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Reaffirming Human Dignity in Disputes Over Children Born From Assisted Reproductive Technologies

by

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I. Introduction

In 1998, a California appeals court made an astonishing ruling: the legal parents of a child engineered by the contributions of five people were a couple with no genetic relation to her, including a "father" who had no desire to raise her. *In re Buzzanca*¹ originated when John and Luanne Buzzanca, an infertile couple, contracted with a surrogate, Pamela Snell, to carry and birth a child conceived from anonymous gamete donations. Litigation began after the Buzzanca's marriage broke down, with John divorcing Luanne one month before the child, Jaycee, was born. John attempted to avoid child support, arguing that Jaycee was not a child of the marriage. The court ultimately ruled that he was liable, because he and Luanne were the "legal parents" of Jaycee, despite a lack of biological relationship. The court reasoned that because the couple "intended" to bring about Jaycee's existence, and because they were the "first movers" of Jaycee's existence through their "procreative conduct," they equated to natural parents. Controversially, the court then ordered the Buzzancas' names entered on Jaycee's birth certificate, deleting Snell as the birth mother.

California's rising "intent theory" of assisted reproduction literally means that couples using assisted reproductive technologies (ART) always have a superior claim of parentage over an egg donor, sperm donor, or gestational surrogate. Consequently, intent theory in ART cases has since developed increasing popularity among family law scholars. Some argue that the theory allows infertile women to completely bypass the adoption

process and instead attain automatically the same status as a biological parent.² Likewise, a homosexual couple arranging the creation of a child can do the same thing, so that two persons of the same sex could become the child's "natural parents."³ Most disturbingly, the logical conclusion of intent theory guarantees that "intending parents" will always win over biological contributors in paternity disputes. In theory, an adopting couple could sue for specific performance if, for example, a surrogate mother reneged on an agreement.⁴

This jurisprudential speculation may be premature and dangerous. In the excitement over the supposedly positive applications of intent theory, scholars may have overlooked the negative ones. The term "intent" inevitably brings to mind contract and property law.⁵ Enforcing the promises of up to five people might be licit but for the involvement of a sixth person who has no say in the matter: the child, whose life has been haggled over, bartered, and given a judicial stamp. While there has yet to be a five-way dispute over a child's paternity, with the increasing use of assisted reproduction, the question is now one of when, and how well intent theory holds up when it is truly tested.

This article proposes that the intent theory of ART parentage is misplaced and dangerous. In settling future disputes over legal parentage, courts and legislatures should first consistently remember the inherent dignity of the child at the heart of the dispute. This article then will examine the flaws of intent theory in light of the meaning of human dignity, and conclude that courts should seek an alternative means of resolving these disputes.

II. The Nature of Assisted Reproductive Technology

Assisted reproductive technologies can take several different forms, many of which require more than two people. For purposes of this discussion, they include "traditional" surrogacy arrangements, "gestational" arrangements, and sperm donation.

In a "traditional" surrogacy arrangement, the mother bearing the child is impregnated with the sperm of the adopting father, meaning the birth mother is also the child's genetic mother.⁶ In a "non-traditional" or "gestational" surrogacy, the mother is implanted with the fertilized egg of another woman, and has no genetic relationship with the child. There, the child's genetic material may be supplied by one or both of the individuals intending to raise the child (although genetic material also can be from anonymous donors).⁷ A "substitute father" can also be used: a fertile woman may be artificially inseminated with the sperm of a man other than her husband (called "heterologous" artificial insemination), also often anonymously.⁸

Couples are thus capable of combining any of these procedures to birth a child, such that it is now possible to have up to five "parents" of a child: a sperm donor, egg donor, gestational surrogate, and two adoptive parents. *Buzzanca* is apparently a rare example of that combination; usually, a single person has several contributions. For example, in one famous surrogacy case, the egg donor and gestator were the same person, as were the sperm donor and adoptive father.⁹

Where the donors are known, the contracting parties often agree that the donor will relinquish all parental claims to the child. Such arrangements are essentially the equivalent of private adoptions¹⁰ (Often, the non-genetic parent is required to formally adopt the child). For example, a gestational surrogate would agree to carry the child to term and then surrender her at birth. States vary on the enforceability of such arrangements: some regulate them by statute, others hold them void as a matter of public policy, and a few still hold them illegal.¹¹

III. The Inviolability of Child Dignity

The first premise of this article is that, in resolving the issue of the child's parentage, the inalienable dignity of the child in question must be respected and protected by the legal system. The law cannot forget that the life of a *child*, not a chattel, is at the heart of these disputes. While this notion should be one of common sense, an examination of intent theory reveals that this basic respect for children is now a secondary consideration. A brief examination of the concept of dignity is therefore in order.

A child's dignity is, of course, the same notion of dignity that applies to all human persons. That concept appears in the United States' Declaration of Independence,¹² in the Preamble of the United Nations' Charter,¹³ and the United Nations' Universal Declaration of Human Rights.¹⁴ The Declaration of Human Rights in particular holds that dignity vests at birth because children are considered "persons" from birth, and because human dignity extends to all persons, it must follow that this concept of inalienable dignity belongs to children as well.

The concept of human dignity is unfortunately difficult to define precisely,¹⁵ but is still considered the source of all human rights.¹⁶ While the modern connotation of the word is apparently shifting from the Christian notion of "sacredness" to one centered on individual autonomy instead,¹⁷ the basic term is still synonymous with the "intrinsic worth" of the individual.¹⁸ In having intrinsic worth, human beings are an end unto themselves. It is therefore always illicit to use persons as a means to an end¹⁹ (such as through bondage). Dignity also suggests that one person cannot be more "valuable" than another; instead, there is substantial

equality between persons, or simply: "Each person is as good as every other."²⁰

Human dignity is also considered "inalienable," meaning that it cannot be removed under any circumstances, no matter the method.²¹ Governments thus have the power to eliminate slavery and promote decent human conditions.²² This also means that while children are not fully capable of exercising their rights until adulthood, and parents have the power to exercise rights on their behalf,²³ parents do not and cannot *own* children.²⁴ Rather, the law assumes that parents are stewards of their children until they reach their majority.²⁵

1. Human Dignity According to the Catholic Church

The Catholic Church offers particularly insightful notions of human dignity, especially in the context of children and ART. In the eyes of the Church, dignity is "rooted in [man's] creation in the image and likeness of God,"²⁶ and therefore is inviolable and unquestionable.²⁷ In *Centesimus Annus*, Pope John Paul II warned that children should not be considered "as one of the many 'things' which an individual can have or not have, according to taste, and which compete with other possibilities."²⁸ The statement stems directly from the notion of dignity: children do not exist for the sake of appeasing a parent's desire to have children. Elsewhere, the Church notes that:

A child is not something owed to one, but is a gift. The "supreme gift of marriage" is a human person. A child may not be considered a piece of property, an idea to which an alleged "right to a child" would lead. In this area, only the child possesses genuine rights: the right "to be the fruit of his parents," and "the right to be respected as a person from the moment of his conception."²⁹ Therefore, children have the right "to develop in the mother's womb from the moment of conception" and "the right to live in a united family and in a moral environment conducive to the growth of the child's personality."³⁰

These ideas are derived from the notion of human dignity. Since children, as human persons, have dignity, they cannot be treated as a "means to an end," such as existing to appease their parents' desire to procreate. Rather, in the proper view of the family, the parents' desire to procreate coincides with any children born of the marriage, so that the child is welcomed into the home, rather than viewed as an expectation.

