University of Richmond Law Review

Volume 51 | Issue 2 Article 5

1-1-2017

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THE INTERSECTION OF CONTRACT LAW, REPRODUCTIVE TECHNOLOGY, AND THE MARKET: FAMILIES IN THE AGE OF ART

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INTRODUCTION

As rapidly developing reproductive technologies offer new pathways to parenthood, marriage and parenthood have become increasingly separated, and biology and parenthood no longer go hand in hand. With the advent of Assisted Reproductive Technology ("ART"), providing alternative methods for people to have children when it is otherwise impossible or infeasible for them to do so naturally, a growing number of parents are not actually biologically related to their children, and even when they are, a growing number of parents have had their children with outside medical assistance.[1] While reproductive technologies such as in vitro fertilization, traditional or gestational surrogacy, artificial insemination (by donor or by husband), intrauterine insemination ("IUI"), fertility medication, intracytoplasmic sperm injection,

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A related variation of this article was presented at the 2015 AALS Annual Meeting, Section on Contracts Panel (*Mind the Gap: Contracts, Technology, and Legal Gaps*). I would like to thank the panel moderator, Nancy Kim, and the other panelists, Eric Goldman, Woodrow Hartzog, Corynne McSherry, and Jane Winn, for their thoughtful remarks about issues presented in the paper. I would also like to thank my fabulous research assistants Adam Dexter, John Guyette, Catherine Austin, Jessica Woodrow-Hogan, Briana Deutsch, Alanna Doherty, and Shaina Low for their invaluable research assistance. Small parts of this article were adapted from my article about the broader topic of the enforceability of family-based contracts. *See* Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formulations and Rights*, 36 CARDOZO L. REV. 101 (2015).

1. Of course it has long been possible to become legal parents of non-biological children through adoption. However, in recent years, since the advent of ART, the numbers have grown tremendously. Twenty-eight million children in the United States are raised in families in which their parents are not exclusively two heterosexual parents who are biologically related to their children—they may instead have a single parent, one or both parents may not be biologically related to them, or they may have more than two parents. Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 91 (2004).

pre-implantation genetic diagnosis, and cryopreservation are now available to give biological children to those who otherwise might be childless, this capacity has challenged our collective notions about family and the significance of biology in assigning parental rights. Ethical questions that arise require rethinking the traditional view of family as something organic and natural, and as a self-contained unit.[2]

Technological innovation always creates new challenges for the law. As new technologies create new possibilities, they also create legal and ethical questions that may take years to resolve. Ethical and legal questions persist regarding the enforceability of contracts that facilitate the formation of non-traditional families. New reproductive technologies also allow for far-reaching reproductive decision-making that was not possible even a generation ago. Parents can now select the sex, race, or other characteristics of an embryo to be implanted. Parents can also choose to cryopreserve their embryos to allow for implantation in the future, or choose to terminate or reduce a pregnancy because of birth defects or multiples. With the opportunities presented by reproductive autonomy and choice comes a legal and ethical chaos of sorts, and a division that pits consent against state and public interest.

This article contemplates the ways in which technology has affected existing assumptions about ownership and relationships, and the ways in which it has changed legal statuses and the law. It looks specifically at the ways in which the law, technology, and the market are intersecting with respect to reproductive technology, creating both new paths and new roadblocks. This article examines the ethical questions that have arisen based on the capabilities of new reproductive technologies, and the ethical questions that have arisen when, through private ordering, parties attempt to reduce the risk of uncertainty from new reproductive technologies.

There are many reasons that people may turn to technology for reproductive choices, including health issues that undermine carrying a healthy pregnancy (like breast cancer or blood diseases); the parents' inability to reproduce because of infertility or because they are a same-sex couple; the desire to harvest eggs or

2. *See* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE 246 (1997); Janet L. Dolgin, *The Law Debates the Family: Reproductive Transformations*, 7 YALE J. L. & FEMINISM 37, 38–41 (1995).

sperm before undergoing irreversible medical procedures that prevent reproduction (such as full-body radiation or hysterectomy); or the desire to harvest one's own eggs for future family planning after ideal reproductive age.[3] Using the many existing forms of reproductive technologies now available, there are seemingly infinite family arrangement possibilities.

Through medical procedures such as pre-implantation genetic diagnosis, it is now possible to create so-called "designer babies."[4] Early prenatal visits can reveal that the mother or surrogate is carrying a high-order, multiple pregnancy.[5] High-level ultra sounds and amniocentesis can alert parents to birth defects,[6] whether or not severe enough to impair the child's quality of life.[7] Such prenatal screening can lead to issues as varied as selective abortion and eugenics.[8] Similarly, still relatively new reproductive capacities, such as artificial insemination, in vitro fertilization ("IVF"), gamete donation and transfer, traditional and gestational surrogacy, and cryopreservation, can lead to issues as varied as cloning and posthumous reproduction, and can result in a multitude of nontraditional family formations, including multiple varieties of families with more than two parents.[9]

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3. *See* Bruce L. Wilder, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law*, 18 J. AM. ACAD. MATRIM. LAW. 177, 182 (2002); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 311–15 (1990).

4. *See* Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 3 YALE J. HEALTH POL'Y L. & ETHICS 283, 285 (2008); SARAH FRANKLIN & CELIA ROBERTS, BORN AND MADE: AN ETHNOGRAPHY OF PREIMPLANTATION GENETIC DIAGNOSIS 1–2 (2006).

5. *See* B. J. Whitlow et al., *The Value of Sonography in Early Pregnancy for the Detection of Fetal Abnormalities in an Unselected Population*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 929, 934 (1999).

6. *See* E. Albert Reece & Carol J. Homko, *Embryoscopy, Fetal Therapy, and Ethical Implications*, 57 ALB. L. REV. 709, 709 (1994).

7. *See* Hélène Grandjean, Danièle Larroque & Salvator Levi, *The Performance of Routine Ultrasonographic Screening of Pregnancies in the Eurofetus Study*, 181 AM. J. OBSTETRICS & GYNECOLOGY 446, 449–50 (1999) (discussing the detection of major and minor malformations in fetuses).

8. *See* Adrienne Asch, *Why I Haven't Changed My Mind About Prenatal Diagnosis: Reflections and Refinements*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 234, 234 – 235 (Erik Parens & Adrienne Asch eds., 2000) (discussing ethical issues with selective abortion); Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 898 (2007) (discussing moral concerns that reproductive technology has the ability to be used in eugenic ways).

9. *See* Bruce A. Fowler & Teresa C. Baird, *Frozen in Time: Planning for the Posthumously Conceived Child*, 37 COLO. LAW. 45, 45 (2008); Andre P. Rose, Note, *Reproductive Misconception: Why Cloning Is Not Just Another Assisted Reproductive Technology*, 48

As these technologies develop, questions arise as to whether, as a society, we should allow market forces and private contracting to control their use. Is leaving development of reproductive technology to the demands of the market equivalent to saying nothing is right or wrong—only efficient or inefficient, wealth maximizing, or not wealth maximizing? Or does the market represent the natural course of change and the inevitable direction of society, with regulation of technology in these areas simply inhibiting progress? Should ART be regulated and limited, or should it freely flourish? There is no single answer to these questions that can be applied across the board to all the various existing and emerging technologies. I argue, however, that where there is tension between individual reproductive choice and other moral values, the use of reproductive technologies is most often best left to the choice of individuals and the innovation of the market.

Part I highlights some of the ethical issues that arise from the reproductive capabilities that have developed over the past decades, focusing specifically on: gamete donation and surrogacy, resulting in more than two legal or biological parents; preimplantation genetic testing; the creation, selection, freezing, and destruction of embryos; and prenatal testing, selective abortion and selective reduction. Much of the resistance to these technologies stems from long-held and deeply ingrained beliefs about the purity of reproduction and motherhood.[10] As technology continues to create reproductive possibilities that were once unheard of or considered fantasy, the purity of motherhood, pregnancy, reproduction, and family are threatened, creating controversy and debate. This part examines some potentially troubling contract clauses that can give reproduction choices to intended parents that did not exist before technology facilitated it. The part then attributes some of the resulting ethical concern to societal hesitance to deviate from traditional family norms, looking specifically at the sacredness of motherhood and primacy of biology in definitions of parenthood.

Part I also addresses the problems of exploitation and lack of assent, problems that often account for some people's negative reaction to the technologies discussed. A common critique of the

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DUKE L.J. 1133, 1133–34 (1999); Dolgin, *The Law Debates the Family: Reproductive Transformations*, *supra* note 2, at 38–39.

10. *See* John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 912 (1996).

technologies discussed is the potential for exploitation of women.[11] There is an important argument that women have not truly consented if they choose to sell their genetic material or use their bodies to carry a child for others, or if they agree to contract clauses affecting reproduction, such as a hopeful mother's agreement to dispose of unused embryos during IVF, or a surrogate's agreement to selectively reduce a pregnancy if the intended parent asks. The consent in those cases is thought to be involuntary, or at least weakened by the need for financial compensation.[12] This part outlines seven reasons that exploitation is not the paramount concern. Importantly, studies show that most women making such choices do so with extended thought and care and with full knowledge, and their decision making is already controlled by careful screening and restrictions. Further limiting a woman's contractual freedom in these areas would wrongly presume that all women experience pregnancy and child-birth the same way, severely undermining a woman's autonomy.[13]

Finally, this part addresses the legitimate concern of the high cost of these technologies, potentially prohibiting equal access to these services.[14] For example, one of the greatest access concerns is with the use of pre-implantation genetic diagnosis ("PGD") and the process of genetic enhancement. PGD has the potential to create physically and intellectually superior children for those who can afford the technology, arguably widening the gap between the haves and the have-nots.[15] This part ultimately concludes, however, that the paramount importance of reproductive

11. *See* Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1155–56 (2014); June Mary Zekan Makdisi, *Involuntary Cloning: A Battery*, 79 ST. JOHN'S L. REV. 13, 17 (2005); Joan Mahoney, *An Essay on Surrogacy and Feminist Thought*, 16 L. MED. & HEALTH CARE 81, 81 (1988).

12. *See* Field, *supra* note 11, at 1155.

13. To be sure, the burdens and risks associated with ART are not equally shared between men and women, with women often bearing the major physical and psychological burden. Because a woman's status in many societies is identified with her fertility, the social burden of infertility can also be much heavier on women. Therefore, in general, the ethical issues with ART may affect women disproportionately. Because of this, and because historically women's autonomy has been challenged far more than men's, the focus of this part is on protecting the individual autonomy and decisionmaking of women regarding reproduction (though my thesis supports the protection of men's reproductive autonomy as well). *See* Mahoney, *supra* note 11, at 82–83.

14. *See* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 227 (1995).

15. *See* Laura Damiano, *When Parents Can Choose to Have the "Perfect" Child: Why Fertility Clinics Should Be Required to Report Preimplantation Genetic Diagnosis Data*, 49 FAM. CT. REV. 846, 851–53 (2011).

freedom should outweigh potential concerns about access, especially in light of the fact that competition and insurance should eventually drive the price down.

Despite these valid critiques, in Part II, this article argues for emphasis on consent and market freedom, and for more rigorous and consistent enforcement of reproductive agreements. Failure to enforce the intentions of the parties when it comes to reproductive contracts involving children has often led to unintended and sometimes absurd results, results often not in the best interests of the child, such as the unintended separation of twins, an intended couple paying the expenses for a baby when they do not get custody, or a sperm donor being required to pay child support. More broadly speaking, failure to enforce reproductive contracts can inhibit the development of important technologies and can thwart medical advances.

The law, which by its nature is slow to respond to and slow to capture a constantly evolving societal mood, is ill-equipped to regulate reproduction.[16] For example, over a century ago, artificial insemination was thought to be scandalous, but eventually, opinions softened and the practice is now commonplace.[17] Since law necessarily lags behind social momentum, family law and regulation are often unable to address adequately the myriad ethical issues that have arisen, and are likely to arise, as technology advances further. The lag of family law behind technology can be explained both by state legislatures remaining slow to expand statutory definitions of family, and by family law remaining doctrinally wedded to its patriarchal origins. But even as family law adapts, it will never be able to keep pace with the rapid developments happening in reproductive technology and accommodate all possible non-normative relationships, expanding based on cultural and social shifts, and made even more accessible through technology. Legislation often fails to address individual issues that fall outside the norm, it can be over-inclusive, and it can hold back progress.

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16. Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of* In Vitro *Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–17 (2005); Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern that Technology*, 48 DEPAUL L. REV. 825, 825 (1999); James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 814 (1998).

17. *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1035–37 (2002).

On the other hand, consent, market forces, and contract law, based on individual needs, individual desires, and societal demand, are in the best position for dealing with rapid technological momentum.[18] People have a fundamental right, both morally and legally, to privacy and freedom regarding reproduction, so intervention where there are private reproductive agreements is not usually justified without identifiable harm to identifiable individuals. Despite ongoing resistance by a sizeable segment of the population to reproductive freedom (evident by the development of the law regarding contraception and abortion), individual choice today generally guides reproduction (whether natural or artificially mediated). It follows that a free market and private contracting are the best vehicles for delivering assisted reproductive services and for responding to individual choice.

Commerce in human gametes has seen huge and increasing demand in recent decades. This article argues that such commerce need not be any different from commerce in other meaningful activities of life (such as paying one's doctor) or commerce in other articles of special significance (such as a religious text or a wedding ring). Facilitating the use of ART, including the ability to buy and sell gametes and the ability to do prenatal screening and make individual choices about pregnancy, is generally best for society. When market demand is high, it spurs innovation and medical advances (including the ability to diagnose genetic disorders prior to embryo transfer), while also helping otherwise infertile couples to participate in procreation and raise healthy children.

Choice must, of course, be real. Those who seek reproductive services must be adequately informed of their options and the risks and benefits. However, as long as the natural restrictive parameters of informed consent in contract law are policed, private agreements and choice should govern. While contract law, consent, and the market cannot necessarily deal adequately with every contingency, they are generally better suited than family law and state regulation to deal with the vast ethical quandaries that arise from sweeping change. Assisted reproduction, like sexual reproduction, is not a social enterprise. Although it often in-

18. *See* Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 817–18 (1985) ("The private contract establishes a first-order relationship based on individual needs and desires.").

volves more than two parties, it is still based on private arrangements and should be governed by rules of privacy and autonomy.

I. ETHICAL ISSUES CREATED BY NEW REPRODUCTIVE TECHNOLOGIES: NON-TRADITIONAL FAMILY FORMATIONS AND CULTURAL FEARS

New and emerging advances in prenatal testing and screening, and new medical procedures developed to improve an infertile couple's chance of a healthy pregnancy have led to pressing ethical questions about autonomy, individual choice, and the nature of family. The following sections highlight the effects of ART on social conceptions of motherhood and family in different contexts and advance the notion that reproductive autonomy should be paramount, considered above most other ethical concerns.

