increased from 10.7 percent to 31 percent of the annual total.⁶ There is no evidence that AID has played a major role in producing this shift.

Women who choose to become parents without partners do so for varied reasons and become pregnant in varied ways. But the end result is typically the same—a child with one residential parent. Whether conceived sexually or technologically, few of these children have significant paternal ties.⁷ It is true that older, well-educated women who

NOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY 3 (1988). But the advent of intracytoplasmic sperm injection (ICSI), involving the in vitro microinjection of a single spermatid into an ovum, has dramatically altered the treatment of male infertility. A large portion of couples who formerly resorted to AID now conceive a child biologically related to husband and wife using IVF and ICSI; thus, in 1996, ICSI was used in 30% of U.S. IVF cycles. 1996 ART REPORT, *supra* note 3.

6. Compare U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998 80, tbl. 100 (1998) (1990s data), with U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996 79, tbl. 98 (1997) (1970s data).

7. Experts estimate that no more than a quarter of nonmarital children are born to cohabiting couples. See Larry L. Bumpass & J.A. Sweet, *Children's Experience in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 FAM. PLANNING PERSPECTIVES 256 (1990); Andrew J. Cherlin, *The Weakening Link Between Marriage and the Care of Children*, 20 FAM. PLANNING PERSPECTIVES 302, 303 (1988).

choose single parenthood are able to offer their children advantages that younger, less educated mothers cannot, and that these women may disproportionately become mothers technologically rather than sexually; but it is socioeconomic status, not technology, that determines that advantage. In sum, while the rise of single motherhood has undeniably and profoundly altered our family life, there is no evidence to support the view that the phenomenon results from AID, or that AID defines a distinctive subset of single-parent families.

Even in cases of technological conception involving “divided” parentage, the ultimate result is typically an altogether familiar parent-child relationship. When a married couple employs AID to achieve a pregnancy, for example, the result is not all that different from a pregnancy resulting from marital infidelity.⁸ Husbands who know that they are not biological fathers do sometimes agree to act as fathers to their wives’ children. We know so because of the cases in which they later attempt to back out; and we know that courts have been hostile to these attempts, just as they have been in the case of AID.⁹ Indeed, AID statutes conferring parental status on a consenting husband, which have now been adopted in most states, represent little more than the codification of the equitable doctrine of paternity estoppel specifically applied to the new AID context. IVF using donated eggs and husband sperm represents a novel twist in the traditional pattern—unfaithful husbands have rarely attempted to rear their nonmarital children, at

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. U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991 6–7, 12 tbl. F (Current Population Reports No. P60–187, 1995) (reporting that 56% of custodial mothers, 41% of custodial fathers, and 27% of never-married mothers had been awarded child support in 1991 and that 34.0% of custodial parents without support orders reported simply that they “did not pursue a child support award,” 17.5% that they “did not want child support, 16.5% that they believed “other parent [was] unable to pay, and 17.5% that they were “unable to locate [the] other parent”).

8. Experts variously estimate the rate of nonmarital paternity among births to married women. See Serge Bredart & Robert M. French, *Do Babies Resemble Their Fathers More Than Their Mothers? A Failure to Replicate Christenfeld and Hill 1995*, 20 EVOLUTION & HUMAN BEHAVIOR 129, 130–31 (1998) (summarizing research reports and noting estimates of extramarital paternity of 6% to 30% in southern England and 10% in rural Michigan); S. MacIntyre & A. Sooman, *Non-Paternity and Prenatal Genetic Screening*, 338 LANCET 869 (1991) (reporting that the proportion of U.S. children born to married women who were not fathered by the women’s husbands is probably from 1% to 5%, but may be as high as 10%).

9. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.02A, comment d. (Council Draft No. 5, Oct. 6, 1998) (citing cases and noting that “[m]ost states find husbands estopped from challenging paternity under certain facts”). See also Jean A. Goldstein, Note, *Children Born of the Marriage—Res Judicata Effect on Later Support Proceedings*, 45 MO. L. REV. 307, 308 n. 5 (1980).

least in the marital household—but the basic pattern is the same. In each case, a married couple has decided to rear a child to which 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 they are rearing together.¹⁰