The moral wrong is particularly apparent from a recent story involving ART in which a deaf lesbian couple, Sharon Duchesneau and Candace McCullough, *intentionally* genetically engineered two deaf children using sperm from a deaf donor.³¹ The women claimed that

deafness is an identity, not a disability, and wanted their children to share in that identity. They reasoned that "a hearing baby would be a blessing; a deaf baby would be a special blessing,"³² and frankly stated that the arrangement was their attempt to create a "perfect baby."³³

The intentional disabling of a child and calling it a "blessing" severely violates child dignity to a new degree: in the minds of the couple, their children are something to be prepackaged and arranged to satisfy *their* conception of a "perfect" baby who can share in the "blessing" of deafness. Apparently, they ignored whether the *children* would reciprocate that desire (and it will be interesting if these children decide to sue their parents in the future). In the parents' minds, the *expectation* of having a child who could share their handicap justified the children's intentional mutilation.

These ideas are critical in accounting for why the Church opposes forms of ART that separate procreation from the conjugal act.³⁴ Because children have the right to be conceived in their mothers' wombs, much of the problem is that ART using genetic material not of the persons who will raise the child "infringes the child's right to be born of a father and mother known to him and bound to each other by marriage."³⁵ While ART involving *only* a husband and wife are "less reprehensible" (such as a wife artificially inseminated by her husband's semen), they still are wrong because, in addition to treating the child as something "owed", the act "entrusts the life and identity of the embryo into the power of the doctors and biologists and establishes the domination of technology over the origin and destiny of the human person."³⁶

The importance of conjugal procreation, as opposed to artificial means, has been stressed by John Paul II:

In conjugal love and in transmitting life, the human cannot forget his or her dignity as a human person; it raises the natural order to a certain level, one which is no longer merely biological. That is why the Church teaches that responsibility for love is inseparable from responsibility from procreation. The biological phenomenon of human reproduction, wherein the human person finds his or her beginnings, also has as its end the emergence of a new person, unique and unrepeatable, made in the image and likeness of God. The dignity of the procreative act in which the interpersonal love of the spouses finds in its culmination in the new person, in a son or daughter, emerges from that fact. That is why the Church teaches that openness to life in conjugal relations protects the very authenticity of the love relationship.³⁷

This statement verifies why the conjugal act is a moral requirement of procreation. In ART techniques which separate the two, the effort "forces" the child into existence for the satisfaction of the parents' (admittedly

benevolent) desires. However, in the Church's understanding of marriage, the union of the couple in the conjugal act is meant to be "open" to the transmission of life,³⁸ so that any resulting children are welcomed rather than expected.³⁹ "No one may subject the coming of the child into the world to conditions of technical efficiency which are to be evaluated according to standards of control and dominion."⁴⁰ While parents who procreate through the conjugal act, like ART parents, also might desire children for the sake of satisfying the procreative urge, the conjugal act itself does not violate the child's dignity. Conjugal procreation always operates independently of the intention of the parents: couples can desire a child and not become pregnant, while others can take steps to avoid conception and still have pregnancy result. Ideally, the parents' intentions should coincide with the biological reality of the child's conception. So, while parents' intentions might offend the dignity of the child, the means of conception should not.

The Church considers surrogacy arrangements particularly illicit. "Surrogate motherhood agreements, with or without the payment of money, treat the child as a non-person, as an item of property to be disposed of at the will of others without regard to his own interest."⁴¹ This statement works in conjunction with the Church's interpretation of the seventh commandment, which "prohibits actions or enterprises which for any reason—selfish or ideological, commercial or totalitarian—lead to the enslavement of human beings, disregard for their personal dignity, buying or selling or exchanging them like merchandise."⁴² Although surrogacy arrangements do not conjure up belligerent images of slavery, they nonetheless fit the technical definition because the sale of a child is the result.

2. Positive Law Bases of Child Dignity

Modern American positive law generally reflects the above concepts of human and child dignity. It is axiomatic that children are not property, but are persons who need protection from the parent, or failing that, the state.⁴³ One author notes that "[a] 'child' is a person, and not a subperson over whom the parent has an absolute possessory interest; a child has rights, too, some of which are of a constitutional magnitude."⁴⁴ Likewise, the parent-child relationship is considered a status, neither a contract nor a property right. The relationship is strong enough that it can only be altered in accord with due process.⁴⁵ "[T]he usual view is that the right cannot be dealt with as though it were a vested property right. Rather, it is in the nature of a trust imposed on the parent for the child's benefit."⁴⁶ *U.S. v. Wiegand*,⁴⁷ a child pornography case, illustrates the importance of child dignity. Speaking for the Ninth Circuit on why child pornography was illegal, Judge Noonan wrote:

The crime is the offense against the child—the harm “to the physiological, emotional, and mental health” of the child... the “psychological harm”...the invasion of the child’s “vulnerability”...These harms collectively are the consequential damages that flow from the trespass against the dignity of the child. Any photograph makes its human subject an object. No offense to human dignity is done. The pornographic photographer subordinates the humanity of his subject to the sexuality of the subject. The humanity of the subject is not eliminated; how could it be? Indeed the interest of the pornographer is in the human person treated as a sexual object. From a feminist perspective, this reduction of humanness has been seen as a male offense...But whether the person is male or female, the essential operation is the same: an assault upon the humanity of the person pictured, making that person a mere means serving the voyeur’s purposes... Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult cannot consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.⁴⁸

At least one court has also reflected the idea that a child is not “owed” to an individual, even in light of the constitutional right to procreation. In the famous *Baby M* case, part of the court’s justification for voiding the surrogacy contract was its view that

[t]he right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that... The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve considerations other than the right of procreation.⁴⁹

While not passing judgment on ART per se, clearly the court was opposed to the notion that the child was a “thing” somehow owed to either of the parties based on their right to procreate.