With progress, often comes fear of the dark side of technological advancement—fear of the unknown or fear of deviation from tradition. Since new technologies can reshape society (in this case, by redefining reproductive and family possibilities), public concerns tend to have a strong moral or ethical element, in addition to more traditional concerns about health and safety.[19] Such ethical, social, and sometimes religious concerns are generally rooted in traditional values and, in the case of ART, moral beliefs about the purity and sacredness of reproduction, motherhood, and family.[20] Although ART was developed to help an infertile couple's chances of getting pregnant, today it is also used by fertile people, including male or female homosexual couples, single men and women, and post-menopausal women—a break from the traditional dyad of marriage and parenthood.[21] Deeply held beliefs that marriage should be between a man and a woman, only married couples should have children, and reproduction and motherhood should be natural, as well as concerns about the fragmented families may that can be created when it is not, have sparked much of

19. Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 SETON HALL LEGIS. J. 103, 103–04 (1988) (explaining that new reproductive technologies have caused social and ethical concerns).

20. *See id.* at 105–06, 111 (explaining that human reproduction has a special and sacred meaning for people and that religious groups question whether ART should be allowed to exist at all).

21. *Reproductive Technology*, ADELAIDE CENTRE FOR BIOETHICS AND CULTURE http://www.bioethics.org.au/Resources/Resource%20Topics/Reproductive%20Technology.html. (last visited Dec. 16, 2016).

the debate about the appropriate use of technology involving reproduction.[22]

Beliefs about the purity of reproduction and motherhood play out in specific ways as they relate to different technologies, but the core values are often the same. One hundred years ago there was nothing to challenge natural motherhood.[23] But today, assisted reproductive technologies challenge a central cultural assumption: reproduction and motherhood are and should be natural, exalted above all else.[24] Historically, it was thought that people should have children out of love and altruism, and should not be paid for their genetic material or for carrying a child. Potential parents should accept the gift of a child, regardless of gender and despite health conditions. Additionally, a mother is expected to have a special bond with the child she is carrying that should transcend a private contract or any other interests. The potential created by technology requires examination of the assumption that parenthood should involve procreation by a genetic male and a genetic female and should be the natural result of love.

This part focuses on the tension between individual choice and other moral values, specifically focusing on surrogacy and gamete donation, pre-implantation genetic testing, the use of excess embryos, and selective abortion or reduction. For each type of technology or reproductive choice, critics generally fear the commodification of family and reproduction, exploitation and lack of consent, and unequal access.[25] This part shows that these concerns are overstated, often rooted in traditional and untested beliefs about the sacredness of motherhood and family, and should give way to the paramount concern of reproductive autonomy.

22. *See* Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 373–74, 376 (2011).

23. *See Assisted Reproductive Technology (ART) Timeline*, ART: TALKING TO CHILDREN ABOUT ASSISTED REPRODUCTIVE TECHNOLOGY, www.artparenting.org/about (last visited Dec. 16, 2016) (indicating that the first successful in vitro fertilization did not occur until 1978).

24. *See* Dana, *supra* note 22, at 376.

25. *See* Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J. L. & PUB. POL'Y 349, 351 (2012) (outlining the debates related to ART).

A. *Surrogacy and Gamete Donation*

Surrogacy is becoming more widely accepted in the United States every year.[26] Liberalization of surrogacy and a wider acceptance of the practice are linked to the expansion of rights for gay couples—the human rights issues that propelled legalization of gay marriage also drove reform in the area of surrogacy.[27] Surrogacy perpetuates the traditional idea that women should become mothers, opening doors for thousands of women and men to have a biological connection to their children.

While the practices of surrogacy and gamete donation are generally accepted today, they can lead to nontraditional family formulations that push the boundaries of "family."[28] Consider the story of Jodie and Shannon, two sisters who helped birth each other's children.[29] When Jodie and her husband were unable to conceive, they used Shannon's egg for IVF.[30] Then, later, when Shannon was unable to carry a child herself, they used Jodie as a surrogate for Shannon and her husband's twins.[31] Shannon became the biological parent of her sister's child, and Jodie became the aunt of the child she gave birth to.[32] Scenarios like this challenge societal notions of parenthood as something natural.

Relatedly, these reproductive technologies share common ethical issues revolving around contracting and compensation. Several countries prohibit financial compensation for the donors and for the surrogate.[33] The arguments against compensation include arguments that the technology disturbs traditional notions of family, and that the commodification, or "buying and selling," of

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26. *See* Dana, *supra* note 22, at 362 (explaining that with the development of in vitro fertilization came a rise in the social acceptance of surrogacy beginning in the 1980s).

27. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1191, 1253 (2016).

28. *See* Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER, SOC. POL'Y & L. 431, 434, 436–37 (1999).

29. Wes Judd, *The Messy, Complicated Nature of Assisted Reproductive Technology*, PAC. STANDARD (Sept. 28, 2015), https://psmag.com/the-messy-complicated-nature-of-assisted-reproductive-technology-π349d0c55a874#.3gmvegbm6.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See generally* Kiran Sreenivas & Lisa Campo-Engelstein, *Domestic and International Surrogacy Laws: Implications for Cancer Survivors*, 156 CANCER TREATMENT RES. 135 (2010).

human gametes and reproduction generally is inherently immoral and may lead to the exploitation of women.[34] Also, since infertility treatment is expensive and insurance coverage is rare, these technologies are generally only available to those who can afford it,[35] creating inequality of access. With the market maintaining an elevated price, fertility continues to be seen as an asset or commodity, perpetuating its commodification.[36]

Despite these concerns, views on surrogacy radically changed in this country, and continue to quickly evolve in favor of gestational surrogacy agreements since modern-day surrogacy first came on the scene in the 1970s. New York, for example, is on the verge of radically changing the way it regulates surrogacy. Surrogacy became illegal in New York in 1992, shortly after the controversial New Jersey *Baby M* case.[37] However, the Child-Parent Security Act,[38] recently considered by the Legislature, would make surrogacy agreements enforceable.[39] Currently only the District of Columbia and four states (including New York) ban surrogacy outright.[40] While twenty-one states are silent on the issue, seven states allow surrogacy through case law, and twenty-two states have statutes that allow surrogacy with regulation.[41]

Since the early days of surrogacy and *Baby M*, changes in technology and traditional notions of family have weakened the rationale behind banning surrogacy. As reproductive technology has improved, "gestational" surrogacy—where the surrogate has no biological relationship to the child—"has overtaken 'traditional'

34. *See* Ann Alpers & Bernard Lo, *Commodification and Commercialization of Human Embryo Research*, 6 STAN. L. & POL'Y REV. 39, 41–43 (1995) (explaining that commodification of human gametes creates important ethical questions and poses a harm of exploitation to women).

35. *See* Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER L. & POL'Y 217, 280. The average cost per IVF cycle is $9,266. Paul R. Brezina & Yulian Zhao, *The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies*, OBSTETRICS & GYNECOLOGY INT'L (2012), https://www.hindawi.com/journals/ogi/2012/686253/.

36. *See* Suter, *supra* note 35, at 294–95.

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

38. S.2765, 2015–2016 Reg. Sess. (N.Y. 2015); A.4319, 2015–2016 Reg. Sess. (N.Y. 2015).

39. Pamela Miller & Valerie Cohen, *Changing Tides: Legalizing Surrogacy in New York*, N.Y.L.J. (Mar 18, 2016), http://www.newyorklawjournal.com/id=1202752468097/Changing-Tides-Legalizing-Surrogacy-in-New-York.

40. *Id.*

41. *Id.*

surrogacy."[42] Many believe that the public policy against "selling" parental rights is less forceful when applied to gestational surrogacy, since the surrogate is not the natural mother of the child.[43] In one case, for example, the Superior Court of Pennsylvania upheld a gestational surrogacy agreement, characterizing the policy argument against surrogacy as "unsustainable in the face of the evolving role played by alternative reproductive technologies in contemporary American society."[44] The court highlighted a "growing acceptance of alternative reproductive technologies" in the Commonwealth.[45] The evolution of state surrogacy laws can be attributed, at least in part, to a growing acceptance of same-sex partnerships, and the concomitant growing use of assisted reproduction by same-sex couples. The American Society for Reproductive Medicine describes a "notable trend . . . for lesbian women and couples and, increasingly, for single and coupled gay men, to have offspring, most commonly through some form of assisted reproduction."[46] Further, it can be attributed simply to widespread use and societal demand.

Because views evolved over time in favor of surrogacy, legislation has been somewhat unsuccessful in regulating its use and serves only to impede the development of safe procedures and social change. When courts refuse to enforce surrogacy agreements, they empower surrogate mothers to commit extortion—as the surrogate would have incentive to threaten to renege in order to get more money. This would result in greater cost to both parties—it would be more expensive for intended parents looking for a surrogate (as they would have to screen potential surrogates more carefully) and the surrogate would presumably receive a lower price (since her performance would be uncertain). These scenarios illustrate the productive value of enforcing contracts.

Within this context, this part addresses persisting ethical concerns with surrogacy and gamete donation, including concerns about commodification, lack of access, exploitation, and lack of

42. *Id.*

43. *Id.*

44. *In re* Baby S, 128 A.3d 296, 304 (Pa. Super. Ct. 2015) (quoting Ferguson v. McKiernan, 940 A.2d 1236, 1245 (Pa. 2007)).

45. *Id.* at 306.

46. Santosh Kumar Mishra, *An Insight into Access to Fertility Treatment by Gay, Lesbians, and Unmarried Persons—Changing Nature of Reproduction and Family*, INT'L J. REPROD. FERTILITY & SEXUAL HEALTH (Oct. 29, 2014), http://scidoc.org/articlepdfs/IJRFSH/IJRFSH-2377-1887-01-301.pdf.

true consent. It highlights ways in which these concerns can be linked, more generally, to the fear that the practices of surrogacy and gamete donation will compromise notions of American motherhood, as well as to an undeniable ongoing backlash against women's reproductive freedom and autonomy.

1. The Sacredness of Motherhood and the Fear of Commodification

A dominant fear associated with ART is related to the dignity of personhood—this fear is rooted in notions about the commodification of babies and the conflation of economic exchange and intimacy.[47] Some critics fear that the market and the commercialization of reproductive tissues could undermine personhood, turning "unique individuals into fungible entities with monetary values."[48] For example, there is fear of baby factories in India and other countries, where thriving surrogacy markets are used by wealthy Americans and Europeans seeking unregulated use of wombs.[49]

There are concerns about a future that might resemble life in the dystopian Republic of Gilead, as described in the fictional account of the production of babies by abducted fertile women who are designated as Handmaids and treated as vessels, told by Margaret Atwood in *The Handmaid's Tale*.[50] Additionally, there is

47. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 218 (2012).

48. *Id.*

49. Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1028 (2010).

50. *See generally* MARGARET ATWOOD, THE HANDMAID'S TALE (1987). *The Handmaid's Tale* is set in the dystopia of Gilead in the speculative, not-too-distant future. The narrator, known to us only as Offred (literally "Of-Fred," having been stripped of her own name) tells of a region of the United States taken over by a fundamentalist insurgency. This theocratic regime forces women into total subservience, in keeping with the Gileadean interpretation of Christian Scripture. Years of pollution and abuse of the environment have resulted in widespread infertility, and the society is reorganized around breeding. Fertile women are abducted, designated as Handmaids, and sent to an indoctrination facility. When their "training" is complete, they are assigned to male elites (Commanders) and go to live in their households under the supervision of the Commanders' Wives. This supervision is no mere thing: in keeping with the Gileadean interpretation of the Biblical story of Rachel and her handmaid Bilhah, while the Commander copulates with his Handmaid, the Wife must maintain physical contact with her. This makes any child that results from the Ceremony legally and morally the child of the Wife, who takes possession of the newborn immediately. Handmaids, for their part, are treated solely as vessels. Those who do not become pregnant after being assigned to three different Commanders are designated Unwomen and shipped out to the hinterlands, where they are given the job of cleaning up

a fear that the practice of surrogacy will lead to the commercialization of child bearing driven by profit-making motives of brokers. It has been argued that this is a natural consequence of human desire and an unalterable consequence of modern technology.[51] This "anti-commodification" position is another way courts seek to protect intimate relations from the market, which, some believe, could undermine the dignity of marriage, "denigrate[] the emotional significance of home labor,"[52] and "violate the norms of love that are supposed to govern marital relations" and motherhood.[53]

The commodification concern with surrogacy and gamete donation stems, at least in part, from the fear that technology will diminish the sacredness of pregnancy, childbirth, and motherhood. While historically, marital love making and baby making have gone hand in hand, surrogacy and gamete donation involve a medical intervention that necessarily separates procreation from love and sexual intercourse, which can take on a meaningful significance to some people.

By itself, technology does not threaten the institution of motherhood, and in fact many parents praise the advancement of medical science for helping them to conceive and carry children to term.[54] However, ART is sometimes used by commercial fertility clinics to allow families to plan for the future, often for the convenience of the career woman, or to implant embryos in surrogates who provide surrogacy in exchange for payment.[55] In these

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toxic waste. If they are lucky enough to become pregnant during their "service," the babies they bear are handed over to the Wives. *Id.*

51. *See* Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 75 (2007).

52. Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 95 (1997).

53. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 500 (2005). However, this argument favoring the regulation of economic exchanges in the household reinforces the gendered nature of home labor and disproportionately harms poorer people, usually poor women. Failure to enforce interspousal contracts undervalues the labor associated with the marital relationship. *See id.*

54. *See* Alan Boudreau, Are You My Mommy? Determining Parentage in Modern Families, Address at American Bar Association 2014 Spring CLE Conference (May 8, 2014), http://www.americanbar.org/content/dam/aba/events/family_law/2014/05/section_of_familylawspringcleconference/4_thur_parentage.authcheckdam.pdf. The CDC's latest data estimates that almost 68,000 infants were born into the United States in 2013 due to ART interventions. U.S. CTR. FOR DISEASE CONTROL, ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 3 (2013), https://www.cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf.

55. *See, e.g.*, *Fertility and My Career: The Working Woman's Dilemma*, THE LONDON

scenarios, technology threatens to remove the sacredness of childbirth by divorcing the natural, instinct-driven desire to have children from reproduction. Reproduction is no longer sacred when a woman carries a child she has no desire to raise, when she gives her eggs to a fertility clinic so she can pay her student loans, or when she harvests her eggs for the future with acknowledgement that she does not want to have children yet.[56] These women all benefit from ART in ways that do not reaffirm motherhood as something women want above their careers or cash. In other words, these modern reproductive desires reveal the controversy of ART and surrogacy as deeply rooted in the stigma of selfish women, or worse women motivated by financial ambition who might exploit reproductive technology for their own selfish purposes.[57]

American culture heralds a natural mother-child bond. One website explained, "The bond between a mother and her child has been recognized and celebrated as uniquely powerful and beautiful for countless millennia."[58] Another website rounded up quotes from mothers, including: "The relationship of mother and child remains indelible and indescribable . . . the strongest bond on earth"; "[a] mother's love is like a circle—it has no beginning and no ending"; and "[m]others love is the fuel that enables a normal human being to do the impossible."[59] Another website explains, "The bond between mom and child will always be one of the strongest. A mother's love is unconditional, unselfish and knows no end. A mother's love for her children is so sacred, it is quite

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WOMEN'S CLINIC (Feb. 26, 2016), http://www.londonwomensclinic.com/blog/post/fertility-and-my-career-the-working-womans-dilemma (describing the many options of ART treatments available to working women).