Even when both husband and wife are biologically unrelated to the child they produce, the family that they form closely resembles a traditional adoptive relationship. The “adoption” may have occurred prenatally and without a formal legal proceeding, but the end result is the same: husband and wife will rear a child who is biologically related to neither of them. As with adoption, the parents must come to terms with having a child whose appearance and genetic heritage are nonfamilial in origin; their child, like a child who has been formally adopted, must deal with the uncertainty and informational needs occasioned by having unknown biological progenitors.¹¹

10. These stresses are significant. While the evidence suggests that most married AID users plan to maintain secrecy (see J.N. Robinson et al., *Attitudes of Donors and Recipients to Gamete Donation*, 6 HUMAN REPRODUCTION 307 (1991); D.M. Berger et al., *Psychological Patterns in Donor Insemination Couples*, 31 CAN. J. PSYCHIAT. 818 (1986)), the Canadian Royal Commission on New Reproductive Technologies concluded that “secrecy [about AID] places great strains on families.” Some fathers interviewed said that they felt “fraudulent,” while some mothers indicated that they felt they were “living a lie.” Adults born through DI who were interviewed by Commission researchers also reported that “the decision to keep DI a secret was very damaging—they felt deceived and said they had always sensed that something was ‘wrong’ in the family. Some told the Commission that they found out about the method of conception at a time of family crisis, such as divorce or death in the family—a time when secrets are difficult to keep.” PROCEED WITH CARE, *supra* note 1, at 464–65. Men married to women who have borne children through AID also tend to support mandatory counseling before AID. See C.L. Wendland et al., *Donor Insemination—A Comparison of Lesbian Couples, Heterosexual Couples and Single Women*, 65 FERTILITY & STERILITY 764 (1996).

11. Adopted and technologically conceived children have identical needs for non-identifying health information about their biological families. Children from both groups may also want information about the identity of their biological progenitors. Some experts have suggested that technologically conceived children will want such identifying information less frequently—adopted children may be more inclined to feel rejected by their biological parents and thus want explanatory information—but we know that some technologically conceived children do want such information, and want it badly. See Margaret R. Brown, *Whose Eyes Are These, Whose Nose?*, NEWSWEEK, Mar. 7, 1994, at 12; Peggy Orenstein, *Are You My Father?*, N.Y. TIMES, June 18, 1995, § 6 (magazine); 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. On the other hand, only a small fraction of adoptees ultimately seek the identity of their biological parents. See William Feigelman & Arnold Silverman, *Adoptive Parents, Adoptees, and the Sealed Record Controversy*, 67 SOC. CASEWORK 219 (1986) (finding that 15% of children of surveyed adoptive parents had asked to see their adoption records and 4% had contacted birth families); John P. Triseliotis, *Obtaining Birth Certificates*, in ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 34 (Philip Bean ed., 1984) (based on adoptees’ applications

All this is not to say that our concept of the family has been static; a half-century ago the *New York Times Sunday Magazine* simply would not have featured a family consisting of an Afro-American toddler (Erez), his gay, male, white “parents” (one of whom had adopted the toddler when “well past 40” and before meeting 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.”¹² The shift in our family life that has made possible—and socially acceptable—a family like that of Erez is large and real. But there is little evidence that technology has played a major role in determining the nature or direction of familial change. Nor is there evidence that the families which arise from technological conception are markedly different from those that arise from sexual conception, adoption or, as in the case of Erez, from shared family life.

Given that technological conception, for all its novelty and glitter, ultimately produces altogether familiar family forms and problems, it should come as no surprise that courts have typically dealt with questions of parental rights and responsibilities in these cases using very traditional lines of attack. The first cases to be litigated involved AID. Given the marital legitimacy presumption, litigation arose almost invariably in the context of parental divorce and involved a husband who sought to avoid child support obligations by challenging his paternity. In most of these cases, the AID child had been treated by both parties as a child of the marriage for years and—just as they did in similar circumstances outside the AID context—courts typically relied on equitable doctrines such as laches or estoppel to hold that the mother’s husband was the child’s legal father; occasionally, a court held the child to be illegitimate, but nonetheless imposed a support obligation.¹³

At least one court has applied the same approach when the husband sought to have himself declared the sole parent of children conceived through in vitro fertilization with the husband’s sperm and donated

for access to birth records in Great Britain, estimating that 21% of all British adoptees might apply for birth records during their adult years).