Ultimately, the issue of human and child dignity by itself does not answer the question of who the proper parents are in ART disputes. Rather, dignity acts as a guideline on how the law should *not* act: that is, the law must ensure that the child’s dignity, already damaged as a product of Art, is not violated any further. The child should never be objectified, but should be considered a real party in interest whose future and identity are at the heart of the dispute. While dignity implies that any determination of

parenthood might be acceptable, it does explicitly mean that a theory based on contract or property is illicit.

IV. Critiquing Intent Theory in Light of Human Dignity

A. Origins of Intent Theory

1. *Johnson v. Calvert*

Popular application of the intent theory of parentage has its origins in *Johnson v. Calvert*,⁵⁰ a 1993 California case. Mark and Crispina Calvert were unable to bear children, and contracted with Anna Johnson to be implanted with an embryo conceived from the Calverts' gametes. Shortly after implantation, the parties' relationship deteriorated, and Johnson threatened to keep the child unless full payment was made. The Calverts, in turn, sued for a declaration that they were the legal parents; Johnson countersued for a similar declaration.

The problem, according to the court, was that California allowed either blood or birth as sufficient proof of maternity. The relevant statute's language was permissive, using terms such as "may" and "or," which the court viewed as creating equally persuasive alternatives between blood and birth. Even the old adage, *mater est quam gestatio demonstrat* (by gestation the mother is demonstrated) suggested to the court that "while gestation may demonstrate maternal status, it is not the *sine qua non* of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights."⁵¹

The court resolved this apparent conflict by relying on the parties' intentions, holding that "when the two means do not coincide in one woman, she who intended to create the child—this is, she who intended to bring about the birth of the child that she intended to raise as her own—is the natural mother under California law."⁵² Its rationale was based primarily on the theories of Professors Hill⁵³ and Shultz.⁵⁴ It first applied Hill's theory of "but-for causation": "the child would not have been born but for the efforts of the intended parents... The intended parents are the first cause, or the prime movers, of the procreative relationship."⁵⁵ It similarly relied on Professor Shultz's belief that "the mental concept of the child is the controlling factor of its creation, and the originators of that concept merit full credit as conceivers."⁵⁶

The *Johnson* majority also relied on Professor Shultz's belief that "[w]ithin the context of artificial reproductive technologies... intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."⁵⁷ Little was said on this particular point, although Hill's article offered similar comments that further explain the rationale. Hill's thinking is worth repeating in full:

[T]he gestational host and genetic progenitors should be held to their original promises not to seek any parental rights in the child... the deontological strain holds that people generally should be held to their promises simply because promise keeping is good in itself. The predicament of the intended parents is poignant precisely because the surrogate's promise is the very basis for her involvement in the procreative relationship in the first place. Absent a commitment on her part, the intended parents could seek the assistance of another. But where the gestational host, or the genetic progenitor... has gained access to the procreative relationship initiated by another, she should not be permitted the double injustice of renegeing and, more importantly, retaining custody of the child.

The consequentialist strain of this argument emphasizes the reliance of the intended parents upon the promise of other parties in the procreative relationship. The intended parents rely, both financially and emotionally, to their detriment on the promise of the biological progenitors and gestational host. They rely financially by purchasing the material essentials of child-rearing, including baby furniture, clothes, toys, and other accessories. They may even move or expand their home to accommodate the new arrival. If the promise of the other parties were not enforceable, the intended parents could not make these preparations without the possibility of losing their investment.

More importantly, the intended parents rely emotionally on the promises of the others to refrain from claiming parental rights in the child. They rely by preparing themselves psychologically for parenthood and all that it entails. They also rely emotionally to the extent that they have interacted with the surrogate and anticipated the birth of the child.⁵⁸

The two interrelated concerns essentially revolve around contractual reliance: that the intended parents' expectations must be met, and that the genetic or gestational contributors must be prevented from renegeing. Another author complains that the genetic basis does not "address the serious problem of providing an adequate remedy for abuses in the bargaining process between parties involved in assisted reproductive arrangements."⁵⁹

Additionally, the court also relied on Shultz's notion that "the interests of children... are unlikely to run contrary to those of adults who choose to bring them into being."⁶⁰ The inference is that the contracting parents' desire to raise a child is indicative of their responsibility and parenting ability.⁶¹ This rule supposedly would "promote certainty and stability for the child."⁶²

2. Flaws in the *Johnson* Opinion

Although the result of *Johnson* is in line with this note's theories, the reasoning is severely flawed, as explained by dissenting Justice Kennard.⁶³ Kennard first observed that "but-for" causation is properly applied in tort law, but even then, California applied a "substantial factor" test in causation. He conceded that the intending mother was, of course, a "substantial factor" in the child's creation, but the theory was "misplaced" because, in reality, "[b]oth the genetic and the gestational mothers are indispensable to the birth of a child,⁶⁴ illustrating that in the ART process, all parties make apparently equal contributions. This is specifically apparent where an intended parent screens the potential candidate for specific qualities (i.e., the genes of a person with specific qualities, such as appearance, talent, or race). In such cases, the genetic parents' contribution is heightened because the contracting parent seeks a particular type of person, making the gamete donor's contribution even more "substantial."

Justice Kennard directly discusses the principles of child dignity in his criticism of the "originators of concept" rationale of the majority. He illustrates that the source of this reasoning was from intellectual property law: the idea that "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self."⁶⁵ As Kennard correctly stated, the logical end of this rationale is that the child must be considered the property of the intending parent. This treatment of children as property is antithetical to society's understanding of children and family. There is a manifest inappropriateness in applying this rationale in order to reach *Johnson's* result: it means that the child is a thing properly owed to one party or another.

The same fault can be found with the "reliance" rationale advocated by Professors Shultz and Hill and the *Johnson* majority. It is irrelevant that the ART contract is voluntary, express, deliberate, and bargained for. If the contract were enforceable, the only real remedy is specific performance, the subject of which is the life of a child.⁶⁶ Again, this theory is highly inappropriate,⁶⁷ as it treats the child as a means of fulfilling the ends sought by the parents. Hill's above passage is revealing: the concern is primarily for the contracting parents' financial and emotional investment, rather than the child's well being. It is a gross violation of dignity to treat the child as a placebo to ease the contracting parents' loss. The child is not a party to the contract, but instead the *subject* of it. Of course, the law rarely allows a non-signatory to be bound to a contract, and there is no reason to treat a child born of ART any differently.