56. "The press is awash with warnings about delaying motherhood and the short-sighted selfishness of career-hungry women who suddenly realize that 'Motherhood' is in its final week of release and it's now or never." Gillian Ragsdale, *The Maternal Myth: Why Motherhood Can Be Such a Tough Decision*, PSYCHOL. TODAY (Dec. 18, 2013), https://www.psychologytoday.com/blog/kith-and-kin/201312/the-maternal-myth.

57. *See, e.g.*, Wendy Tuohy, *Freezing Your Eggs: How 30-Something Single Women are Challenging Infertility*, HERALD SUN (Nov. 21, 2014, 4:00 AM), http://www.heraldsun.com.au/news/victoria/freexing-your-eggs-how-30something-single-women-are-challenging-infertility/news-story/c6808220f53920f8ea5c41d18126ebe3 (dismissing the notion that women who have eggs frozen are "selfish career women").

58. *Mother-Baby Bond: The Biology of Love*, THE VISUAL MD, https://www.thevisualmd.com/health_centers/child_health/mother-baby_bond_the_biology_of_love/mother_baby_bond_the_biology_of_love (last visited Dec. 16, 2016).

59. *Quotes from a Mother: Love and Survival*, http://quotesfromamomloveandsurvival.blogspot.com/2008/08/unbreakable-bond-mother-and-child.html (last visited Dec. 16, 2016).

hard to put into words."[60] But what happens to that bond when motherhood is dissected into two parts—the provider of the egg and the gestational carrier? And what happens when a woman chooses to have a baby that she will immediately give up to the intended parents?

Surrogate mothers do not fit into the paradigm of women being the "good mother." Rather, surrogate women are sometimes seen as deviant mothers, making the decision to give up a child before getting pregnant and violating the sacred bond between mother and child in the process. A mother, either through biology or through carrying the baby, who gives up her child is often thought to break that indelible bond and violate a sacred relationship. It does not help that the language of surrogacy reinforces such notions of the "good mother;" for example, delineating between traditional and gestational surrogacy, commercial and noncommercial surrogacy, and using the word "donation" when referring to gamete transfer.[61]

It is also historically thought that women have an instinctual desire to be mothers. People often speak of the "biological urge" and "women's biological instinct to have children."[62] Young girls are taught child bearing is something that is supposed to, and will, happen in their own lives. Conversely, one rarely hears about men having the same urge. The idea perpetuates the view that "'normal' women experience an instinctual longing from within to have a child, and if they did not there is something wrong with them." [63] The deep feeling that some women may have of wanting to have children, however, most likely stems from social and cultural influences, not biological ones.[64] Nonetheless, when a woman agrees to carry a child for another woman and agrees to give up that baby after presumably forming the inevita-

60. Nadia Carriere, *The Best Quotes—Sayings About Mothers and Mamas*, DISNEY BABY (Aug. 13, 2008), https://www.disneybaby.com/uncategorized/the-best-quotes-about-mom-mother-mama-our-best-friend/.

61. *See, e.g.*, Brian Manning, *Surrogacy Terms: Gestational Carrier vs. Surrogate*, CIRCLE SURROGACY (May 6, 2014), http:www.circlesurrogacy.com/blog/2014/05/06/surrogacy-terms-gestational-carrier-vs-surrogate/ (discussing the implications of using the terms "gestational carrier" and "surrogate").

62. Laura Carroll, *The "Biological Urge": What's the Truth?*, HUFFINGTON POST (Aug. 10, 2012, 10:27 AM), http://www.huffingtonpost.com/laura-carroll/childfree_b_1752906.html.

63. *Id.*

64. Gary L. Brase & Sandra L. Brase, *Emotional Regulation of Fertility Decision Making: What is the Nature and Structure of "Baby Fever"?*, 12 EMOTION 1141, 1151–52 (2012).

ble bond with it, she is often viewed as violating these sacred beliefs about womanhood and motherhood.[65]

Notions of the "good mother" are often found and reinforced in pop culture. It is all too common in gossip magazines or celebrity blogs to find public praise for the woman who utilizes reproductive technology to give her the child she has always wanted and fought hard to conceive.[66] The narratives typically strive to make ART palpable for the reader, highlighting the heartbreak of the intended mother who could not conceive and carry a child herself,[67] or the altruistic motives of a surrogate who unselfishly gives of herself to a couple.[68] Gestational surrogates, and the fertility clinics that assist in contracting them to potential parents, present a particularly careful narrative about the desire to give a couple the unselfish gift of surrogacy. Indeed, surrogacy is often referred to as a "gift," and fertility websites typically talk about the gift of helping an infertile couple.[69] For example, one fertility website defines "surrogate" as "one who gives of herself so that others may experience the joy of parenting" and highlights the descriptions behind the word as including "[l]ove, selflessness, willingness, [and] generosity."[70] Many fertility agencies have web-

65. *See, e.g.*, Arland K. Nichols, *Why Surrogacy Violates Human Dignity*, CRISIS MAG. (Apr. 7, 2015), http://www.crisismagazine.com/2015/surrogacy (stating that "[s]urrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood").

66. *See, e.g.*, Anna Alemendrala, *12 Celebrities Who Have Opened Up About IVF and Surrogacy*, HUFFINGTON POST (June 14, 2016, 7:00 AM), http://www.huffingtonpost.com/entry/12-celebrities-who-have-opened-up-about-ivf-and-surrogacy_us_575a22cfe4b0ced23ca7a74a ("The thing that unites them all, in addition to grief over miscarriages and failed IVF attempts, is their hope to complete their families on their own terms. Read on and be inspired.").

67. *See, e.g.*, Tim Nudd, *Giuliana Rancic is Expecting a Baby*, PEOPLE (Apr. 23, 2012), http://www.people.com/people/article/0,,20589362,00.html (reporting that Giuliana Rancic is "one step closer to having the baby that she and husband Bill Rancic have always dreamed about" and that her "prayers have been answered" after her road to motherhood was "made difficult by infertility struggles, one miscarriage and a diagnosis of breast cancer").

68. *See, e.g.*, *10 Celebrity Parents Who Used a Surrogate*, SUGGEST.COM, http://www.suggest.com/lifestyle/2107/10-celebrity-parents-who-used-a-surrogate/#page=1 (last visited Dec. 16, 2016) (noting that one celebrity found her surrogate to be "extraordinary" while another celebrity was so grateful that would "give [his] life for the woman who helped bring my sons into this world").

69. *See, e.g.*, *Becoming a Surrogate*, AM. REPROD. CTRS., http://www.arcbabies.com/index.php/treatments/surrogacy/becoming-a-surrogate (last visited Dec. 16, 2016) (stating that surrogates will be able to help give the "gift of life" to an infertile couple and "achieve their greatest dream of bringing a child into this world").

70. *The Gift of Surrogacy*, ANU FERTILITY CONSULTANTS (May 30, 2015), http://www.surrogacyincanada.com/new-blog-post/.

sites with headings, such as "The Gift of Surrogacy,"[71] or "Surrogacy—Giving the Ultimate Gift of Life."[72] When reproductive technology is used to provide "gifts," the presumption is that it has no place in the market economy, profit motives should be questioned, and contracts should not be enforced.

Women who receive payment for surrogacy must demonstrate that their motives are in line with societal notions that motherhood should be a sacred gift, and should not involve a paycheck. When surrogacy is praised as offering the ultimate gift, it becomes a newsworthy event when a woman "donates" her eggs with the simple motivation to make money. For example, the title of one news story about an egg donor was, "*Woman Donates Eggs for Rent Money*," loosely suggesting that the reason she was donating her eggs is suspect.[73] In the article, the writer explains that Stephanie, the donor, was "[s]trapped for cash," and would not be donating her eggs, if it weren't for "the faltering economy."[74] The judgment is implicit.

One of the most lasting voices in this controversy is Elizabeth S. Anderson, who argues that a woman's labor is beyond the realm of the market—that pregnancy, childbirth, and motherhood are a labor too sacred to be commodified.[75] Her thesis, and the overwhelming response to her scholarship since, demonstrates that the stigma of reproductive technology lies not in the fear of the future possibilities of ART, but instead, in the growing threat of motherhood traded on the commercial market.[76] It is a simultaneously obvious and nuanced threat to gender expectations: a woman can conceive, carry, and raise a child, but she must do it

71. *The Gift of Surrogacy*, BUILDING FAMILIES, INC., https://www.buildingfamiliesinc.com/en/2010/12/the-gift-of-surrogacy/ (last visited Dec. 16, 2016).

72. *Surrogacy—Giving the Ultimate Gift*, FAM. INCEPTIONS INT'L, http://www.familyinceptions.com/surrogacy-giving-the-ultimate-gift-of-life/ (last visited Dec. 16, 2016).

73. Russell Goldman, *Woman Donates Eggs For Rent Money*, ABC NEWS (Aug. 11, 2008), http://abcnews.go.com/Business/Economy/story?id=5533309&page=1.

74. *Id.* Shelly Smith, Director of the Egg Donor Program in Los Angeles, stated, "[w]e always hope people are donating for altruistic reasons, but we know money is part of it." *Id.*

75. Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 71 (1990).

76. *Id.* at 91–92; *see also* Alan Wertheimer, *Two Questions About Surrogacy and Exploitation*, 21 PHIL. & PUB. AFF. 211, 211 (1995) (arguing that surrogacy will not undermine or replace unconditional parental love with love conditioned on market principles because unconditional love is already impossible). *But see* Steven D. Hales, *The Impossibility of Unconditional Love*, 9 PUB. AFF. Q. 317, 318–20 (1992).

out of love for the child, and never as a participant in the market economy.

The fallacy of the notion that motherhood, and families in general, should be held sacred and should not be traded in the market economy is that motherhood and reproduction are already traded in the market economy in scenarios that are not generally questioned. For one thing, clinics and laboratories will continue to profit in this industry, even if the surrogate and gamete donors are not compensated (the distaste for surrogacy is not a blanket aversion—it generally occurs only when it is in exchange for monetary compensation).

Other examples of motherhood being traded in the market include maids and nannies, who do the traditional gendered work of keeping a house and raising children. The distinction between a market for women who carry an embryo to term for payment and a market for live-in nannies that raise five-year-olds for a paycheck is thin. To argue that these women or the markets they operate within are vastly different because of the reproductive labor involved ignores the fact that a live-in nanny is also deeply physically and emotionally engaged with a child she did not carry herself. This distinction that stigmatizes one form of motherhood traded on the market but rationalizes the other is separated by this ephemeral notion of sacredness for the former, but never the latter.

This sacredness not only acts to remove reproductive labor like surrogacy from the marketplace, it also bears down on the market value of all gendered labor, doing a disservice to the work of all women who seek a fair wage. The paradigm of exalting sacred institutions of womanhood and motherhood, as above the market, historically serves to undermine the market value of gendered work typically performed in the home, such as home healthcare or domestic work. The fact is the market already assigns monetary value to childcare, housework, adoption, and other gendered labor, and compensates non-family members for that work. However, when performed by family members, the monetary value of the work is not only lost, but too taboo to articulate in a contract. Consequently, the value of "women's work" becomes illegible and deeply undervalued in the market economy.

Pierrette Hondagneu-Sotelo captured the trap of financial ambitions in gendered work pitted against altruistic notions of

motherhood when she interviewed a couple, the Ross Family. The family was livid when their live-in nanny, Carmen, asked for a raise, seemingly out of nowhere:

> "We kind of had a blowup, and then she started acting really inconsiderate about her position, in my opinion," recalls Mrs. Ross. . . . "I just felt really bad, and I said, 'Gosh, it's apparent that you don't appreciate what you have here. I try to have a nice house for you to live in, and I never ask you to do something that I wouldn't do myself.' . . . I said, 'Is money just really all that's important to you?'"
> Indeed, it was the suggestion that Carmen was motivated as much by her wages as by love for the Ross children that stung her employer most.[77]

The dynamic playing out between Mrs. Ross and Carmen shows the ingrained expectations of women with children, even when the children are not their own. This dynamic is even more salient when considering that Mrs. Ross was a working woman herself, and the idea of leaving her children at home with a nanny cut both ways for her. However, it never dawned on Mrs. Ross during this interaction that a nanny affords her the opportunity to fully participate in the job market. To Mrs. Ross, Carmen should be motivated by love for her children first.

While compensating individuals for donating gametes or being surrogates can raise some ethical concerns as discussed above, not compensating gamete donors and surrogates can raise counter ethical concerns, such as devaluing women's work and decreased supply of eggs and sperm. A free market of gametes ultimately benefits all parties—gamete providers get the compensation they desire, and those willing to pay for such gametes get the reproductive tissues they need to undergo assisted reproduction.

Overall, on moral grounds, the social expectation that mothers commit to raising children as their ultimate life project, that they cherish motherhood over all other competing values, and that they perform the labor of motherhood out of pure altruism and love of their particular biological children, is a traditional social prejudice, arbitrary in that females happen to get pregnant while men do not. Even assuming the "naturalness" of such motherly dispositions, it does not overcome the naturalistic fallacy (the er-

77. Pierrette Hondagneu-Sotelo, *Blowups and Other Unhappy Endings*, *in* GLOBAL WOMEN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 55, 60 (Barbara Ehrenreich & Arlie Russell Hachschild eds., 2003).

ror of deriving an "ought" from an "is"). The surrogate's decision to bring forth the conditions for flourishing childhood and parenthood, whether for an infertile sister or an anonymous gay couple, respects the dignity of both. Enlightened society and the law both have come to understand parenthood as a moral relationship rather than a biological one, and the best interest of the child as being determined by social conditions and functional parenthood, not biological relations.

2. The Problems of Exploitation and Informed Consent

In addition to commodification and market concerns, many feminists and others worry about the bodily exploitation of women who choose to sell their genetic material or use their bodies to carry a child for others.[78] It is thought that the consent in those cases is not truly voluntary, or is weakened by the need for financial compensation and power disparities.[79] The suggestion is that surrogacy is exploitative because only poor women are amenable to the working conditions of surrogacy.[80] When middle class women act as surrogates, the belief is that they are verifiably motivated by altruism because they would not have to make that choice to be a surrogate otherwise. However, protecting against the risk of exploitation has "resulted in paternalistic rulings and regulations restricting the practice of commercial surrogacy throughout the United States," and "impermissibly restrict[ed] women's autonomy and freedom to contract."[81]

Notions of exploitation tend to be predicated on the market's valuation of surrogacy. Because of social expectations that women would serve as surrogates for free, the economic value of surrogacy has been driven down to approximately three dollars an hour or, in some cases, as low as fifty cents an hour.[82] If surrogacy were valued higher based on the emotional commitment and physical

78. For a survey of articles addressing the possible exploitation of surrogates, see Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 430–31, nn.24–28, 30–31 (2014).

79. *Id.* at 430–32.

80. *Id.*

81. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 392 (2012).