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

13. See Note, *Children Born of the Marriage—Res Judicata Effect on Later Support Proceedings*, *supra* note 9; ALI PRINCIPLES, *supra* note 9, at § 3.02A comment d (citing cases and noting that “[m]ost states find husbands estopped from challenging paternity under certain facts”). See also *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (holding child illegitimate but husband liable for child’s support based on consent to AID).

ova.¹⁴ After all, when a married woman achieves pregnancy with her husband's consent, her husband's sperm, and a donated ovum, she is in exactly the same position as the husband who has consented to AID (or agreed to father a nonmarital child). Both marital partners should be able to rely on the marital presumption of legitimacy just as they can in the case of AID. To hold otherwise would involve perhaps unconstitutional gender discrimination; certainly there is no basis in family law or policy for treating the two cases differently.

Even in a "five-parent" case—sperm donor, egg donor, gestational surrogate, and commissioning couple—where the marital presumption does not apply, estoppel principles remain applicable. Indeed, a California court recently used just this approach when the male member of the commissioning couple sought to avoid child support obligations during a divorce proceeding commenced shortly after the child's birth: "By consenting to the birth of a child" the Court quite traditionally noted, "... a husband incurs the legal status and responsibility of fatherhood."¹⁵ While the court's analysis of the motherhood issue was considerably more tortured, there is no reason why the estoppel principle should not apply with equal force to a wife; both parties, by consenting to the birth of a child, should logically incur the legal status and responsibilities of parenthood.

Courts have also taken a traditional approach to contracts purporting to determine the parental rights and obligations of participants in technological conception. It is black letter family law that contracts between parents that determine parental status, child custody, and child support are voidable; whether such contracts were entered premaritally, post-maritally, or without any marriage at all, courts routinely declare them unenforceable.¹⁶ It should thus come as no surprise that courts have generally followed an identical approach in analyzing the legality of surrogate parenting contracts and agreements between a mother

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

15. See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. App. Ct. 1998).

16. See Unif. Premarital Agreements Act § 3(b), 9B U.L.A. 376 (1987) ("The right of a child to support may not be adversely affected by a premarital agreement"); IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 839 (3d ed. 1998) ("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 states 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) (support); *Straub v. B.M.T.*, 645 N.E.2d 597 (Ind. 1994) (preconception contract between unmarried sexual partners absolving potential father of support obligations).

and known sperm donor limiting the donor's parental rights and obligations.¹⁷

I do not mean to suggest that the various forms of technological conception present nothing new. Clearly these are novel ways of having babies, that require extension of current legal doctrine. IVF even offers one genuinely new relationship, that of the gestational mother who is biologically unrelated to the child she carries to term. While mechanical incubators may play the role of gestator for as much as a third of the gestational period, sexual conception currently offers no possibility of completely severing gestational from genetic motherhood. Nor can a legal contest between a gestational and genetic mother be resolved by recourse to traditional doctrines like estoppel and the marital presumption of legitimacy. But that is not to say that the determination of parental rights in such a case must rely on novel methods of analysis; the simplest—and, I would argue—best approach in these cases is to say that the genetic mother is the legal mother because she is the one biologically related to the child. Biology has been, after all, the primary determinant of parenthood both in our law and culture. Parentage doctrines that ignore biology—the marital presumption of legitimacy, paternity estoppel, equitable adoption—all developed to protect the *child's* emotional and economic interests. In the case of a woman who gestates a child for another, these interests are simply not at stake. Unsurprisingly, some courts have already employed just this kind of reasoning in analyzing the claims of gestational versus genetic mothers.¹⁸

Courts could, of course, analyze the case of gestational surrogacy and other forms of technological conception using novel rather than traditional lines of attack. Indeed, the only high court to have addressed claims by both “mothers” in a case of gestational surrogacy relied in part on the genetic mother's intention to rear the child.¹⁹ Determining

17. The leading decision on surrogacy is, of course, *In re Baby M.*, 537 A.2d 1227 (N.J. 1988). See also *In re Moschetta*, 25 Cal. Med. Rep. 4th 1218 (1994); *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998). For cases involving sperm donors and mothers, see *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986); *C.M. v. C.C.*, 377 A.2d 821 (N.J. Super. Ct. 1977); *In re Interest of R.C.*, 775 P.2d 27 (Colo. 1989). But see *Leckie v. Voorhies*, 875 P.2d 521 (Or. Ct. App. 1994) (granting summary judgment against sperm donor who had signed written contract providing that his visitation was at the convenience of lesbian couple and that he would not assert parental claims). For other cases, see Annot., *Rights and Obligations Resulting from AI*, 83 A.L.R. 4th 295 (1991).