While people normally should be held to the promises they make, this in no way means that contract law is always controlling.⁶⁸ It is

axiomatic that the law can declare certain contracts void for unconscionability. If contract ultimately controls ART disputes, then what is the limit to contract enforcement? A purely contractual view of family law, regarding the fate of persons, raises questions about where it stops. It risks limiting the world to Justice Holmes' classic positivist notion of contract law that "all contracts are formal, [and] that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs."⁶⁹ If the pre-birth sale of a child can be enforced, what prevents it *after* birth? What prevents suits for specific performance of abortion or prostitution? In this regard, intent theory cannot reconcile itself. If the contracting parents were proven the natural parents, then a kidnapping charge might be far more effective and appropriate than a property theory.

What this criticism really calls for is a claim for reliance damages. If the intending parents have honestly made large expenditures in reliance on the delivery of a child, then reimbursement for that quantifiable reliance might not be unjust.⁷⁰ The limit is for the courts to determine, so long as it falls short of specific performance in delivery of the child. Professor Shultz's advocacy for contract enforceability and Professor Hill's "prime mover" argument fail to address children's rights and interests,⁷¹ much less their dignity.

The final argument, that the intent to parent is indicative of fitness, also fails for two reasons: it is both inflexible and speculative. Justice Kennard agreed with the majority that a rule seeking to protect the child's interests should be paramount: his complaint, however, is that the rule makes an inflexible presumption for the contracting parents.⁷² He foresaw cases of substance abuse, instability, economic change, and so on in the homes of the contracting parents, while the home of the parents denied custody would be a realistically better environment. His analysis illustrates another problem of ART agreements: since they often amount to the equivalent of private adoptions, they occur outside the watchful eye of state supervision. Thus, there may be no means of knowing whether the individuals to whom the child is being surrendered really are fit to parent. In adoptions, the state should be present throughout the process "to protect the integrity of the adoption process by which the child's right to support, management, and care may be re-established in relation to an adoptive parent."⁷³ In ART arrangements, the state has no presence until a problem arises. So, while ART allows parents to conveniently override the red tape of the adoption process,⁷⁴ those barriers do exist in order to protect the child's safety.

The related problem is in declaring intent as indicative of fitness; while perhaps intuitive, it is ultimately speculative. How do we know that

the intended parents' intentions will not run contrary to the child's best interests? One author points out that

the intent to parent does not guarantee the ability to parent. A woman is not miraculously invested with parenting skills just because she wishes to parent, even when she has expended time and effort to accomplish her desires. Commissioning couples in assisted reproduction, and adoptive parents, who make extensive effort to become parents, are hardly more righteous than the rest of the population.⁷⁵

Additionally, at least one case of an ART-conceived child killed by his adoptive parents⁷⁶ illustrates that "intended" parents are not instantaneously fit parents because of their intent.

The moral danger in ART cases shown by *Johnson* is that parenthood is "created" through contract, rather than as a social and legal relation. As one author notes, a status-based theory of parentage implies *obligations* on a moral level, or, failing that, a legal requirement that those obligations be fulfilled.⁷⁷ The source of obligations in a purely contractual view of parentage is more difficult to pinpoint. As a result, intent theorists should not be surprised that people like John Buzzanca⁷⁸ or homosexual partners of genetic parents of ART children⁷⁹ want out of their parental obligations, pointing to their lack of biological connection as eliminating any obligation to the child. While a paternity suit in such cases might be enforceable, the fact that these suits and their defenses arise should shock no one in a world where the view of family is shifting from status to contract.

3. *In re Buzzanca*

The facts of *Buzzanca* were discussed in Part I, above. As stated, the California appeals court declared John and Luanne to be the lawful parents of Jaycee, making John liable for child support. The result was reached by a clever judicial sleight-of-hand, relying on *Johnson's* determination that California's paternity law "may" allow for paternity to be determined by several means, none of which explicitly relied upon genetics. It also relied upon statutes that allowed paternity to be established by several non-genetic means, such as marrying the child's mother before birth, consenting to being named as a father on a child's birth certificate, or consenting to the artificial insemination of one's wife. The court therefore analogized the Buzzancas' situation to that contemplated by the artificial insemination statute: "...both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie."⁸⁰ The court believed

that the spirit of the law warranted the extension of paternity to John Buzzanca as well; the fact that Luanne did not give birth was irrelevant.

The court observed that a simple estoppel theory would have been sufficient to ensure John's paternity; however, it took the theory a step further so it could also declare Luanne to be the lawful mother. It likened Luanne to "a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child."⁸¹ That is, just as a husband could be declared a father by consenting to insemination, so could a mother because "there is no reason to distinguish between husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being."⁸² That, combined with Luanne's intent to be Jaycee's mother, and the fact that no other party attempted to claim custody, made her the "intended" mother under *Johnson*. The court believed that public policy encouraged this decision: the establishment of paternity would prevent the taxpayers from paying for the child's care. Additionally, Luanne's maternity necessitated that John be assigned paternity: his "procreative conduct," albeit artificial, made him just as liable as an unintended father who engaged in casual sex. Controversially, the court then declared that the Buzzancas' names should appear on Jaycee's birth certificate.

4. Flaws in the *Buzzanca* Opinion

Although there is no question that the outcome of *Buzzanca* was correct, the court's method of reaching its conclusion is even more confusing than *Johnson's*. While the decision established John and Luanne as Jaycee's parents, it fails to specify exactly what *kind* of parents they are beyond a vague "lawful" determination. Are they "natural" parents? The fact that their names were entered on the birth certificate is strong evidence that the court intended this result, yet it remains a legal fiction that Luanne will someday have to explain to her "daughter."

A likely explanation for the court's ruling was that the decision was outcome-determinative; after all, the entire nature of the dispute was whether paternity obligations were enforceable against John, and the determining parentage was only a secondary issue. The court's repeated concern—that if John were correct, Jaycee would be an orphan and state ward—further suggests that the court's goal was finding any way to enforce John's obligation.

A repeated concern raised by intent theorists is that, in favoring biology over intent, people like John Buzzanca will have an escape to avoid paternal responsibility.⁸³ The result, as the *Buzzanca* court feared, is that ART-children would become state wards and taxpayer burdens. The heart of the matter is that a child has been brought into the world through technology and then abandoned by an individual who unexpectedly

wanted out of the contract. In terms of equity, the decision makes sense: Jaycee herself (and Luanne on her behalf) had a strong reliance claim against John. That is, John's so-called "procreative conduct" creates reliance on Jaycee's part that she would have a father figure to provide her with support. This is illustrated by John's signing of the contract two weeks after implantation; although John actually signed the contract two weeks after implantation, the court correctly held the written instrument merely ratified an oral agreement.