82. Elisabeth Eaves, *Want To Work For $3 an Hour?*, FORBES (July 24, 2009, 12:00 AM), http://www.forbes.com/2009/07/23/surrogate-motherhood-minimum-wage-opinions-columnists-elisabeth-eaves.html; Jane E. Brody, *Much Has Changed in Surrogate* Pregnancies, N.Y. TIMES (July 20, 2009), http://www.nytimes.com/2009/07/21/health/21brod.html.

labor involved, perhaps the market might demand higher prices for surrogacy, thus diversifying the economic situation of many surrogates. The presumptions are based on the fundamental premise that, absent an altruistic motive, women would not choose to use their bodies in these ways, unless they were being exploited. The catch-22 is that many women who are surrogates are not driven by financial rewards to begin with, further illustrating the pervasive notion that women want to carry children for others, and not for their own rewards—inescapable cultural assumptions.

The exploitation of women by intended parents with more social power is a concern that can be addressed in seven ways: (1) studies show that most surrogates do not make rash decisions without full knowledge and assent; (2) the standard contract defenses of duress and unconscionability check for vulnerability and unfairness; (3) it is in the intended parents' interest that the surrogate have previous children and is not primarily motivated by payment; (4) prohibition will lead to reproductive tourism, exacerbating the likelihood for exploitation and distorting the market price; (5) altruistic surrogacy is arguably more exploitative of the labor of labor; (6) exploitation is a greater concern in housing and employment where the state takes a laissez-faire attitude in favor of freedom of contract; and (7) the argument that it is bad to pay women for something that is bad for them is founded on circular reasoning.

First, to presume that a woman is unable to grant consent to be a surrogate or donate eggs, or to any other reproductive choices, presumes that all women experience the same unbreakable sacred bond with the unborn child and the same emotional effects of pregnancy. It presumes that all women have a natural "maternal instinct" that would prevent them from ever voluntarily relinquishing a child. This set of presumptions buys into deep-seeded but untested cultural values and severely undermines women's autonomy and contractual freedom. Indeed, rather than making rash, shallow decisions regarding surrogacy, one commenter indicated that "[p]arties to a surrogacy contract generally wait an average of four months before the first attempt to conceive, suggesting careful consideration preceding pregnancy and allowing the surrogate to evaluate the magnitude of her decision."[83] In a relat-

83. London, *supra* note 81, at 401.

ed study, empirical research showed that based on qualitative interviews with 130 IVF patients and ninety fertility care providers as well as 260 online patient surveys, most patients have surprisingly positive consent behaviors with respect to informed consent documents and conversations, including reading forms, reading forms closely, and finding forms comprehensible.[84] As a result, despite some well-publicized cases, problems of contested surrogacy are somewhat rare.[85]

Restricting a woman's procreative autonomy and freedom of contract "imposes a detriment on women under the guise of protecting surrogates from exploitation."[86] As shown above, not all women relate to childbearing in the same way. Rather than making presumptions based on the sanctity of reproduction and motherhood, presumptions are better served that are in favor of the competence of surrogates who are exercising their right to self-determination by making thoughtful and informed decisions.

Second, contract law already contains protections against exploitative and unfair contract provisions: the defenses of economic duress, undue influence, and unconscionability. All three defenses ask the factual question of whether the weaker party effectively had alternative courses of action available and whether she entered into the contract voluntarily with full knowledge.[87]

> If, for example, choices are made about how many embryos to create, how many to implant, and how to track and store frozen gametes, reproductive materials, and embryos without discussion with the parties supplying them and if those providing reproductive services do not provide accurate and timely information about the risks of fertility-enhancing drugs, success rates using different techniques, and costs, then choice is illusory, especially in an area as sensitive and as defining of personal self-image as reproduction.[88]

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84. Jody L. Madeira, *The ART of Informed Consent: Assessing Patient Perceptions, Behaviors, and Lived Experience of IVF and Embryo Disposition Informed Consent Processes*, 49 FAM. L.Q. 7, 9 (2015).

85. Jessica Grose, *The Sherri Shepherd Surrogacy Case Is a Mess. Prepare for More Like It.*, SLATE (Apr. 28, 2015, 5:54 PM), http://www.slate.com/blogs/xx_factor/2015/04/28/sherri_shepherd_surrogacy_case_there_s_little_consensus_on_the_ethical_dimensions.html; Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851, 869, n.145 (2013).

86. London, *supra* note 81, at 409.

87. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. LAW INST. 1981).

88. ARTHUR L. CAPLAN, AM I MY BROTHER'S KEEPER: THE ETHICAL FRONTIERS OF BIOMEDICINE 6 (1997).

Consent must include extensive counseling about the inherent medical and emotional benefits and risks associated with most forms of ART, and participants must participate voluntarily and without coercion or undue influence.[89]

Contract law already maintains the tools to conduct these types of analyses. Contracts for which assent is not truly voluntary will not be enforced. In fact, if surrogacy contracts are not enforced as against public policy, the surrogate or the intended parents will be much better positioned to exploit the other party without recourse. The surrogate may refuse to give up the baby unless paid more money. The intended parents may refuse to pay medical costs unless the surrogate acquiesces to unreasonable demands.

Third, the available statistics suggest that surrogates in the United States are not generally exploited. The American surrogacy agency ConceiveAbilities, typical of American surrogacy agencies, maintains requirements for potential surrogates that align with the interests of intended parents.[90] Surrogates must not be on "government financial support," "have given birth to and be raising at least one child," have "[n]o history of clinical mental illness," "agree to psychological testing," have a "[s]table, responsible lifestyle," and be "[f]inancially sound."[91]

NPR's four-part series, "Making Babies: 21st Century Families," identifies Macy Widofsky as representative of American surrogates.[92] She had already undergone "easy pregnancies."[93] She "wanted to repeat the process."[94] Another surrogate explained that, "[y]es, it's a business contract in a sense, but it's so much more than that."[95] Whether or not payment is the primary motivation, the payment secures the relationship and eliminates uncertainty, symbolic of commitment.

89. *See* Sara Cotton et al., *Model Assisted Reproductive Technology Act*, 9 J. GENDER RACE & JUST. 55, 66 (2005).

90. *See Surrogacy Requirements*, CONCEIVEABILITIES, https://www.conceiveabilities.com/surrogates/surrogate-requirements (last visited Dec. 16, 2016).

91. *Id.*

92. Marisa Peñaloza, Carrying *'Dreams': Why Women Become Surrogates*, NPR (Apr. 17, 2012, 6:53 PM), http://www.npr.org/2012/04/17/150589059/carrying-dreams-why-women-become-surrogates.

93. *Id.*

94. *Id.*

95. *Id.*

Surrogates are generally not wealthy, but are also, for the most part, far from desperately poor. According to The Atlantic's analysis:

> The typical profile runs like this: married, Christian, middle class, with two to three biological children, working a part-time job, living in a small town or suburb rather than a big city, with a degree of college education but usually without a college degree. . . . In the United States, statistics show that surrogates fall into the average household income category of under $60,000. About 15 to 20 percent are military wives. Some are single women. Those who are married have husbands who support paid surrogacy. . . . They have health insurance. . . . Of the women who serve as surrogates for [the Center for Surrogate Parenting ("CSP")], roughly 35 percent repeat the experience.[96]

CSP is representative of the vast majority of surrogacy agencies in their strict criterion for surrogates:

> Ethical surrogacy agencies and lawyers [do not] accept two specific categories of potential surrogates. First, they reject women below the poverty level who may be at greater risk for health concerns and coercion, and who probably do not have medical insurance. Second, they reject women who [do not] have children.[97]

Fourth, history has shown that tighter regulation or prohibition of surrogacy will lead to "reproductive tourism," such as the use of surrogates by American intended parents in China, India, Brazil, and elsewhere, where surrogacy is cheaper and there is no way to determine a fair market price.[98] Prohibition and regulation in the United States will lead to a higher risk of exploitation because society-to-society exploitation is prone to be hidden from view, to be susceptible to objectification of the foreign other, and to become an institutionalized, unregulated black market.

Fifth, prohibition of commercial surrogacy alongside the permissibility of altruistic surrogacy risks a more pernicious form of exploitation whereby the labor of the woman is not viewed by the courts as labor in the economic sense. This view dismisses the woman as an autonomous economic agent and reinforces the social prejudice that the work of a woman in the home and for the family has no economic value. This belief is rooted in impermissi-

96. Leslie Morgan Steiner, *Who Becomes a Surrogate?*, THE ATLANTIC (Nov. 25, 2013), http://www.the atlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/.

97. *Id.*

98. *See* Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 L. & INEQ. 277, 277–78, 285, 296–97 (2009).

ble, overgeneralized gender stereotypes, deemed unconstitutional.[99] Respect for the surrogate's economic autonomy requires that payment is at least permissible, if not morally obligatory.

Sixth, critiques invoking duress, inequality, and amoral wealth-maximizing choices made by the intended parents and the surrogate are more coherently and usefully made against the market economy as a whole, rather than against selective contract provisions that can, under certain circumstances, illustrate structural market failures. Contract law exists within the market economy, not the other way around. Exploitation critiques are best leveled, for example, at owner-employee and owner-tenant relationships where the less powerful party seeks the necessities of life. Surrogacy is distinguished in that the surrogate enters the contractual relationship freely and does not seek a necessity of life. It is a hypocrisy for the state to adopt a laissez-faire attitude toward employment, housing, healthcare, and predatory loans, yet to concern itself with the commodification of human beings when women's reproductive autonomy is at stake.

The inconsistency suggests an alternative motive: restricting women's reproductive choices. The legislative histories of states and the federal government indicate a trend of animosity toward women's reproductive autonomy under the cloak of rationalizations, insisting that the intent of the legislation is either to protect public morality or women's health.[100] This animosity is evident in the legal regulation of private reproductive issues such as the use of contraception and abortion.[101]

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99. United States v. Virginia, 518 U.S. 515, 533–34 (1996).

100. *See, e.g.*, 162 CONG. REC. H23–24 (daily ed. Jan. 6, 2016) (statement of Rep. Wagner).

101. Beginning with the Comstock laws in 1873, Congress outlawed the Postal Service from transporting all erotic literature, contraceptives, abortifacients, and sex toys for the sake of eliminating the "obscene" from society. *See* Law of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 599, *invalidated by* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61, 70, 75 (1983). It was not until 1983 that the Supreme Court ruled that such intrusions into citizens' mailboxes were unconstitutional violations of the First Amendment. *Bolger*, 463 U.S. at 61, 75. Recently, the Supreme Court struck down a Texas statutes that prescribed, in the words of the Court, "[u]nnecessary health regulations," requiring abortion providers to have admitting privileges at a hospital within thirty miles of the facility even though, the Court writes, "[t]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300, 2302 (2016) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992); Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)). No leap of the imagination is required to infer the intent of the Texas

Finally, to argue that it is inherently exploitative to pay a woman for something that is bad for her is an obvious instance of circular reasoning at best and undue paternalism at worst.

3. The Problem of Unequal Access

Another legitimate concern with surrogacy contracting is its high cost, prohibiting equal access. This is an incidental outcome. Income inequality is the culprit to be addressed on its own. Universal healthcare is one answer—and PGD could be an impetus and clear example of the stake society has in equality.

In some ways, surrogacy mirrors a typical commercial transaction, where two contracting parties each voluntarily agree to give up something in order to get something they value more—a fertile woman seeking financial compensation, trading with an infertile couple who desires a baby. With the commodity in great demand, supply and demand takes hold to set a market price. From there, free markets work and government interference would only impose costs on society.

In this paradigm, the elevated cost of surrogacy is unlikely to persist—competition among clinics, as well as increased technological efficiency over time, will eventually drive the price down, as happens with most new technologies. For example, the average price of a new twenty-one-inch television went from $2495 in 1948, to $495 in 1960, to $260 in 1972, to about $100 today.[102] Similarly, in 2011, the original price of a 16 GB iPad 2 was $499; in 2012, the price dropped to $399.[103] That same iPad can now be purchased for much less.[104] In the end, competition among clinics will improve the quality of ART services and drive the price down.

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state legislature.

102. *See TV Selling Prices*, TELEVISION HISTORY—THE FIRST 75 YEARS, http://www.tvhistory.tv/tv-prices.htm (last visited Dec. 16, 2016).

103. *See iPad 2*, APPLE-HISTORY, http://apple-history.com/ipad_2 (last visited Dec. 16, 2016).

104. *See* Brett Molina, *Apple Cuts Prices, Boost Storage on iPads*, USA TODAY (Sept. 8, 2016, 9:27 AM), www.usatoday.com/tech/news/2016/09/08/apple-cuts-prices-boost-storage-ipads/89993382/. *See generally* Andrew Krabeepetcharat, *Advanced Technology Drives Prices Down*, MEDIA CTR. (July 23, 2014), http://media.ibisworld.com/2014/07/23/advanced-media-drives-technology-prices/ (discussing that increased competition and technological advances cause a decline in prices for consumer technology devices, such as flash drives and e-readers).

If universal healthcare is not feasible, then the high cost of ART can also be remedied if states require insurance coverage, which might eventually happen organically as views on surrogacy continue to evolve and surrogacy becomes more commonplace. Overall, there are better ways to combat access issues than limiting reproductive freedom and restricting the use of the important technology altogether.

B. *Pre-Implantation Genetic Testing and Parent Choice*

Through the use of assisted reproduction, prospective parents today often have a say about some of the actual or potential features of their child-to-be. Debate has flourished about what degree of discretion would-be parents should have, specifically in choosing the gender, race, and other physical characteristics of embryos to implant.[105]

PGD was introduced in 1990 for genetic analysis of embryos developed through IVF.[106] This technology offers the ability to characterize the genetic composition of embryos prior to embryo transfer, allowing doctors to diagnose hereditary and serious diseases and allowing parents to screen their future children from those diseases, even before conception.[107] Because embryos are tested prior to implantation, parents are able to avoid invasive post-conception diagnostic procedures, such as amniocentesis and chorionic villus sampling.[108] In the event that the screening results in an unfavorable diagnosis and the parents decide not to continue with the implantation, they avoid the decision and the potential trauma of having an abortion.[109] PGD is generally considered safe and has undeniable benefits when used to diagnose genetic disorders.[110]

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105. *See* Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 L. & INEQ. 481, 485 (2009).

106. *See* Howard W. Jones, Jr. & Jean Cohen, *Preimplantation Genetic Diagnosis*, 87 FERTILITY & STERILITY S47, S47 (Supp. 2007).

107. *See* Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUSING J. HEALTH L. & POL'Y 245, 247–48 (2008).

108. *See* Jeffrey R. Botkin, *Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U. L. REV. 265, 278–80 (2003).

109. Molina B. Dayal, *Preimplantation Genetic Diagnosis*, MEDSCAPE (Dec. 30, 2015), http://emedicine.medscape.com/article/273415-overview#a1; Botkin, *supra* note 108, at 281.

110. *See* Spar, *supra* note 105, at 485; Ronald Bailey, *Warning! Bioethics Can Be Hazardous to Health*, MED. ECON. (Oct. 25, 1999), http://medicaleconomics.modernmedicine.