18. See *Arrendondo v. Nodelman*, 622 N.Y.S.2d 181 (Sup.Ct. 1994) (determining maternity genetically); *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. Com. Pleas 1994) (same).

19. *Johnson v. Calvert*, 851 P.2d 77 (Cal. 1993).

parental rights based on the parties' intention is an untraditional method of analysis. It is also a dangerous one. In our law and culture, there is simply no sense in which parenthood has been connected with intention. Children may have biological parents, adoptive parents, or even functional parents, whose rights and obligations derive from their consensual assumption of the real job of child rearing, but no one is a parent based on intention. Applied to sexual conception, an intention-based approach would, logically, cast into doubt the parentage of the many children one or both of whose parents did not intend to have them. Even in the context of technological conception, it would suggest that the woman who commissions a gestational surrogate birth should be declared the mother even if it turns out that the baby is the biological child of surrogate and husband.²⁰ Perhaps more importantly, there is no obvious reason to abandon traditional methods of determining parentage.²¹

In sum, because the families that come into being through technological conception are not markedly different from those that come into being in other ways, it makes sense for courts to utilize traditional family law doctrine when resolving claims about parental status and obligation. By and large, courts have followed this approach; they should (and, we should hope, will) ignore the prompting of commentators urging reliance on intention, contract, or any other doctrine that does not apply to the rest of our families. To do otherwise risks inconsistent and unpredictable outcomes determined by the accident of how a child is conceived rather than the lived reality of family life.

Legislation is still desirable to provide certainty and avoid litigation. The majority of states now have statutes specifying that a child born to a married woman through AID with her husband's consent is a child

20. Compare *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992) (based on blood tests revealing "ordinary" surrogate's husband to be the genetic father of child born with severe handicaps—and whom neither the sperm donor nor "surrogate" mother wanted—surrogate and husband declared legal parents despite contract and intention of sperm donor and his wife to become legal parents).

21. Some commentators have urged that parentage should be determined based on gestation rather than intention or genetic tie. Gestation is, on the surface at least, a traditional method of determining motherhood. But to rely on gestation as the determinant of motherhood and genetics as the determinant of fatherhood would undesirably introduce a gender-specific approach to the determination of parentage. Moreover, none of the policy values that, in determining fatherhood, have been thought significant enough to trump biology apply in the case of gestational surrogacy; the gestator's contributions to the child's development, while vital, do not induce the kind of dependence and attachment on the part of the child that have led courts to protect established relationships. To focus on women's gestational role as the prime determinant of parenthood would also suggest that, if and when a mechanical incubator capable of sustaining fetal life and development throughout pregnancy is developed, the machine should be recognized as "mother."

of the marriage.²² These statutes are squarely based on traditional family law doctrine, in particular the marital presumption of legitimacy and the doctrine of paternity estoppel. In looking at the newer parentage issues arising from AID and IVF, legislatures should follow the same approach, adapting traditional rules and policies to the technological context.²³ Families are social entities, not technological constructs; children conceived technologically deserve the same protections and status that our family law grants to all other children.

II. Commercialism and Reproductive Control

While current family law doctrine offers courts and legislatures a good deal of guidance in resolving the status issues arising from technological conception, it provides little help with the larger regulatory issues that arise from the new reproductive technologies. The new technologies make possible an unprecedented level of commercialization and reproductive manipulation. These new possibilities may not produce new family forms, but they certainly do raise fundamental questions about reproductive control, commercialization, and the status of the preembryo. Our courts have just begun to consider these questions and, outside the context of surrogacy contracts, our legislatures have been almost entirely inactive.

Surrogacy legislation was spurred by the nationwide publicity accorded the case of *Baby M.*, involving the legality of an agreement by a "surrogate" mother to relinquish the child she had conceived through artificial insemination to the sperm donor and his wife in return for \$10,000.²⁴ Almost half of the states enacted legislation dealing with

22. The 1973 Uniform Parentage Act set out the principle 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." Unif. Parentage Act § 5, 9B U.L.A. 287, 301 (1987). As of 1994, fifteen states had adopted the Uniform Parentage Act or a virtually identical standard; fifteen others had enacted statutes that varied by eliminating the licensed physician requirement. See Commentary to Uniform Status of Children of Assisted Conception Act (USCACA) § 4, 9B U.L.A. 155 (Supp. 1994). See also Kathryn Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1645 (1984) (listing 21 states requiring physician implantation).