All *Buzzanca* did was to advocate the already-existing "equitable parent" or "equitable adoption" doctrine. Because John assumed the social role of a parent vis-à-vis Jaycee, he could have been estopped from denying legal paternity.⁸⁴ This rule existed before intent theory, so pragmatically, "intent" covers anything new. In fact, viewing the decision as one of equity exposes a major flaw of intent theory. As mentioned above, some intent advocates believe that the rule guarantees stability for the child, since the intent of parents is unlikely to run contrary to the child's interests.⁸⁵ Cases like *Buzzanca* show otherwise. Realistically, a child's interests include not just financial support from a parent, but also emotional support and social and moral guidance. Intent theory, despite its claim, fails to prevent the problem of deadbeat parents. At best, this theory only imposes a financial obligation to the child via the equitable parent. Hence, John Buzzanca is not *socially* a father to Jaycee, but only a financial supplier, and has sworn never to be a father in any practical sense.⁸⁶ While one author complains that these children "are then left in limbo as to their parentage as well as their financial support,"⁸⁷ intent theory ensures only the latter, leaving the former still in question.

So why did the *Buzzanca* court go beyond a mere theory of equity? Likely, it did so because it was the only way the court could declare Luanne's maternity. The courts had already dug a proverbial hole by allowing the case to proceed for three years, during which Luanne and Jaycee undoubtedly bonded as a family.⁸⁸ It would be a strange decision if *involuntary* paternity could be declared against John, but *voluntary* paternity could not be granted to Luanne (Such a result might also mean that John, as a lawful parent, could remove Jaycee from Luanne, the unlawful parent, at his discretion.). It is possible that the circumstances and elongated litigation left the court no practical choice by which to guarantee Luanne's maternity.

The problem is that the declaration was a complete legal fiction. How this theory will play out in future litigation (for example, if *all* potential donors simultaneously sued for custody) might reveal problematic results. In the short term, *Buzzanca* may have safeguarded the social function of the family, as one author suggests.⁸⁹ But the court's theory also undermines the traditional family in three respects. According

to Professor Radhika Rao, "the ideology of family law is premised upon the ethos of altruism:"⁹⁰ that is, that the family is supposed to be founded on love and affection, in polar opposition to market forces, which are based on autonomy and arms-length transactions.⁹¹ Rao admits that this is a false dichotomy: the family and market have always shared functions, and ART exposes this fact.⁹² Regardless of whether the family does have a commercial basis, the perspective has frightening implications. By viewing family as a contract, rather than a status, it again undermines the sense of *obligation* tied to family. She notes that eliminating biology brings the family closer to a world of pure private ordering.⁹³ The potential result is that familial commitments "become both contingent and revocable... [P]arenthood by consent may encourage the attitude that family relationships can be freely entered and exited, accepted or rejected."⁹⁴ Third, Rao notes that by making biology irrelevant to ART parents, it makes biology irrelevant to everyone: biology is no longer sufficient or necessary even for *traditional* biological parents.⁹⁵ Rao's reasoning suggests that parents of sexually conceived children now have further incentive to justify a lack of obligation to their children. If non-genetic ART parents such as John Buzzanca can freely abandon paternity and be liable only for finances, what stops traditional biological parents from doing the same?⁹⁶ A growing argument is that, under *Roe v. Wade*, a putative father is allowed to escape responsibilities for a child just as a mother can through abortion.⁹⁷ The contractual view of family inevitably creates such derivative results.

If "intent" determines parentage in ART cases, what prevents intent from being the paradigm of parenthood in every case? This view might have little impact on most families, since most "intended" parents are also the biological parents of their children. However, *delinquent* or *inadvertent* fathers theoretically could claim a lack of intent. The theory otherwise creates an odd inconsistency: why impose liability on a natural father who denies responsibility, yet deny paternity to an individual who seeks to embrace it? (This could also impact a natural mother's ability to revoke her consent to her child's adoption: the law could extend "intent" even further to declare that a couple who intends to adopt a child shouldn't be denied specific performance.) *Buzzanca* likened itself to *Stephen K. v. Roni L.*,⁹⁸ in which a man who relied upon a false statement that his sexual partner was using birth control pills could not bring a claim of fraud against her after she became pregnant. It suggests that, in order to keep *Buzzanca* consistent with *Stephen K.* type cases, application of intent theory should be limited solely to ART disputes, which is a more sensible result. Theorists arguing that intent is the paradigm of all parentage have not explained how a case like *Stephen K.* can be reconciled with the theory.

B. Other Justifications for Intent Theory, and Responses

Another rationale for intent theory is that it creates certainty in the determination of a child's parents, so her identity is not in "limbo" during litigation.⁹⁹ The rationale exists for two reasons: first, it discourages biological parents from suing; second, it supposedly protects the child's identity.¹⁰⁰ This concept, while appealing, is still unpersuasive: legal efficiency is no reason to prevent a suit, particularly where one party might justly be the proper parent. On the first point, lawsuits may streamline the legal process, but it fails to prevent *all* lawsuits, and ignores that a better theory of biological parentage may yet exist. The argument again presupposes that intent theory is the correct paradigm, and does not address the theory's merits. The argument also applies to *any* model of parentage: if the presumption favored biological parents, the "bright-line" certainty of a predictable result in litigation will remain.

The second rationale—the protection of the child's identity—might be more meritorious, since protecting the child's sense of self is a poor outcome. However, the "protection" will probably only amount to a delaying tactic, since the child will inevitably discover her ART origins and still have her sense of self impacted. The "certainty" of paternity is also the theory's weakness—it speaks little of the child's best interests.¹⁰¹ It is therefore hollow; intent only guarantees outcome, not well-being.

A confused and ultimately non-sequitur argument is that ART arrangements must be enforced because to do otherwise violates a woman's fundamental right to contract. According to one advocate, "[p]rohibiting women from freely entering into contracts, or any type of deal, demeans them."¹⁰² Obviously, women have this right, and no rational jurist can question that. The rationale's flaw is its breadth: it assumes that contract and free choice supercede any other consideration. The author ignores that some contracts are unenforceable on public policy grounds, such as illegality and unconscionability. If women really have an unlimited right to contract, does this mean that a client for prostitution can demand specific performance? Can an abortionist do the same once a woman signs a consent form? If a woman freely contracts to sell a limb, and then reneges, should the law enforce it?

This argument takes a question of conscience and answers with equal protection, dodging the original issue. It unfairly *demand*s that women stand by a potentially unconscionable contract just to prove a point about gender equality. Even if equal protection *is* a legitimate concern, Ilana Hurwitz's response is better. She notes that "[t]o exercise a change of heart is both financially and emotionally costly for a surrogate...[S]urrogates who change their minds, despite the inordinate risks, demonstrate the

autonomy and fortitude of women, not their supposed frailties."¹⁰³

This "right to contract" also fails to answer the *moral* question of child selling or contracts involving children. The argument dictates that contract is always the morally controlling factor,¹⁰⁴ but a pure contract theory ignores that the child's future is being predetermined by financial exchange. So while intent theory might strengthen women's fundamental rights, it severely impacts those of the children involved.