Embryo manipulation technology has resulted in overwhelmingly positive medical outcomes. PGD helps identify genetic defects within embryos to prevent diseases or disorders from being passed on to the child.[111] "Since its introduction . . . it has been most widely used to prevent the birth of children with conditions such as Down's syndrome, Tay-Sachs disease, cystic fibrosis, sickle cell, Huntington's chorea, and Cooley's anemia."[112] It has also increasingly been used to create "savior siblings," with matching bone marrow or other tissues to transplant in older siblings who are sick.[113] There is no cure for many genetic conditions discovered through PGD and available treatments often carry great risks. PGD can also identify, before implantation, embryos that are of poor quality and likely to result in a miscarriage.[114]

However, significant ethical questions arise about the use of PGD. Many of the ethical problems that critics have with this technology are the same as with surrogacy and gamete donation. As with surrogacy, much of the push against use of this technology stems from untested ideas about the sanctity of reproduction and notions that childbirth should be natural.[115] The traditional belief is that children are a sacred "gift from God," and should be loved regardless of specific traits.[116] Childbirth should not involve

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com/medical-economics/news/clinical/obstetrics-gynecology-womens-health/warning-bioethics-can-be-hazardous (noting "the birth defect rate for IVF babies . . . is lower than for children who are born in the normal way").

111. *See* Botkin, *supra* note 108, at 280–81.

112. *About Genetic Selection*, CTR. FOR GENETICS & SOC'Y, http://www.geneticsandsociety.org/section.php?id=82 (last visited Dec. 16, 2016).

113. *See* Marley McClean, *Children's Anatomy v. Children's Autonomy: A Precarious Balancing Act with Preimplantation Genetic Diagnosis and the Creation of "Savior Siblings"*, 43 PEPP. L. REV. 837, 842 (2016).

114. *See* Mahdi Zahraa & Shaniza Shafie, *An Islamic Perspective on IVF and PGD, with Particular Reference to Zain Hashmi, and Other Similar Cases*, 20 ARAB L.Q. 152, 154 (2006). The most recent advances from genetic testing focus on deconstructing the genetic content of an unhealthy female egg to remove disease from the egg and reassembling it using the genetic material from a healthy donor egg, resulting in a germ cell containing the genetic material from two different women. *See* Judith Daar, *Multi-Party Parenting in Genetics and Law: A View from Succession*, 49 FAM. L.Q. 71, 73–74 (2015). This technique is known as mitochondrial manipulation technologies. *See id.* at 72. When a single sperm fertilizes that cell, the result is a "three parent embryo" with the DNA from three different people. *See id.* at 71. Though issues can arise related to child support, inheritance, and custody, this procedure is highly beneficial, medically preventing transmission of disease to the carrier's offspring, while allowing an intended mother with genetic diseases to maintain a biological connection to her child. *See id.* at 73–74, 76–77.

115. *See* Nigel M. de S. Cameron, *Pandora's Progeny: Ethical Issues in Assisted Human Reproduction*, 39 FAM. L.Q. 745, 752–53 (2005).

116. *See* John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 442–43 (2003).

a deliberate and intellectual process, but rather should be instinctual and natural; the parent-child bond should be unselfish and unconditional. Reproduction is no longer "sacred" when couples exploit reproductive technology for their own selfish purposes. Again, these sacred cultural beliefs remain untested.

As with surrogacy, critics also point to commodification issues and the lack of equal access to the technology as problems with trait selection and the use of PGD.[117] For example, the use of PGD for general trait selection will arguably give users who can afford it a leg up, if and when the technology allows for the creation of intellectually and physically superior children, further increasing the class divide. PGD technology is still rapidly advancing and all possibilities have not yet been realized. As a result, the price of this technology still remains steep.[118] But when the technology inevitably becomes more commonplace, as with surrogacy, competition and increased efficiency will cause the price to naturally decline. As with surrogacy, the technology is simply opening the door to the possibility for a better quality of life. Autonomy should be paramount.

While many of the arguments and responses are much the same as with surrogacy, the remainder of this part focuses on the unique issues that arise with the engineering of embryos. The focus is whether it is appropriate to use PGD as a means of selecting cosmetic characteristics of the embryos to implant and concerns regarding the "designer baby."

Genetic manipulation makes it possible for parents to pick physical characteristics of their offspring by choosing embryos solely on the basis of gender, race, or other traits. For example, California Cryobank, America's largest sperm bank, allows potential parents to choose from traits including height, weight, education, occupation, religion, eye color, hair color, race, and medical history.[119] Critics fear that allowing trait selection of this sort will eventually skew the population toward homogeneity or reinforce and effectuate social prejudices.[120]

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117. *See* Janet L. Dolgin, *Method, Mediations, and the Moral Dimensions of Preimplantation Genetic Diagnosis*, 35 CUMB. L. REV. 519, 524–25, n.29 (2005).

118. *See id.* at 525.

119. *See Advanced Search*, CALIFORNIA CRYOBANK, https://cryobank.com/search/ (last visited Dec. 16, 2016).

120. *See* Laura Damiano, *When Parents Can Choose to Have the "Perfect" Child: Why*

Such fears, however, incorrectly analogize pluralistic contemporary America with the homogenous, traditional societies of China and India, or the authoritarian society of early twentieth century Germany. These fears can also be falsely based on an inadequate respect for the priority of the paramount moral principle of reproductive autonomy. The following will show how the feared outcomes are purely speculative, and as a result, state interference to prevent such outcomes impermissibly restricts reproductive autonomy and is not warranted.

1. Sex Selection

The use of technology to sort and separate spermatozoa into X and Y chromosome groups allows parents to choose to have a male or female child, even for reasons unrelated to genetic abnormalities. Although a 2008 study found that 42 percent of the clinics surveyed offer gender selection,[121] the practice is still controversial.[122] Sex selection for non-medical purposes has generated perhaps the strongest policy response. Many people believe that using gender selection for non-medical reasons could lead to the kind of population skew seen in China and India, and potentially play a similar role in reinforcing gender stereotypes,[123] while oth-

Fertility Clinics Should Be Required to Report Preimplantation Genetic Diagnosis Data, 49 FAM. CT. REV. 846, 852 (2011); Richard Hayes, *Genetically Modified Humans? No Thanks*, WASH. POST (Apr. 15, 2008, 1:47 PM), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/15/AR2008041501620_pf.html.

121. Sumathi Reddy, *Fertility Clinics Let You Select Your Baby's Sex*, WALL ST. J. (Aug. 17, 2015, 1:38 PM), http://www.wsj.com/articles/fertility-clinics-let-you-select-your-babys-sex-1439833091.

122. *Id.*

123. Steve Connor, *Medical Ethicist: Ban on Sex Selection of IVF Embryos Is Not Justified*, INDEP. (July 3, 2013), http://www.independent.co.uk/news/science/medical-ethicist-ban-on-sex-selection-of-ivf-embryos-is-not-justified-8683940.html; *see also* Shelly Choo, *Chrissy Teigen's IVF Backlash: How Common is Baby Sex Choice?*, NBC NEWS (Feb. 26, 2016, 12:14 PM), http://www.nbcnews.com/health/womens-health/chrissy-teigen-s-ivf-backlash-how-common-baby-sex-choice-n526621. Such practices could also reinforce gender as a binary construct in general, a practice that some countries are steering away from. In Sweden, for example, the most recent National Encyclopedia includes the term "hen," a gender-neutral pronoun that can be used by people who do not fall within the gender binary of man or woman. *See* Nina Bahadur, *Swedish Gender-Neutral Pronoun, 'Hen,' Added to Country's National Encyclopedia*, HUFFINGTON POST (Apr. 11, 2013, 5:40 PM), http://www.huffingtonpost.com/2013/04/11/swedish-gender-neutral-pronoun-hen-national-encyclopedia_n_306 3293.html. Some Swedish citizens and politicians are pushing for public institutions, such as schools, to adopt gender-neutral practices and terminology. Nathalie Rothschild, *Sweden's New Gender-Neutral Pronoun:* Hen, SLATE (Apr. 11, 2012, 5:43 PM), http://www.slate.com/articles/double_x/doublex/2012/04/hen_sweden_s_new_gender_neutral_pronoun_causes_controversy_.html.

ers believe that this personal decision should be left to the parents, like any other parenting or birthing decision.

Some advocates, rooted in the work of transgender and gender non-conforming leaders, assert that sex selection, in a country where sex is commonly misunderstood to be synonymous with gender, reinforces the gender binary, a social construct that fails to recognize the wide spectrum of fixed and fluid gender identities outside of the man/woman binary.[124] Some argue that gender selection could be detrimental to children because it impinges on their freedom to form their own gender identities by assigning a gender identity that matches their sex at birth, before a child can self-determine their gender identity.[125]

The story of model Chrissy Teigen and her husband, singer John Legend is illustrative. Teigen recently underwent IVF and chose to implant only female embryos.[126] The couple experienced backlash on social media for "handpicking qualities" that they want "rather than letting nature take its course."[127] In response, Teigen joked, "I also picked the embryo with a taste for bacon, a knack for magic, and size 7 feet so she can always find shoes."[128] Experiencing a similar backlash, celebrity couple Kim Kardashian and Kanye West also reportedly used a gender selection process to have only male embryos implanted during IVF, hoping to give a brother to their daughter.[129] Family balancing, as in the case of Kim and Kanye, is often viewed as more ethically acceptable because it does not result in a preference of one gender over

124. *See* Rajani Bhatia, *Constructing Gender from the Inside Out: Sex-Selection Practices in The United States*, *in* WOMEN, SCIENCE, AND TECHNOLOGY: A READER IN FEMINIST SCIENCE STUDIES 304 (Mary Wyer et al. eds., 3d ed. 2014).

125. *See* GENERATIONS AHEAD, TAKING A STAND: TOOLS FOR ACTION ON SEX SELECTION, https://napawf.org/wp-content/uploads/2010/01/Toolkit-final.pdf (last visited Dec. 16, 2016).

126. Choo, *supra* note 123.

127. Mark Grey, *Chrissy Teigen Goes on Twitter Defense After Gender Selection Reveal*, MSN (Feb. 25, 2016), http://www.msn.com/en-us/entertainment/celebrity/chrissy-teigen-goes-on-twitter-defense-after-gender-selection-reveal/ar-BBpWYys; *see also* Choo, *supra* note 123 (explaining how the couple "faced a Twitter backlash over [their] desire to have a girl"); *Chrissy Teigen Comes Under Backlash After Revealing Gender Selection*, HEALTHYWOOD HILLS (Feb. 25, 2016), http://healthywoodhills.com/health/chrissy-teigen-comes-under-backlash-after-revealing-gender-selection/ (explaining that Teigen is "getting burned" after revealing she chose the gender of her baby, and that "her decision wasn't received too well").

128. Grey, *supra* note 127.

129. Rachael Rettner, *Is it Ethical to Choose a Baby's Sex? Kim and Kanye Fuel Debate*, LIVE SCI. (June 24, 2015, 4:49 PM), http://www.livescience.com/51336-kardashian-west-baby-sex-selection.html.

the other.[130] However, even with family balancing, there are still concerns that the practice might "represent a 'slippery slope' toward choosing other traits in children, like their eye color, height or intelligence."[131]

The slippery slope argument assumes that sex selection and trait selection are impermissible because of potential outcomes, either perniciously skewing the population toward homogeneity or reinforcing and effectuating social prejudices. These outcomes are conceptually distinct, but largely the same phenomenon. Critics point to the sex imbalances in China and India as evidence of the likely result of gender selection and extrapolate that trait selection will also lead to a homogeneity unworthy of the variety and richness of human life while doubly prejudicing those who fall in the out-group.[132] But such speculative outcomes do not justify state intervention without the articulation of an identifiable harm to identifiable persons,[133] especially since intervention restricts the moral principle of reproductive autonomy. It is a fundamental principle of political liberalism that the state must sustain the conditions for actualizing the widest feasible array of conceptions of the good life, ways of being in the world, and life projects *that do not harm others*.[134] If the potential harm is merely speculative, interference is not warranted, especially where there is a strong countervailing policy that furthers the good life.

Assuming limitations to the absolute principle that extremism in defense of reproductive liberty is no vice, reasonable compromise short of prohibition is available. Nita Farahany, a member of President Obama's Commission for the Study of Bio-Ethical Issues, frames the goal in a debate this way: "a middle ground of prudent vigilance, public oversight and debate about genetic en-

130. *Id.*

131. *Id.*

132. *See* Robert Sparrow, *A Not-So-New Eugenics: Harris and Savulescu on Human Enhancement*, 41 HASTINGS CTR. REP. 32–42 (2011) (arguing that the use of genetic techniques by parents to "enhance" their children is not meaningfully different from past use of eugenics).

133. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1987) ("The only part of the conduct of anyone for which [one] is amenable to society is that which concerns others. In the part which merely concerns [oneself], [one's] independence is, of right, absolute. Over [oneself], over [one's] own body and mind, the individual is sovereign."); DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. IV (1789) ("Liberty consists in the freedom to do everything which injures no one else.").

134. MILL, *supra* note 133, at 9; DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, *supra* note 133.

gineering is better than prohibition."[135] Making gender selection available only for family balancing purposes is one compromise, eliminating any potential sex imbalance due to the aggregative of individual preferences for boys or girls. However, this compromise arguably restricts the paramount value of reproductive autonomy arbitrarily. Parents may have permissible motives in selecting gender. Parental motives, however, seem to be of questionable legal significance.

The social conditions of modern pluralist America can be distinguished empirically from homogenous China and India.[136] In the United States, there is no deeply rooted preference for male babies.[137] In fact, if anything, there is a preference for females.[138] In a world where an additional estimated 100 million female human beings are not alive today due to sex discrimination in China, India, and elsewhere,[139] a slight preference for female babies in pluralist America is far from a moral calamity.

2. Race Selection

In addition to gender selection, parents and intermediaries involved in making a baby through ART can also preference race in order to match parents to same-race gamete donors. Intended parents can often use the market to make a child resemble the non-biologically related family as closely as possible,[140] which can be beneficial, but may also be viewed as perpetuating racial hierarchies.

Most sperm banks operating in the United States provide information regarding donor skin color and some even organize donor catalogues by race.[141] An unregulated market creates competi-

135. Intelligence Squared U.S., *Prohibit Genetically Engineered Babies Full Debate*, YOUTUBE (Feb. 14, 2013), https://www.youtube.com/watch?v=fEn7XOr34Zo.

136. DENA S. DAVIS, GENETIC DILEMMAS: REPRODUCTIVE TECHNOLOGY, PARENTAL CHOICES, AND CHILDREN'S FUTURES 133 (2d ed. 2010).

137. *Gender Preference in the United States*, INGENDER, http://www.ingender.com/xyu/gender-preference/#SexSelection (last visited Dec. 16, 2016).

138. *Id.*

139. Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. OF BOOKS (Dec. 20, 1990), http://www.nybooks.com/articles/1990/12/20/more-than-100-million-women-are-missing/.

140. Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 L. & INEQ. 481, 485 (2009).

141. Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1846 (2009).

tive prices according to such donor characteristics. Simple supply and demand allows for pricing in which people will pay a premium to have kids that share their racial heritage. Since ART is primarily used by white people,[142] the result is that white genetic material generally commands a higher market value than African American gametes.[143] This can lead to the commodification of genetic material and the children it produces.