23. A few states have already extended their AID statutes to provide for a similar approach in cases of IVF with donated ova and gametes. See FLA. STAT. ANN. § 742.11 (1998); N.D. CENT. CODE § 14-18-04 (Michie 1991); OKLA. STAT. ANN. tit. 10 § 555 (West, Supp. 1998); TEX. FAM. CODE ANN. § 151.103 (West 1997); VA. CODE ANN. § 20-158 (Michie 1995).

24. In the Matter of Baby M, 537 A.2d 1227 (N.J. 1988).

commercial surrogacy. In all but a handful of states, legislatures simply codified, in the surrogacy context, the traditional ban on baby-selling and the principle that contracts respecting children's status are unenforceable.²⁵ These statutes thus fail to resolve the larger questions about the commercialization of reproduction. Most do not apply to gestational surrogacy,²⁶ and none affect the sale of genetic material. The result is that would-be parents are perfectly free, as one recent headline put it, to "shop for Ivy League eggs,"²⁷ and sperm, and gestator—and to offer thousands of dollars to get what they want.

Some commentators have argued that the new forms of commercialism degrade child bearing in the same way that prostitution degrades sex. Enough European nations have agreed with this assessment—and moved to limit or ban such payments—that one commentator, summarizing the European law on reproductive technology, notes "non-commercialization" as an "area of convergence" across national boundaries.²⁸ A commission appointed to recommend policies on reproductive technology for Canada has recommended that even the providers of assisted reproduction should be noncommercial entities.²⁹

25. Today, almost half of the states have legislation dealing with surrogacy; some state laws criminalize participation in and/or brokering of a surrogacy agreement and some explicitly permit noncommercial surrogacy. See IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 1498 (3d ed. 1998). See also ROBERT BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 125, tbl. 5-1 (1995) (categorizing state laws). Only a handful of states permit any form of commercial surrogacy. See, e.g., FLA STAT. ANN. § 63-212 (West 1997 & Supp. 1998); N.H. STAT. ANN. §§ 168-B-1-B:32 (1994 & 1996 Supp.) (recognizing judicially approved surrogacy contracts, specifying allowable payments, and allowing surrogate to rescind agreement within 72 hours of child's birth); NEV. REV. STAT. § 127.287 (Michie 1993) (excluding from baby-selling prohibitions a "lawful contract to act as a surrogate" while "not prohibit[ing] a natural parent from refusing to place a child for adoption after its birth"); VA. CODE ANN. §§ 20-156 *et seq.* (Michie 1995) (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 Virginia laws ostensibly forbid payment to surrogates, but contain broad exceptions allowing payment of the surrogate's "expenses."

26. In 1995, only ten states had statutes dealing with gestational surrogacy. See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2350 n. 16 (1995).

27. Ova are rarely "donated" without compensation; many "donors" are sought through advertising and paid fees of \$3,000 or more. See Brigitte Greenberg, *Infertile Couples Shop for Ivy League Eggs*, BUFFALO NEWS, Jan. 4, 1999, at 4A; 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*, MINN. STAR-TRIBUNE, Apr. 5, 1998, at 1E.

28. Linda Nielsen, *Legal Consensus and Divergence in Europe in the Area of Assisted Conception—Room for Harmonization?*, in *CREATING THE CHILD: THE ETHICS, LAW, AND PRACTICE OF ASSISTED CONCEPTION* 305, 315-16 (Donald Evans ed., 1996) [hereinafter *CREATING THE CHILD*].

29. *PROCEED WITH CARE*, *supra* note 1, at 477, 572, 593 (recommending that sperm

There is no obvious reason for the United States to pursue a different and more commercial path in reproductive medicine than that followed by our peers among the family of nations. Like other industrialized countries, we already ban organ sales³⁰ and (except in Nevada) the sale of sexual services. If the eager entrepreneur is not permitted to sell sex or her spare kidney, one can certainly make a case that it is logically inconsistent to allow her to sell her ova or gestational services. (Of course, it is also possible to distinguish the two sales.)