A related argument is that individuals entering ART contracts do so with full realization of the consequences, such as medical risks and emotional costs.¹⁰⁵ This theory points to the fact that many genetic contributors already have children of their own, and are therefore prepared for the experience of surrendering a child.¹⁰⁶ The flaw here is that while intent is a basic requirement of contract law, as the court complained in *Belisto v. Clark*, intent can be hard to prove.¹⁰⁷ Furthermore, intent can *change* as the genetic contributor realizes the magnitude of the contract. One author argues: "[I]ntentions concerning parenthood before a child comes into being are not required to be stable or fixed."¹⁰⁸ This is apparent from women who change their minds about giving up a child for adoption or having an abortion.¹⁰⁹ The fact is that "people's intentions are rarely uni-dimensional or everlasting, and it is rarely possible to identify a person's one, true intent."¹¹⁰ Even a surrendering parent who has previously given birth may not realize the consequences of giving away a child in contract. "Given the changes in feeling that we know frequently occur, and that we generally want to occur, during pregnancy and at birth, the informed voluntariness of the choice to give up the child is at its peak when made with full awareness of the pain entailed—after the child comes into being."¹¹¹ Therefore, a lack of undue influence, duress, or coercion in ART contracts is irrelevant, since some unconscionable contracts *can* be entered without those factors.

Furthermore, if the complaint is that some genetic contributors already have children is taken to mean "so why do they need more?," then the statement is unfair. The logical extension of the rationale is that children are utilitarian commodities, and that the birth of some children decreases the *need* for more. The argument makes the genetic parent appear to have less necessity for that particular child, while the contracting parent has *more* necessity for the child. The intent argument creates roundabout sympathy for the intended recipients. Regardless, sympathy for the unfortunate infertility of those persons does not entitle them to a child as a social remedy. This argument recalls the importance of continual re-emphasis of the child's individual dignity. Even one intent theorist admits that "[e]motions concerning parenthood are sufficiently predictable and of such a transforming nature that any attempt to reduce them to the

four corners of a contract seriously undermines the profound experience of creating life."¹¹²

The central basis for the contract model may be, as one author claims, an underlying assumption that the human body is one's property and therefore a freely transferable good.¹¹³ According to Kermit Roosevelt, since many courts now recognize property rights in gametes, parental rights should be determined by who has property rights in the reproductive material when gestation begins.¹¹⁴ In other words, parental rights are derived from property rights.

Roosevelt's argument admittedly has more merit, since he creatively relocates where parental rights vest. Effectively, he concedes the power of biology, but does so by stating that gametes are as transferable as blood, skin, and organs. If an egg is transferred from one woman to another, it becomes the second woman's egg. The problem is that Roosevelt never exactly states from where he makes the determination that the body is transferable to begin outside of a vague belief that "[w]ithout any property rights in the body, we would have the odd result that others have as much claim to our bodies as we do."¹¹⁵ He may have merely assumed the assessment for the sake of his argument. But even assuming that the body *is* property, Roosevelt's argument is that *paternity* is freely transferable. Things are certainly marketable, but neither a child nor a status can be treated the same way. The President of the United States cannot sell his job title. A parent cannot sell the fact that he is genetically related to someone.

There is something disturbing about the body being a property interest, as Roosevelt himself admits.¹¹⁶ The language is inappropriate, as it suggests that the human body is somehow separate from the human person. The source of these property rights is not explained, unless it is just some strange incidence of birth that one is born with the body that one owns. The resulting question is whether one could theoretically sell his entire body, and if so, whether the law must enforce that contract. Roosevelt notes that the 13th Amendment's prohibition of slavery renders one's rights in the body inalienable.¹¹⁷ So even if property ownership determines the relationship of the body to the person, our better sense suggests that there must be logical and moral limits to the ability to transfer one's body. Hence, a contract for prostitution or abortion must be unconditionally voidable by the person with the so-called property interest in the body.

This must also be true with ART. Since the transfer of both paternity and a child is involved, this would also be a case where the contract must be voidable. Even Roosevelt admits that the transfer of paternity and children are illegal and void; his solution "cheats" the illegality by moving the line of where paternity vests. Others frankly admit that the notion of "family" must be expanded in order to make the intent argument

effective.¹¹⁸ Again, the problem is that linguistic manipulation cannot overcome factual and biological reality. Putting the Buzzancas' names on Jaycee's birth certificate does not make them her natural parents.¹¹⁹ The effort is disturbingly similar to the belief of Winston, the protagonist of Orwell's *1984*, that reality exists entirely within the mind, as determined by the state.¹²⁰ These theories do the same thing: they alter the reality of paternity in order to escape the moral and legal prohibition of child selling by arguing that no sale ever happened.

Even if intent theorists believe that intent is a mere terminology used in parentage determinations, and not a contract, the problem is that contract law must inevitably be applied in these disputes. That application, of course, violates a child's dignity by its very nature. One author's criticism is very revealing:

In the end, the notion of intent cannot reflect and preserve autonomous individuality and, at the same time, provide proof (as a substitute for biological "facts" such as blood and genes) of the enduring essence of familial love and loyalty. Judicial reliance on intent in cases such as *Johnson* will prove impractical or will be expressly transformed into a more straightforward reliance on ordinary contract principles.¹²¹

Furthermore, as explained above, intent fails to entertain seriously the interests,¹²² much less the dignity, of the child. Marsha Garrison very succinctly describes the problem:

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 determination that this group is sufficiently different from the remainder to justify inconsistent treatment, or in the event that the governing 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.¹²³

Until intent theorists can make such a showing, intent theory will inevitably collapse upon its own shaky foundation.

VI. Conclusion

This article began by reaffirming that, when a child has been created through assisted reproductive technologies, the primary and continual consideration of the law should be maintaining the child's inalienable dignity. While the very use of ART constitutes a significant violation of the

child's dignity, the violation need not continue. The law cannot undo what has happened, but can ensure that the child's future is restored to its proper path.

This article has also illustrated why "intent theory," the increasingly popular paradigm of parentage, is incorrect. Intent theory ultimately acts as a contractual model of parenthood that half-heartedly attempts to protect traditional notions of children, parents, and the family. The theory treats children as fungible property and the family as a contractual relationship that can be freely exited. In the long term, this theory will do more harm than good to the social function of the family. It improperly changes the family from a status to a contract, thereby eliminating much of the moral value of the relationship. This article has demonstrated that even the most meritorious rationales for intent theory ultimately fail to create a proper model of the family or to protect human dignity. While another theory favoring "intended" parents might be more acceptable, intent theory in its current form is unable to do so.