Indeed, reproduction has been racialized in many ways for centuries. During slavery, white slave owners often forced their slaves to have children, used fertility as a factor when considering the purchase of slaves, and promoted sex for reproductive purposes among their slaves, including providing incentives for slaves that bore more than six children.[144] Further, the United States also has a long history of sterilizing women of color to control and limit their reproduction.[145] Today, the racialization of reproduction can be seen in the surrogacy market. Surrogacy is mostly used for the benefit of white intended parents. When white intended parents choose to have white children via ART, they are implicitly acknowledging that our society places a supreme value on whiteness. There is a presumption that a white child will be safer, healthier, more educated, less incarcerated, and more economically stable than a child of color—all the gaps that studies have found to exist between white and black children.[146]

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142. Dov Fox, *Race Sorting in Family Formation*, 49 FAM. L. Q. 55, 56 (2015).

143. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 269–72 (1997). *Cf.* José Gabilondo, *Heterosexuality as a Prenatal Social Problem: Why Parents and Courts Have a Taste for Heterosexuality*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 118, 121 (Michele Bratcher Goodwin ed., 2010) (discussing how straight children may increase the social status of parents, thus making them more valuable to some, while gay children may have the opposite effect).

144. MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY 63–64 (1983).

145. *See* JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 65–76 (2003); *see also* Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128, 1128–38 (2005) (exploring the intersections of race, sex, immigration, sterilization, and health policy by tracing the chronology and context of involuntary sterilization in modern California).

146. *See generally* Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REP. (Jan. 28, 2015, 12:01 AM), http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal (discussing the gaps in education between black and white kids); STATE OF OBESITY, OBESITY PREVENTION IN BLACK COMMUNITIES (2014), http://stateofobesity.org/disparities/blacks/ (discussing racial and ethnic disparities in obesity); George Gao, *Chart of the Week: The Black-White Gap, in Incarceration Rates*, PEW RES. CTR. (July 18, 2014), http://www.pewresearch.org/fact-tank

The reality, however, is that, without the use of reproductive technology, people are free to choose their sexual partners (and potential co-parents) based on race—a right grounded in individual freedoms. There is no reason the same should not be true of potential parents using reproductive technology.

The evidence suggests that over the last millennia, reproduction has become increasingly less arbitrary. Broadly, five stages are distinguishable that likely correspond to increasing cognitive complexity. First, mammals met each other and had an arbitrary sexual encounter (arbitrary in the sense that they did not plan or foresee having an encounter at that place with that particular mammal). Second, humans in hunter-gathering societies had sexual encounters, the evidence suggests, with many partners in their small cooperative group. Third, after agriculture, humans reproduced with members of the same class or status. Fourth, humans reproduce for the sake of romantic love and planning a future. And fifth, we have ART and reproductive autonomy in gender and trait selection. In each case, reproduction becomes less arbitrary and more planned.

As a mature nation, we look back with regret at miscegenation statutes and legislative restrictions on homosexual relationships. We have learned that intrusions into one's private sexual and reproductive life are particularly damaging to both the individuals at stake and societal relations. It follows that such intuition works in favor of a laissez-fair approach to the use of PGD.

Women already choose what to eat when pregnant, what to avoid, what to listen to, and how to exercise. In choosing a mate based on beauty, hips, breast, jaw, and height, humans reduce the arbitrariness in selection and substitute free choice. Choosing a mate based on race is no different. The technology available simply takes reproductive choice one step further. The goal is to reduce uncertainty and risk and bring prudent consideration of available options to family planning. Status quo bias[147] is likely what prevents many people from seeing ART as part of the same continuum.

/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates/ (discussing the gap in incarceration rates between blacks and whites).

147. *See generally* Scott Eidelman & Christian S. Crandall, *Bias in Favor of the Status Quo*, 6 SOC. AND PERSONALITY PSYCHOL. COMPASS 270, 270–81 (2012) (discussing the reasons for status quo bias).

3. General Trait Selection and Eugenics

In addition to gender and race selection, genetic screening for other traits is also becoming more readily available. Today PGD can be used to select cosmetic traits such as eye and hair color, complexion, and height, and will eventually enable the selection of traits such as athletic ability and intelligence.[148] Embryo screening for such cosmetic criteria that are less medically important has created its own controversy.

As with surrogacy, critics point to commodification issues and lack of equal access to the technology as problems with trait selection. Some say that it is unethical to bioengineer children because the process of genetic enhancement, which might ultimately allow parents to produce physically and intellectually superior children, is expensive, and therefore, available only to parents with substantial means.[149] Such unequal access would only "[widen] societal divisions."[150]

However, other advocates point to the fact that as parents, we already work to make our children as physically fit and intelligent as possible. For example, parents use "tutors, music lessons or [instill] discipline."[151] As one expert explained, "I don't think there's anything wrong with the attempt to make our children smarter or kinder. . . . If we did think that was wrong, we should give up parenting, and put them out on the street."[152] As with all ART, inequality itself is the culprit and should be addressed on its own—universal healthcare or changes in insurance requirements could resolve the access issues without compromising women's reproductive autonomy.

Taken to its extreme, the fear associated with trait selection extends to concerns about eugenics. Eugenics is defined as the science of improving a human population by controlled breeding to increase the occurrence of desirable heritable characteristics.[153]

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148. Gautam Naik, *'Designer Babies:' Patented Process Could Lead to Selection of Genes for Specific Traits*, WALL ST. J. (Oct. 3, 2013, 7:31 PM), http://www.wsj.com/articles/SB10001424052702303492504579113293429460678.

149. *Id.*

150. *Id.*

151. Tia Ghose, *Children to Order: The Ethics of 'Designer Babies,'* LIVESCIENCE (Mar. 13, 2014, 2:00 PM), http://www.livescience.com/44087-designer-babies-ethics.html.

152. *Id.* (quoting Bonnie Steinbock, philosopher at the University of Albany, State University of New York).

153. *Eugenics*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (2d

The radical, far-reaching consequences of self-selection and selective breeding—when users of donated genetic material select gametes on the basis of race and when intended parents are permitted to choose the specific traits of a potential baby, including cosmetic traits—may involve racial extermination and other forms of genocide. Indeed, the Holocaust was an example of an attempt at radical eugenics.[154] A more recent example is the pattern of state-sanctioned sterilization of Black and Latina women.[155]

Of course, individual reproductive choices should not be protected when it leads to the elimination or extreme reduction of populations, whether overtly intentional or not. Issues relating to the scientific engineering of a population are disturbing and warrant government legislation. Indeed, doctors already have professional and ethical obligations that may protect against larger, broad-scale concerns.[156] However, as this part will show, the practice of trait selection is not likely to lead to scientific engineering of the population.

Defending the moral permissibility of trait selection by parents voluntarily making use of PGD against these and adjacent criticisms, it is helpful to articulate a normative framework for what is often called "liberal eugenics" (compatible with political liberalism) as opposed to "authoritative eugenics" (a tool of political authoritarianism).[157] The experience of the twentieth century prejudices the historically conscious with a sea of negative connotations. The Nazis carefully studied and learned from American liberal notions of propaganda and eugenics, and used the principles of each toward their own ends, resulting in a conflation of the two.[158] Eugenics became associated with the authoritarian eugenics of Nazi Germany, compelling American institutions after the war to change their names, and giving critics of "benign eugenics"

College ed. 1980) (defining eugenics as "the movement devoted to improving the human species through the control of hereditary factors in mating").

154. *See* Daniel J. Kevles, *Eugenics and Human Rights*, 349 BMJ 435, 435 (1999).

155. *See* Kathryn Krase, *History of Forced Sterilization and Current U.S. Abuses*, OUR BODIES OURSELVES (Oct. 1, 2014), http://www.ourbodiesourselves.org/health-info/forced-sterilization/.

156. *See, e.g.*, *AMA Code of Medical Ethics*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page (last visited Dec. 16, 2016).

157. Sara Goering, *Eugenics*, STAN. ENCYCLOPEDIA OF PHIL. (July 2, 2014), http://plato.stanford.edu/archives/fall2014/entries/eugenics/.

158. *Id.*

further ammunition to be skeptical of the practice in the United States.[159]

However, it can be argued that both propaganda and eugenics are neutral tools; ethical and moral concerns arise only in response to the way in which the tools are used. For example, a boxing coach is unjustifiably held accountable if, unbeknownst to him, his student goes out and needlessly punches people in the face. Boxing can be used for exercise and sport, defense, or gratuitous violence. In itself, it is neutral. Propaganda has the same neutral status.[160]

So how can the normative framework of liberal eugenics be distinguished from that of authoritarian eugenics? A "normative" framework can be understood as the conceptual limitations and elements of an institutional practice.[161] Four normative elements of liberal eugenics distinguish the practice from authoritarian eugenics and support the permissibility of sex and trait selection through ART against the common critiques: (1) private purposes; (2) individual freedom (reproductive autonomy); (3) value pluralism; and (4) enlightened scientific reasoning.[162]

First, liberal eugenics is based on private choices for private purposes, whereas authoritarian eugenics is based on centralized choices for the state's purposes, whether that be the glory of a nation or the dominance of a particular race.[163] Therefore, the practice of liberal eugenics is voluntary and individuals are neither coerced to select genes nor legally prohibited from doing so.[164] The reason most of us understand that Nazi-style, authoritarian eugenics is immoral is because it is coercive and disregards the welfare of individual stakeholders. On the other hand, liberal eugenics respects free choice and remains neutral with regard to the purposes of individual stakeholders.

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159. *Id.* For example, once the concept of "eugenics" soured after World War II, the American Eugenics Society became the Society for the Study of Social Biology. *Id.* The negative connotations associated with "eugenics" persist.

160. *See* Charles L. Griswold, *Plato on Rhetoric and Poetry*, THE STAN. ENCYCLOPEDIA OF PHIL. (Feb. 4, 2016), http://plato.stanford.edu/archives/fall2016/entries/plato-rhetoric/.

161. For example, normative models of democracy list various elements, including free speech, equal voting rights, and a separation of church and state, as conditions for democracy to be more than mere majority rule. Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 2 (1994).

162. Goering, *supra* note 157.

163. *Id.*

164. *Id.*

Second, liberal eugenics is premised on the traditional American value of individual liberty, whereas authoritarian eugenics is premised on the ontological and moral priority of the state or social organism.[165] Parents are able to select genes based on their own values and conceptions of what is good for them and their children. Prohibiting ART-related genetic selection is an intrusion into the private lives of individuals, particularly their reproductive autonomy, precisely what critics of Nazi-style authoritarian eugenics see as most problematic.

Third, given the variety of genetic choices available to potential parents and the variety of potential parents in the given society in which we find ourselves, fears of homogeneity, or the exacerbation and effectuation of social prejudices, are insufficient worries to trump the paramount value of reproductive autonomy.[166] The practice of liberal eugenics in modern America will be embedded in a cultural milieu that presumes, respects, and practices value pluralism, whereas authoritarian eugenics starts from the opposite position, valuing one type of human being, one set of values, and one conception of the good life.[167]

Not only does political liberalism see the state as neutral with regard to "the good life" and what people value, but, as a sociohistorical fact, the United States is so large, complex, and diverse that empirically there can be no consensus on these matters.[168] It may be inferred that parents will desire different and varied traits for their children, or abstain from ART altogether, belying concerns for a race to blond, blue-eyed boys, a fear almost incomprehensible if not for the Nazis. In fact, in a pluralistic, open, and liberal society such as ours, we should expect parents to choose traits that many of us find counterintuitive because human beings are animals with feelings, not rational wealth-maximizers. There is some evidence that for many people, the "best" child is the child most like his or her parents,[169] or most like the best ver-

165. *Id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. This can be presumed by looking at the numbers of people who choose to have a biological child through IVF over adoption, presumably wanting to pass down their own genes. One can also look at how donor sperm and egg selections are made. DNA, which generally provides information about health and ancestry, is often employed to match the genetic profile of a would-be parent to that of donor sperm or eggs. *How to Choose a Sperm Donor*, CONCEPT FERTILITY CLINIC (July 23, 2014, 8:25 AM), http://www.conceptfertility.

sion of his or her parents. Thus, we can reasonably expect the variety of rich human characters and experiences that critics of liberal eugenics fear will be lost. Further, we can reasonably expect many parents to reject the notion that more physical and intellectual capacity is always a good thing. In fact, those values are often incompatible—chase one value and we lose the other.[170]

Fourth, the practice of liberal eugenics in modern America will be conducted by parents informed by genetic counselors who are themselves informed by enlightened scientific reasoning, whereas authoritarian eugenics of the twentieth century, in both the United States and Germany, mistakenly identified social and institutional plights as genetic.[171] Justice Oliver Wendell Holmes, Jr., the author of the *Buck v. Bell* decision,[172] articulated the erroneous assumptions of the day, that immorality, prostitution, crime, and promiscuity are genetic rather than institutional, and held that compulsory sterilization statutes do not violate the Due Process Clause of the Fourteenth Amendment.[173] We now have a better grasp of the interaction between genetic content, social institutions, and the environment generally.[174]

As a compromise, using PGD for medical treatment or genetic disease elimination, as opposed to "genetic enhancement" purposes, may appear more ethically permissible to those skeptical of the consequences of meddling with the human genome, so-called "God-playing." However, this compromise again arbitrarily restricts reproductive autonomy.

In sum, the starting point is political liberalism, whereby the state remains neutral with regard to values, as opposed to classical republicanism whereby the state encourages virtuous citizens

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co.uk/2014/07/23/how-to-choose-a-sperm-donor/. In addition, anecdotal evidence supports the idea that parents often seek to have children who are like themselves. *See, e.g.*, Barbara Stewart, *Tough Choices: In Vitro vs. Adoption*, N.Y. TIMES (Jan. 8, 1995), at CY1 (interviewing infertile parents who want nothing more than to have a biological baby, explaining: "Their dreams are not of just any child. They want a child or children of their flesh, a child with the father's chin and the mother's knack for mental arithmetic.").

170. *See* Erik Parens, *Is Better Always Good?*, HASTINGS CTR. REP. (1998), at S1 (discussing the various concerns of human enhancement); Isiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 119, 169–70 (1970) (explaining that humans choose between ultimate values).

171. Goering, *supra* note 157.

172. 274 U.S. 200, 205 (1927).

173. *Id.* at 207.

174. MICHAEL RUTTER, GENES AND BEHAVIOR: NATURE-NURTURE INTERPLAY EXPLAINED 178 (2006).

with particular desired dispositions.[175] It follows that the burden is on the state to articulate an identifiable harm to identifiable persons in its justification for prohibiting the conduct of private parties, not on the private parties to articulate why their conduct is morally permissible. Moreover, because the value at stake here, reproductive autonomy, is paramount, the state's burden is high, requiring more than speculation about potential societal consequences. Finally, the intrusion into reproductive autonomy by twentieth-century authoritarian eugenics is precisely what society aims to avoid, increasing our skepticism of the state's justifications that rest on societal consequential moral reasoning.

With a normative framework that distinguishes liberal eugenics from authoritative eugenics, and with reproductive autonomy as the overriding concern, the fear of potential discrimination is not dismissed but overridden by autonomy considerations. The fact of pluralism with respect to desirable traits and gender, as well as the myth of perfection, will together check for imbalances and homogeneity, and will assure a variety of rich human characters and dispositions, skills, and interests.