But it is important to note that the U.S. system of health care financing—reliant entirely on private insurance except in the case of the elderly and very poor—is unlike that found in any other Western industrialized country. Nations that have moved to curb commercialism in reproductive technology also have more centralized health care systems that curb commercialism in other aspects of medical practice as well. Moreover, they have experience with health care regulation on a scale never experienced here. It thus should not surprise us that it is the United Kingdom, with “arguably . . . the most centralized [health care] delivery and financing system of any in Western Europe,”³¹ that has enacted the most comprehensive regulatory regime to govern technological conception.³² In the United States, by contrast, fertility clinics, like other medical providers, are frequently for-profit entities “interested above all in turning a buck.”³³ The medical profession has not sought regulation of commercialism in reproductive technology and the public is not clamoring for such regulation either. A case may well come along—like the *Baby M.* litigation—which will galvanize public opinion and produce a national prohibition, like that which currently obstructs organ sales. But until it does, we cannot expect commercialism to wane; almost certainly it will increase.

Family law has no doctrines directly applicable to the general issue of commercialism in reproductive medicine, nor is there any obvious way for a court to now become involved in the monetary aspects of a sperm or egg “deal;” except in the case of a preembryo sale, such

donors be compensated “only for their inconvenience and . . . , the direct costs of donation,” that “payment for egg donation not be permissible,” and that “[a]ssisted conception services should not operate on a for-profit basis”).

30. 42 U.S.C. § 274(b).

31. WILLIAM J. CURRAN ET AL., *HEALTH CARE LAW AND ETHICS* 1054 (5th ed. 1998).

32. For a detailed description of the British regulatory scheme, see DEREK MORGAN & ROBERT G. LEE, *BLACKSTONE'S GUIDE TO THE HUMAN FERTILIZATION & EMBRYOLOGY ACT 1990* (1991).

33. Michael D. Lemonick, *The New Revolution in Making Babies: A Host of Breakthroughs—From Frozen Eggs to Borrowed DNA—Could Transform the Treatment of Infertility*, *TIME*, Dec. 1, 1997 (describing variation in access criteria).

transactions are simply not, even arguably, baby sales.³⁴ Other issues in reproductive medicine—preembryo storage and disposition, sex selection, multiple implantations, access criteria, cloning—are equally, if not more, difficult to review through the litigation process. Divorce courts have been squarely presented with the question of control over the disposition of preembryos,³⁵ but issues more typically reach a court in a posture that does not permit resolution—or even review—of the underlying policy question. For example, courts have reviewed the practice of posthumous conception—but only in the context of a will contest,³⁶ and in a proceeding under the Social Security Act to determine whether a child born more than 300 days after the death of the insured met the statutory definition of dependent.³⁷ Confronted with narrow questions of this sort, courts simply cannot develop the broad, consistent policies that are necessary if we are to have a regime in which reproductive technology is controlled by something other than the dollar.

Do we want families in which parents routinely “design” and buy the child they want? Such possibilities cannot fail to affect our family life and family values. But the widespread availability of contraception, abortion, and prenatal testing already permits would-be parents to exert an unprecedented level of control over the reproductive process, while “gray market” adoptions enable those who want a child to use cash to get one.³⁸ It is not obvious that the new reproductive possibilities are qualitatively different from those that have long been available; nor is it obvious that they are not.

Other industrialized nations, recognizing both the importance and difficulty of the issues, have established commissions of one sort or another to assess public opinion, gather data, and make consistent policy recommendations.³⁹ The United States has not. We should. But, without a tradition of national policymaking in either health care or family life, it is not clear that we will.

34. Embryo sales, on the other hand, can easily be analogized to baby sales. See Gina Kolata, *Clinics Selling Embryos Made for Adoption*, N.Y. TIMES, Nov. 29, 1997, at 1A.

35. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

36. *Kane v. Superior Court (Hecht)*, 44 Cal. Rptr. 2d 578 (Cal. App. 1995).

37. *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348 (La. Ct. App. 1994).

38. See Diana Jean Schemo, *Adoptions in Paraguay: Mothers Cry Theft*, N.Y. TIMES, Mar. 19, 1996, at A1.

39. See JONATHAN GLOVER ET AL., *ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES: THE GLOVER REPORT TO THE EUROPEAN COMMISSION 15* (1989). See also *WHAT PRICE PARENTHOOD? ETHICS AND ASSISTED REPRODUCTION 104 et seq.* (Courtney S. Campbell ed., 1992) (surveying policy development in a number of nations); Jean Martin, *Prioritising Assisted Conception Services*, in *CREATING THE CHILD*, *supra* note 28 (briefly describing work of commissions in the Netherlands and Sweden).