Lawyers, courts, legislators, and most importantly, parents, should be wary of these considerations in the future. As *Buzzanca* indicated, "[t]hese cases will not go away." The law must prepare to reaffirm that which made the family such a lasting institution.

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2. Milena D. O'Hara and Andrew W. Vorzimer, Article, "In re Marriage of Buzzanca: Charting a New Destiny," 26 *W.St. U.L. Rev.* 25, 36 (1998/1999).
3. *Id.* at 26-27. O'Hara & Vorzimer claim to have successfully represented a gay couple in obtaining a judgment of paternity under *Buzzanca*. *Id.* at 36-37.
4. Ilana Hurwitz, Article, "Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood," 33 *Conn. L. Rev.* 127, 142-143 (2000). While acknowledging this advantage of intent theory, Hurwitz complains that it simultaneously creates legal inflexibility.
5. *Johnson v. Calvert*, 851 P.2d 776, 796-97 (1993) (Kennedy, J., dissenting).

6. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994).
7. Ardis L. Campbell, J.D., Annotation, "Determination of Status of Natural Parents in Contested Surrogacy Births," 77 A.L.R. 5th 567 (2001).
8. Michael J. Yaworsky, J.D., Annotation, "Rights and Obligations Resulting From Human Artificial Insemination," 83 A.L.R. 4th 295 (2001).
9. *In re Baby M.*, 537 A.2d 1226, 1235 (1988).
10. *Belisto v. Clark*, 67 Ohio Misc. 2d 54, 63 (Ohio Ct. Common Pleas 1994). Note that some "intent" theories, *infra* Part IV, argue that ART births are not adoption, but that the "intended" parent *is* the natural parent and therefore the child is surrendered to its rightful parents.
11. A recent survey of U.S. surrogacy law is available at Campbell, *supra* n. 13.
12. The Declaration of Independence para. 1 (U.S. 1776). The word "dignity" itself does not appear, but the document's phrase "all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness" captures the essential concept.
13. United Nations Charter Preamble. The U.N. commits itself "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small."
14. Article 1 of the Declaration recognizes that "[a]ll human beings are born free and equal in dignity and human rights." Additionally, Article 4 prohibits human slavery, and Article 7 holds all human persons equal before the law in light of equal protection.
15. Oscar Schachter, Comment: "Human Dignity as a Normative Concept," 77 A.J.I.L. 848, 849 (1983).
16. *Catechism of the Catholic Church* ("CCC"), § 1930.
17. Nicholas Tonti-Fillippini, "The Concept of Human Dignity in the International Rights Instruments," in *The Identity and Status of the Human Embryo: Proceedings of the Third Assembly of the Pontifical Academy for Life*, 388, 390 (Juan De Dios Vial Correa & Elio Sgreccia eds., Libreria Editrice Vaticana, 1999).
18. Schachter, *supra* n. 21, at 849.
19. *Id.*: see also John Paul II, *Christifideles Laici (On the Vocation and the Mission of the Lay Faithful in the Church and in the World)*, (December 30, 1988) no. 37.

20. Id. at 851.
21. Tonti-Fillipini, *supra* n. 18, at 386.
22. Id.
23. Sara L. Johnson, LL.B., Annotation, "Parent and Child," § 9, 59 *Am Jur* 2d 141.
24. Id. at 136.
25. Id. at 143.
26. CCC, *supra* n 22, § 1700; see also John Paul II, *Evangelium Vitae* no. 38.2.
27. John Paul II, *Veritatis Splendor* (August 6, 1993), no. 92.1.
28. John Paul II, *Centesimus Annus* (May 1, 1991) no 39.1.
29. CCC, *supra* n. 22, § 2378.
30. *Centesimus Annus*, *supra* n. 29, at 47.1.
31. James Langston, *Lesbians: We Made Our Baby Deaf on Purpose*, available at http://www.thislondon.com/dynamic/news/story.html?in_review_id=545846&in_review_textid=511810.
32. Id.
33. Id.
34. The Catholic Church *does* support technologies which assist married couples in conjugal procreation, so long as the science does not violate human dignity. See Congregation for the Doctrine of the Faith, *Instruction on Bioethics (Donum Vitae)* (1987), II, B, 8; Charles E. Rice, *50 Questions on the Natural Law: What It Is and Why We Need It* (Ignatius Press, 1993) 381.
35. CCC, *supra* n. 22, § 2376, citing *Instruction on Bioethics* II, 1.
36. Id. § 2377, citing *Instruction on Bioethics* II, 5.
37. John Paul II, *Address* (December 14, 1990), *Position Paper* 215 (Nov. 1991), 323-26; see also Rice, *supra* n.40, 316-317.
38. CCC, *supra* n. 22 § 2363.

39. *Instruction on Bioethics*, supra n.40, I, 6.
40. *Id.*
41. Charles E. Rice, *The Winning Side: Questions on Winning the Culture of Life* (1999) 253.
42. CCC, supra n. 22, § 2414; see also John Paul II, *Veritatis Splendor* no. 100.
43. Alice N. Noble-Allgire, Article, "Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born From Stolen or Misdelivered Genetic Material", 64 *Mo. L. Rev.* 517, 588 (1999).
44. See Johnson, supra n. 24, at 137.
45. *Id.* at 135
46. *Id.* at 156.
47. 812 F.2d 1239 (9th Cir. 1987); see also *U.S. v. Boos*, 127 F.3d 1207 (9th Cir. 1997); *U.S. v. Sherman*, 268 F.3d 539 (7th Cir. 2001).
48. *Id.* at 1245.
49. *Matter of Baby M.*, 547 A.2d 1227, 462-63 (1988).
50. Supra n.7.
51. *Id.* As *Belisto v. Clark* pointed out, however, "the framers of those laws did not intend for the law to result in two mothers." *Belisto*, infra n.63, at 60.
52. *Id.* at 782.
53. See generally John Lawrence Hill, Article, "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, 389-90 (1991).
54. See generally Marjorie Maguire Shultz, Article, "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality," (1990) *Wis. L. Rev.* 297; and Marjorie Maguire Shultz, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 396 *Yale L.J.* 187 (1986).
55. *Johnson*, supra n.6, at 782, quoting Hill, supra n.62, at 415.
56. *Id.* at 783, quoting Shultz, supra n.54, 96 *Yale L.J.* at 196.