C. *Creation, Freezing, and Destruction of Excess Embryos*

Much of the public debate and discourse about ART has been dominated by abortion politics, which has centralized the discussion on the moral status of the embryo.[176] Nowhere is that debate more prevalent than with the creation, use, storage, and destruction of excess IVF embryos. The IVF process involves an invasive and expensive extraction of eggs.[177] To prevent the possibility of having to repeat this process and to improve chances of success, doctors extract and fertilize as many eggs as possible, implant the healthiest one, and leave the patient to decide what to do with the remaining embryos.[178] Patients may choose to freeze the remaining embryos for potential future use, donate them for reproductive purposes, donate them to scientific research, or dispose of

175. *See, e.g.*, Gary C. Leedes, *Liberalism, Republicanism and the Abortion Controversy*, 35 VILL. L. REV. 571, 571–72, 584 (1990).

176. June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1015–16 (2010).

177. *Id.*

178. *Id.* at 1016.

them.[179] Contracting in these areas has been controversial because of an embryo's potential for life.

The moral status of the embryo is defined differently depending on one's cultural, religious, political, and philosophical perspectives. On one end of the vast spectrum of views influencing the moral status of the embryo is what some scholars have termed "embryo fundamentalism."[180] Much like "pro-life," anti-abortion advocates, embryo fundamentalists believe that embryos are "unique human beings from the moment of conception, and should be respected as such."[181] They equate the destruction of embryos with the destruction of human lives,[182] and "believe with all their fibers that these are their frozen children."[183] On the other end of the spectrum are those who view embryos as "just another type of bodily tissue, nothing but a clump of cells," with no moral status whatsoever.[184] In between lies a wide range of perspectives that assigns some moral status to an embryo because of its potential to create human life, but does not view the embryo as having a moral status such that its destruction is a violation of human life.[185]

Even for those who assign no moral status to an embryo, the decision of what to do with remaining embryos can still be a difficult one to make. Some patients who do not wish to use the remaining embryos, or for whom the costs of freezing embryos is prohibitively expensive, will choose to donate the embryos to other patients seeking to use IVF.[186] Other patients, however, are uncomfortable with their genetic material being used to conceive a child for another person.[187] Some patients simply wish to avoid

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 1017; *see also* Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 305–06 (2006).

183. Wes Judd, *The Messy, Complicated Nature of Assisted Reproductive Technology*, PAC. STANDARD (Sept. 28, 2015), https://psmag.com/the-messy-complicated-nature-of-assisted-reproductive-technology-349d0c55a874#.ywtzbneo7 (quoting Susan Crockin, Massachusetts-based lawyer).

184. Katz, *supra* note 182, at 306.

185. *See id.*

186. *See* Laura Beil, *What Happens to Extra Embryos after IVF?*, CNN.COM (Sept. 1, 2009), http://www.cnn.com/2009/HEALTH/09/01/extra.ivf.embryos/index.html?iref=24hours.

187. *Id.*

the legal process of donating an embryo to another patient.[188] Many people, both those who view an embryo as having some sort of human moral status and those who view embryos as lacking any moral status, choose to donate remaining embryos to science, in the hopes of using their genetic material to advance human life by developing treatments or cures for fatal diseases.[189]

Many patients choose cryopreservation, the process of freezing bodily material so that it can be used in the future.[190] Cryopreservation deals with the freezing of sperm, eggs, or embryos.[191] While sperm cryopreservation has long been an accepted method for preserving the fertility potential of many young men, egg cryopreservation has proven more difficult medically, and has generated more controversy.[192]

As with surrogacy and the use of PGD, the criticism deals with the sanctity of reproduction—a woman who harvests her eggs for the future because she currently does not want to have children disrespects the "sacredness" of "natural" motherhood. Embryo freezing allows a potential mother to put off motherhood in a way that does not reaffirm the priority of motherhood over career and all else. News sources have often shown scorn for the woman who utilizes reproductive technology to make pregnancy available to her in the future, when she is ready, using, for example, derogatory terms such as "geriatric mother" or "post-menopausal moth-

188. *Id.*

189. *Id.*

190. Carbone & Cahn, *supra* note 176, at 1016; *Egg Cryopreservation (Freezing Your Eggs)*, SEATTLE CHILD. HOSP., http://www.seattlechildrens.org/pdf/PE1372.pdf (last visited Dec. 16, 2016).

191. *Egg Cryopreservation (Freezing Your Eggs)*, SEATTLE CHILD. HOSP., http://www.seattlechildrens.org/pdf/PE1372.pdf (last visited Dec. 16, 2016).

192. For a social history of the rise and acceptance of sperm banking and artificial insemination through the twentieth century, see CYNTHIA R. DANIELS, EXPOSING MEN: THE SCIENCE AND POLITICS OF MALE REPRODUCTION 75–85 (2006). The controversy surrounding the usefulness and impact of egg cryopreservation—as well as outstanding questions of its medical viability—is discussed in Lucia Martinelli et al., *Social Egg Freezing: A Reproductive Change or Smoke and Mirrors?*, 56 CROATIAN MED. J. 387, 390 (2015), http://www.cmj.hr/2015/56/4/26321034.htm (questioning whether social egg freezing improves women's reproductive choices and lives, or if it actually just helps preserve longstanding norms and views surrounding women's bodies and role in society), and Rene Almeling et al., *Egg-Freezing a Better Deal for Companies Than for Women*, CNN (Oct. 20, 2014, 4:11 PM), http://www.cnn.com/2014/10/20/opinion/almeling-radin-richardson-egg-freezing/ (arguing that social egg freezing is not the solution to appeasing demanding work schedules and career goals of women, instead that social policies providing better work-life balance would be more effective).

er."[193] Such modern reproductive desires uncover the stigma of women exploiting reproductive technology for their own selfish purposes.[194] This so-called selfish woman does not fit within the mold of the normal, good mother who has the instinctual desire and the biological urge to have children.

Ironically, women who put off childbirth because of their unique life circumstances, whether it be based on career and the desire to attain financial security before starting a family, illness, or simply because they are waiting to find the right partner, often do so for the most unselfish reasons. The woman's reasons are unselfish because her concern with flourishing motherhood cannot be divorced either conceptually or pragmatically from her concern for flourishing childhood:

> Older mums tend to be better educated, more financially stable, confident and settled in themselves. They have the emotional maturity and life experience that translates well to motherhood. They are more likely to breast feed and breast feed for longer which helps protect against post natal depression.[195]

It follows that the relevant evaluative standard for motherhood ought to be focused on the emotional, social, and intellectual conditions she provides for the child's growth rather than the means by which the woman becomes a mother. Given her particular circumstances, if a woman believes that freezing her embryos is the best way to bring about such future flourishing, respecting the dignity of motherhood does not warrant interference.

Complications arise when couples disagree on the disposition of unused embryos. In a majority of cases, contracts entered into at the time of IVF are enforceable as long as they do not violate pub-

193. *See, e.g.*, Rachael Wheeler, *Kim Kardashian Reveals Plans to Freeze Her Eggs (She Could Just Try, You Know, 'Doing it' with Kanye West?)*, MIRROR (Sept. 10, 2012), http://www.mirror.co.uk/3am/celebrity-news/kim-kardashian-reveals-plans-to-freeze-1317066 (mocking Kim Kardashian for her desire to freeze her eggs "because she doesn't want to be too old before she has kids" and joking that "[t]hey could try the good old fashioned way first"). *But see Welcome to Older Mum*, OLDER MUM: A SUPPORTIVE RESOURCE FOR MOTHERS OVER 35, http://www.oldermum.co.uk (last visited Dec. 16, 2016) (aiming to challenge "outdated" labels such as geriatric mother, and arguing that having children later in life is completely normal, healthy, and may even be possible post-menopause).

194. *See, e.g.*, Kate Connolly Berlin, *65-Year-Old German Woman Expecting Quadruplets Defends Pregnancy*, THE GUARDIAN (Apr. 14, 2015, 6:33 AM), https://www.theguardian.com/world/2015/apr/14/65-year-old-german-woman-expecting-quadruplets-defends-pregnancy.

195. OLDER MUM, *supra* note 193.

lic policy.[196] For example, in a recent case, a California court upheld a contract that mandated a couple's frozen embryos be destroyed in the event of divorce.[197] Shortly before their wedding, the woman discovered she had breast cancer, and together the couple decided to undertake IVF to preserve her fertility.[198] While married, the couple signed a contract with the fertility clinic agreeing that the embryos would be destroyed if they ever divorced.[199] During their divorce, however, the wife changed her mind and argued that her constitutional right to procreate should transcend their agreement.[200] The court rejected this argument and upheld the contract, ruling that the embryos should be destroyed. The court reasoned:

> Decisions about family and children often are difficult, and can be wrenching when they become disputes. The policy best suited to ensuring that these disputes are resolved in a clear-eyed manner—unswayed by the turmoil, emotion, and accusations that attend to

196. *See, e.g.*, *In re* Marriage of Dahl and Angle, 194 P.3d 834 (Or. Ct. App. 2008); Roman v. Roman, 193 S.W.3d 40 (Tex. Ct. App. 2006); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998). In each of these three cases, the couple signed a consent form where they agreed that in the event of death or divorce, any cryopreserved embryos would be destroyed or donated to research. *Dahl*, 194 P.3d at 836; *Roman*, 193 S.W.3d at 42; *Kass*, 696 N.E.2d at 176–77. All three courts held that such an agreement was enforceable and did not violate public policy. *Dahl*, 834 P.3d at 841–42; *Roman*, 193 S.W.3d at 49–50, 54–55; *Kass*, 696 N.E.2d at 180–81; *see also* Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002), *amended sub nom.* 53 P.3d 516 (enforcing a contract which prohibited further development of the embryos). *See generally* Marina Merjan, Comment, *Rethinking the "Force" Behind "Forced Procreation": The Case for Giving Women Exclusive Decisional Authority Over Their Cryopreserved Pre-Embryos*, 64 DEPAUL L. REV. 737 (2015) (asserting that while contracts are effective at resolving disposition issues, a simpler and better framework would be to grant exclusive authority to women to make such decisions); Ceala E. Breen-Portnoy, Comment, *Frozen Embryo Disposition in Cases of Separation and Divorce: How* Nahmani v. Nahmani *and* Davis v. Davis *Form the Foundation for a Workable Expansion of Current International Family Planning Regimes*, 28 MD. J. INT'L L. 275 (2013) (suggesting that embryo disposition agreements should be standardized and given a presumption of validity); Marisa G. Zizzi, Comment, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting a Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391 (2012) (proposing a statute requiring use of a contractual framework to resolve disposition issues as a proactive approach to limit litigation).

197. Findley v. Lee, No. FDI13780539, 2015 WL 7295217, at *44 (Cal. Super. Ct. Nov. 18, 2015). This case was immediately reported by major media outlets. *See* Andy Newman, *California Judge Orders Frozen Embryos Destroyed*, N.Y. TIMES (Nov. 18, 2015), http://www.nytimes.com/2015/11/19/us/california-judge-orders-frozen-embryos-destroyed.html; Justin William Moyer, *Calif. Judge Rejects Woman's Plea to Save Frozen Embryos from Destruction*, WASH. POST (Nov. 19, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/19/calif-court-rules-against-divorced-cancer-survivor-in-dispute-over-frozen-embryos-even-though-she-may-be-infertile/.

198. *Findley*, 2015 WL 7295217, at *4–5.

199. *Id.* at *6–7, *10–11.

200. *Id.* at *35.

> contested proceedings in family court—is to give effect to the intentions of the parties at the time of the decision at issue.[201]

The wife was in essence arguing that the opportunity to become a mother was so sacred that it should transcend their prior agreement. The court, however, gave effect to their contract as the only legitimate way to resolve the reproduction issues between the parties.[202]

Even in the absence of an express agreement, courts tend to defer to the intent of the parties at the time of creating and storing the embryos, considering, among other things, the lengths to which the parties went to preserve the embryos as evidence of intent. In *Reber v. Reiss*, for example, there was no express contract, and therefore, the court balanced the wife's interest in genetic parenthood against her husband's interest in avoiding unwanted procreation.[203] The court placed a great deal of weight on the fact that, due to the wife's advancing age and the extensive cancer treatment, the embryos likely represented her last chance at genetic parenthood.[204] In that case, the couple underwent IVF in response to the news of the wife's cancer diagnosis, delaying her cancer treatment by several weeks to pursue IVF, as a way to preserve her capacity for genetic parenthood.[205] The court viewed this as the husband's implicit agreement to procreate with the wife if her fertility was jeopardized as a result of the cancer treatment.[206] While there was no written contract, the court resolved the issue by balancing two compelling equal rights.[207]

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201. *Id.* at *2.

202. *Id.*

203. Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012).

204. *Id.* at 1138–40.

205. *Id.* at 1132.

206. *Id.* at 1140.

207. On the other hand, in *Davis v. Davis*, the court held that the interest of the wife in donating the frozen embryos to another couple was outweighed by the interest of the husband in not procreating. Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992). The court explained: "Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail." *Id.* at 604. Other courts have held that absent express agreement, when the creators of the frozen embryos are not able to reach an agreement as to the disposition of their frozen embryos, the most suitable solution is to leave them where they are—in cryopreservation storage. *See, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003) (requiring

As with surrogacy contracts, some people may take issue with enforcing these contracts, not because of any public policy surrounding the use of embryos, but rather, because of the difficulty of judicially determining the actual intent of the parties, and the possibility of exploitation and induced manifestations of assent.[208] The problem here might not be with enforcing the agreement of the parties as a general matter as much as determining whether each individual agreement was entered into with full consent. As discussed under surrogacy, there are already contract doctrines in place to deal with this, such as undue influence and unconscionability.[209]

Commonly, parties sign clinic consent forms that specify what they would like to have happen with the embryos if one or both parties die, or if they divorce.[210] However, cryopreservation companies often impose terms without ensuring that parties truly understood all their options. Most clinic consent forms contain language to the effect that in the event of death or divorce, the parties agree to have the embryos either donated to a third party, donated to research, or destroyed.[211] However, parties may not carefully consider a fourth option—that the embryos be transferred to the exclusive control of one of the parties.[212] While parties generally give careful consideration to the overall issue of excess embryos, they may quickly dismiss the option of allowing one of the potential parents to use the embryos in the case of divorce. Too many times, parties cannot imagine circumstances they might later find themselves in—divorced and possibly unable to have genetic children. Before signing advanced directives regard-

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contemporaneous mutual consent of both parties and holding that there was not to be any use or disposition of the couple's frozen embryos unless the couple reached an agreement).

208. *Cf.*, *e.g.*, Merjan, *supra* note 196, at 768 (concluding that sole authority for disposition of embryos should rest with the woman, to simplify the legal ramifications and remain consistent with the Supreme Court's abortion jurisprudence). *But cf.*, *e.g.*, Zizzi, *supra* note 196, at 418 (proposing a statute that would emphasize a contractual approach as the best expression of "the parties' intentions regarding the disposition of their preembryos").

209. *See supra* text accompanying notes 87–89.

210. *See* Anne Drapkin Lyerly et al., *Fertility Patients' Views About Frozen Embryo Disposition: Results of a Multi-Institutional U.S. Survey*, 93 FERTILITY & STERILITY 499, 506 (2010).

211. *See* Catherine Tucker, *Ethical and Legal Issues Arising from the Informed Consent Process in Fertility Treatments*, ABA HEALTH ESOURCE, Mar. 2013, at n.15, http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/aba_health_law_esource_1303_tucker.html.