57. *Id.* at 782-83, quoting Shultz, *supra* n.54, (1990) *Wis. L. Rev.* at 323.
58. Hill, *supra* n.54, at 415-16.
59. Malina Coleman, Article, "Gestation, Intent and the Seed: Defining Motherhood in the Era of Assisted Human reproduction," 17 *Cardozo L. Rev.* 496, 524 (1996).
60. *Johnson*, *supra* n.6, at 783, quoting Shultz, *supra* n.63, 96 *Yale L.J.* at 397.
61. Anne Reichman Schiff, Article, "Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity," 80 *Iowa L. Rev.* 265, 281 (1995).
62. *Johnson*, *supra* n.6, at 783.
63. Kennard ultimately advocated a "best interests of the child standard to determine natural paternity in ART cases. *Id.* at 799-800.
64. *Id.*
65. *Johnson*, *supra* n.6, at 796, quoting Hughes, "The Philosophy of Intellectual Property," 77 *Geo. L.J.* 287, 330 (1988).
66. *Id.* at 796-97.
67. Noble-Allgire, *supra* n.44, at 562.
68. Marsha Garrison, Article, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage," 113 *Harv. L. Rev.* 835, 863-65 (2000).
69. Oliver Wendell Holmes, "The Path of the Law," 10 *Harv. L. Rev.*, 457 (1897).
70. A potential risk involved in allowing a damage suit is that, if the damages were large enough, the contracting couple might offer to drop the suit in exchange for delivery of the child. In such instances, courts should be wary of allowing *either* type of suit, since the "settlement offer" might amount to blackmail.
71. Garrison, *supra* n. 69, at 861-63.
72. *Johnson*, *supra* n.7, at 798.
73. Mitchell Waldman, J.D., Annotation: "Adoption," 2 *Am Jur* 2d 857, 872-73.
74. O'Hara & Vorzimer, *supra* n.4, at 35-36.

75. Hurwitz, *supra* n.5, at 143.

76. See generally *Huddleston v. Infertility Ctr. of America, Inc.*, 700 A.2d 453 (Pa. Super. 1997).

77. *Johnson*, *supra* n.24, at 146-47: "It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation... An omission to discharge this duty is a public wrong which the state, under its police powers, may prevent."

78. See also *People v. Sorenson*, 68 Cal. 2d 280 (holding a father criminally liable for failing to pay child support to a child born to his wife from an anonymous sperm donation).

79. See *Karin T. v. Michael T.*, 484 N.Y.S. 2d 780 (N.Y. Fam. Ct. 1995) (holding that a lesbian who changed her identity to male was the marital father of a partner's children born through artificial insemination).

80. *Buzzanca*, *supra* n.2, at 285-86.

81. *Id.* at 288.

82. *Id.* at 291.

83. Lara A. Brill, Article, "When Will the Law Catch Up with Technology: *Jaycee B. v. Superior Court of Orange County*: An Urgent Cry for Legislation on Gestational Surrogacy," 39 *Catholic Law*, 241, 263-64 (1999); see also Golnar Modjtahedi, Note and Comment: "Nobody's Child: Enforcing Surrogacy Contracts," 20 *Whittier L. Rev.* 243, 268-69 (1998).

84. Waldman, *supra* n. 85, at 929-932.

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86. 48 Hours, "Who's My Mommy?" (CBS television broadcast, Aug. 17, 2001).

87. Modjtahedi, *supra* n.84, at 269.

88. Jaycee was born April 26, 1995; see *Jaycee B. v. Superior Ct.*, Cal. App. 4th 718, 723; the appeal, in *In re Buzzanca*, was decided almost three years later.

89. Janet L. Dolgin, Article, "Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of the Family," 32 *Conn L. Rev.* 523, 541-42 (2000).

90. Radhika Rao, Article, "Assisted Reproduction Technology and the Threat to the Traditional Family," 47 *Hastings L.J.* 951, 958-59 (1996).
91. *Id.* at 962-63.
92. *Id.* at 963-64.
93. *Id.* at 964.
94. *Id.* at 965-66.
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96. Hurwitz, *supra* n.6, at 142-43.
97. See, e.g., Melanie G. McCully, Article, "The Male Abortion: The Putative Father's Right to Terminate His Interests and Obligations to the Unborn Child," 7 *J.L. & Po'y* 1 (1998).
98. 164 *Cal. Rptr.*618 (Cal. Ct. App. 1980).
99. Brill, *supra* n. 108, at 264-65; see also Hill, *supra* n.62, at 417.
100. *Id.* at 263-64.
101. Hurwitz, *supra* n.6, at 143.
102. Modjtahedi, *supra* n.84, at 257.
103. Hurwitz, *supra* n.5, at 148.
104. . Modjtahedi, *supra* n.84, at 259.
105. *Id.* at 279.
106. *Id.* at 274; see also Dolgin, *supra* n.10, at 1273.
107. *Supra* n.15, at 62.
108. Vicki C. Jackson, Article, "Baby M. and the Question of Parenthood," 76 *Geo L.J.* 1811, 1814 (1988); see also Hurwitz, *supra* n.6, at 146-47.
109. *Id.*
110. Dolgin, *supra* n.10, at 1294.

111. Jackson, *supra* n.134, at 1818-19.

112. Schiff, *supra* n.62, at 278.

113. Kermit Roosevelt III, Article, "The Newest Property: Reproductive Technologies and the Concept of Parenthood," 39 *Santa Clara L. Rev.* 79, 80-81 (1998). Roosevelt explicitly rejects intent theory, *Id.* at 91-92, but does intermingle his property theory with contract law and so is appropriately mentioned here. He later notes that "[I]ntention may and should, be the animating spirit of our conception of parenthood," *Id.* at 94.

114. *Id.* at 88.

115. *Id.* at 81.

116. *Id.* at 81.

117. *Id.* at 80-81.

118. See, e.g., Schiff, *supra* n.62, at 267.

119. Cf. *In re Estate of Gardinier*, 42 P.3d 120 (Kan. 2002) (holding that a male-to-female transsexual was not a female within the meaning of a Kansas marriage statute); William Saletan, in *Of Marriage and Mutable Gender* (March 21, 2002), available at <http://www.msnbc.com/news/727503.asp>, remarks that "[t]he court... refused to give up the crazy notion that a birth certificate is supposed to certify what actually happened."

120. George Orwell, *1984*, 205 (Penguin Books 1981) (1950).

121. Dolgin, *supra* n. 226, at 1295.

122. Janet L. Dolgin, Article, "Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies," 28 *Ariz. St. L.J.* 473, 538 (1996); see also Jerald V. Hale, "From Baby M. to Jaycee B.: Fathers, Mothers, and Children in the Brave New World," 24 *J. Contemp. L.* 335, 367 (1998). Hale does endorse a limited intent theory in conjunction with several other factors. *Id.* at 371.

123. Garrison, *supra* n. 69, at 865.