212. *See id.*

ing the embryos, parties should be counseled about the possible alternatives so as to realize true assent. Thus, the problem, for the most part, lies with assent and lack of counseling rather than with public policy about contracting in these areas.

These cases are personal to the individuals whose genetic material created the embryos, and therefore, there is no right answer for how to use or dispose of the embryos beyond looking at the intent of the parties. Since this determination must be made, private agreements between the parties need to be enforceable. Donors and clinics should be required to execute agreements regarding the disposition of donors' frozen embryos before the embryos are created. However, such agreements should not include standard boilerplate language stating that the parties agree the embryos will be destroyed if the parties ever divorce. Where the cryopreservation company in essence imposes a term that calls for the destruction of frozen embryos, or there is no express term indicating the intent of the parties either way, then intent must be discerned from the facts. There is precedent to suggest that where, for example, a woman is trying to save eggs because of treatments that will destroy her ability to make eggs, the great lengths to which the parties go to preserve her eggs is valuable evidence and should be given primary weight in the determination of intent.[213] Enforcing advanced dispositional agreements when the parties make informed decisions provides donors with the greatest amount of procreative liberty, and ensures that individuals participating in IVF fully understand and consider the consequences of their actions.

Unique issues regarding cryopreservation arise after one, or both, of the parties passes away. The advent of successful techniques of spermatozoon and embryo cryopreservation makes the birth of a child whose genetic father or mother is dead technically possible.[214] Posthumous reproduction, which has received growing attention in recent years, is highly controversial, raising some unique questions again about the scope of reproductive freedom and the limits of consent.[215]

213. *See* Szafranski v. Dunston, 34 N.E.3d 1132, 1151, 1162 (Ill. App. Ct. 2015); Reber v. Reiss, 42 A.3d 1131, 1138–40 (Pa. Super. Ct. 2012).

214. *See* G. Bahadur, *Death and Conception*, 17 HUMAN REPROD. 2769, 2770, 2773 (2002).

215. *See, e.g.*, Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 CLEVE.-MARSHALL J.L. & HEALTH 29, 29 (2014).

The uses of this technology can vary. While the most common posthumous reproduction involves the partner of a deceased man herself using his frozen gametes to fertilize her own egg, there are a variety of other scenarios that can pose new questions about consent.[216] For instance, a husband can have the frozen embryos of his deceased wife implanted into a surrogate, or he could remarry and his new wife could be implanted with the frozen eggs. The frozen genetic material can be donated or used by parents of the deceased to produce a grandchild. The deceased might even request that his or her mother, the grandmother of the child, carry the pregnancy.[217] These examples represent new forms of the nontraditional family, raising complicated questions about familial relationships and parentage.

Opponents of posthumous reproduction do not believe the fundamental right to procreate should extend beyond death. Opponents may make arguments about the "psychological instability" of the grieving parent that might "impair the child's future welfare," and that "a resulting child may be a 'substitute' for the lost spouse."[218] But the arguments are more often based on religious doctrines. While there is no consensus among the different religions on posthumous reproduction, Roman Catholics reject it because it separates human reproduction from sexual intercourse and calls for the insemination of a single woman.[219] Islam also rejects this procedure because it takes place after the end of the marital term.[220] Judaism, on the contrary, permits posthumous procreation.[221]

Many of these religious arguments stem from traditional notions about the sacredness of motherhood—these faiths, informed by their doctrines, see "natural" reproduction as a hallowed part of the institutions of marriage and parenthood.[222] Justifications

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216. *Id.* at 33–34.

217. *Cf. id.* at 33 (stating that a surrogate mother can birth the child and that a grandmother may favor surrogacy to create a grandchild). A recent news story reported that a grandmother gave birth to her own granddaughter. Amanda Jackson, *Grandmother Gives Birth to Granddaughter*, CNN (Jan. 8, 2016, 11:48 AM), http://www.cnn.com/2016/01/08/health/grandmother-gives-birth-to-granddaughter-texas-irpt/.

218. Sabatello, *supra* note 215, at 35.

219. *See* Joseph G. Schenker, *Assisted Reproductive Practice: Religious Perspectives*, REPROD. BIOMEDICINE ONLINE 310, 315 (2005), www.rbmonline.com/Article/1539.

220. *See id.* at 315–17.

221. *Id.* at 317.

222. *See id.* at 313.

for civil law based on religious doctrine should be a red flag, distinguished from justifications for civil law based on natural law and universal human rights, which are recognizably universal and generally applicable. For the state to restrict sexual autonomy on the basis of parochial religious teachings goes against the grain of both the principles of the founding of the United States and the contemporary progressive morality informed by conscience over dogma and enlightened society over the past.

Despite these moral concerns, issues involving embryos can typically be resolved based on the consent of both parents. The right to reproductive freedom includes the choice of how and when to procreate and under what circumstances. Parental decisions about the sort of commitment they want to undertake should accordingly be respected. Though it may disturb some of us, the decision to delay childbirth, or even to facilitate childbirth after the passing of one of the biological parents, is not a social problem that requires regulation. Viewing family as a private institution leaves such decisions and dilemmas properly to the family members.

D. *Prenatal Screening: Selective Abortion and Selective Reduction*

While advances in prenatal testing and diagnosis have created previously unimaginable possibilities for childless couples, they have also given rise to an array of ethical questions about selective termination. The ethical questions are especially troubling when they involve contracting.

Prenatal testing allows parents to decide whether to terminate a pregnancy based on a diagnosed birth defect, regardless of its severity.[223] This raises concerns about normalizing selective abortion of fetuses with minor abnormalities.[224] The Institute of Medicine "recommends that prenatal diagnosis not be used for minor conditions or characteristics," but it becomes contentious to determine what constitutes a minor condition.[225] The decision to terminate a pregnancy based on a prenatal diagnosis varies according to differences in cultural and social attitudes toward

223. *See* Antina de Jong et al., *Non-Invasive Prenatal Testing: Ethical Issues Explored*, 18 EUR. J. HUM. GENETICS 272, 272–73 (2010).

224. *Id.* at 272, 274.

225. COMM. ON ASSESSING GENETIC RISKS, INST. OF MED., ASSESSING GENETIC RISKS: IMPLICATIONS FOR HEALTH AND SOCIAL POLICY 105 (Lori B. Andrews et al. eds., 1994).

abortion; personal responsibility; stigmatization; children's role in society; and the significance of class, race, ethnicity, kinship, education, and religion.[226] Even when the information communicated is accurate, human emotion and the desire to conceive can greatly affect judgment when laypersons assess complicated scientific information in a vacuum. But ultimately, termination of healthy pregnancies is permitted in this country, and women have the right to terminate for any reason, as long as it is within the parameters of the law.[227]

While expectant parents can face agonizing choices about whether to terminate a pregnancy because of birth defects or undergo selective reduction when carrying multiples, issues can be even more troubling for parents creating a family through ART.[228] These intended parents must wrestle not only with their own agonizing decisions, but also with the rights and feelings of the woman carrying their child.[229] Issues surrounding termination of pregnancy carried by a surrogate are complicated when the terms of the surrogacy agreement surrounding termination come up against the constitutional right to privacy. When multiple parties are involved in birthing the child, there are complicated questions about who should have the right to make the decision about termination, as well as the way contract law fits with the constitutional right to terminate a pregnancy and the constitutional right to privacy, if at all. Whose wishes should control where the intended parents want to terminate the pregnancy but the surrogate does not, or conversely, where the surrogate wishes to terminate the pregnancy but the intended parents desire to go through with it?

Many surrogacy contracts include clauses that specify the rights of the parties regarding pregnancy termination or selective reduction.[230] Some contracts may specify that the intended par-

226. *See id.* at 159–60.

227. ANGELINA BAGLINI, CHARLOTTE LOZIER INST., GESTATIONAL LIMITS ON ABORTION IN THE UNITED STATES COMPARED TO INTERNATIONAL NORMS 3 (2014), https://lozierinstitute.org/wp-content/uploads/2014/02/American-Reports-Series-Internatnational-Abortion-Norms.pdf.

228. Deborah L. Forman, *Abortion and Selective Reduction Clauses in Surrogacy Contracts: What Every Intended Parent and Surrogate Needs to Know*, PATH2PARENTHOOD (Nov. 24, 2014), www.path2parenthood.org/blog/abortion-and-selective-reduction-clauses-in-surrogacy-contracts-what-every-intended-parent-and-surrogate-needs-to-know.

229. *Id.*

230. *Id.*

ents can make all termination or reduction decisions, while others may include more specific clauses, such as a provision that the intended parents may not reduce for gender-selection purposes.[231] Some contracts involve selective termination clauses that bind a surrogate to terminate the pregnancy under certain adverse or unexpected circumstances.[232] The contract may also delineate the maximum number of embryos that may be transferred.[233]

Although such clauses are fairly common, it is unclear whether they are enforceable. Termination clauses are often found to be in violation of public policy and thus not enforceable.[234] However, while most courts would not enjoin a woman from having a legal abortion or compel a surrogate to terminate or selectively reduce a pregnancy, the issue remains about the effect of the contract and whether one party is entitled to contract damages when the other party does not follow a selective termination provision.[235]

In one highly publicized California case, the court refused to compel selective reduction and did not award contract damages to the intended parents when the surrogate refused to follow the selective reduction provision in the contract. In that case, Helen Beasley, a surrogate mother from the United Kingdom, agreed to carry a child for a California couple, Charles Wheeler and Martha Berman.[236] Without the use of an agency, the parties agreed to a surrogacy contract in which Wheeler and Berman agreed to pay Beasley $20,000 to carry their child, and Beasley also agreed to selectively terminate any additional fetuses should IVF produce a multiple pregnancy.[237] In the second month of her pregnancy, Beasley discovered she was pregnant with twins but subsequently refused to selectively terminate one of the fetuses, prompting

231. *Id.*
232. *See id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. Chris Taylor, *One Baby Too Many*, TIME (Aug. 19, 2001), http://content.time.com/time/magazine/article/0,9171,171789,00.html.
237. *Id.* Under the surrogacy contract, both parties agreed that any request for a selective abortion would be made by the twelfth week of Beasley's pregnancy. Beasley claimed that Wheeler and Berman requested that she abort the unwanted second fetus at the end of the thirteenth week of pregnancy, and that an abortion in the second trimester would pose a health risk. *Surrogate Sues Couple Who Turned Down Twins*, DAILY MAIL, www.dailymail.co.uk/news/article-65930/surrogate-sues-couple-turned-twins.html (last visited Dec. 16, 2016).

the intended parents to terminate the contract.[238] Beasley sued Wheeler and Berman for emotional damages and breach of contract, and later filed a second suit to have their parental rights revoked after they announced their intention to place both twins with an adoptive family.[239] Despite the fact that California law recognizes intended parents' parental rights in surrogacy contract disputes, the court refused to order selective termination.[240]

In another case, however, the court enforced a surrogacy contract and awarded custody to the intended father, but refused to enforce a selective termination provision. In that case, after discovering that the surrogate, Melissa Cook, was carrying triplets, an intended father threatened to sue the surrogate for monetary damages if she refused to selectively reduce the pregnancy, based on a provision in their surrogacy contract that allowed him to request a reduction.[241] He sought reduction based on potential health concerns of the babies and his limited finances for raising three children, believing he should not have to consent to be the parent of an unwanted child, even if he did not ultimately raise it.[242] The surrogate, who was pro-life, sued for custody, as well as her full surrogacy fee, claiming that the surrogacy contract was not enforceable and that she was the legal mother of the triplets (the parties had used an egg from an anonymous egg donor).[243] Cook alleged that the father, a fifty-year-old single, deaf postal worker who lives with his elderly parents, was unfit to care for

238. *Surrogate Sues Couple Who Turned Down Twins*, DAILY MAIL, www.dailymail.co.uk/new/article-65930/surrogate-sues-couple-turned-twins.html (last visited Dec. 16, 2016). Beasley claimed she would not have refused selective reduction had arrangements been made earlier, but that a protracted dispute between the parties delayed matters past the thirteenth week. Taylor, *supra* note 236.

239. *Surrogate Sues Parents Over Unborn Twins*, CNN (Aug. 13, 2001, 12:54 PM), www.cnn.com/2001/US/08/11/surrogate.twins/.

240. ROSEMARIE SKAINE, PATERNITY AND AMERICAN LAW 112–13 (2003). The twin girls were ultimately adopted. Enohumah Kingsley Osagie, *Surrogacy: Whose Child Is It?*, 11 J. OF MED. & MED. SCI. 505, 508 (2010). The complaint was dismissed, without prejudice, by all parties, and the record was sealed. Dismissal of Entire Action Without Prejudice, Beasley v. Wheeler, No. CGC-01-401717 (Cal. Super. Ct. June 4, 2002).

241. Carl Campanile, *Surrogate Carrying Triplets Sues to Stop Forced Abortion*, N.Y. POST (Jan. 4, 2016, 10:57 PM), www.nypost.com/2016/01/04/surrogate-mom-carrying-triplets-sues-to-stop-forced-abortion/.

242. Cook v. Harding, No. 2:16-cv-00742-ODW (AFM), 2016 WL 3190556, at *4 (C.D. Cal. June 6, 2016).

243. *Id.* at *6; Katie O'Reilly, *When Parents and Surrogates Disagree on Abortion*, THE ATLANTIC (Feb. 18, 2016), http://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/.

the children.[244] She sought custody of at least the child who was targeted for abortion, pointing out that it would be "cruel to the child" to allow it to be raised by a stranger (the likely result if the intended father retained custody), when she, the surrogate, wants the baby.[245] On the other hand, the intended father argued that singling out one of the children for adoption would be cruel and that reducing would be preferred.[246]

The court granted the intended father's petition to terminate Melissa Cook's legal relationship with the babies and to name him as the sole parent.[247] Shortly thereafter, Cook gave birth to the triplets. The babies were born premature and remained in the hospital for seven weeks, until they were released into their father's care.[248] During that time, Cook repeatedly tried to see the babies and obtain their medical information, but was forbidden from doing so. The hospital went as far as to install additional security on the neonatal floor.[249]

Under California law, parental rights are given to the intended parents, as evidenced by contract. However, the contract must of course be valid under traditional contract law principles.[250] A complication in the *Beasley* case was that the parties did not consult an agency, and so it is likely the surrogate did not receive proper and thorough counseling and information.[251] There was no selective reduction clause in the written contract (there was only a verbal agreement),[252] and the intended parents were both law-

244. Michelle Goldberg, *Is a Surrogate a Mother?*, SLATE (Feb. 15, 2016, 5:00 PM), www.slate.com/articles/double_x/doublex/2016/02/custody_case_over_triplets_in_california_raises_questions_about_surrogacy.html.

245. Campanile, *supra* note 241.

246. O'Reilly, *supra* note 243.

247. Brendan Pierson, *California Surrogate Loses Bid to be Named Mother of Triplets*, REUTERS, (June 8, 2016), http://www.reuters.com/article/us-california-surrogacy-idUSKCN0YU2G3.

248. *Id.*

249. Cook v. Harding, No. 2:16-cv-00742-ODW (AFW), 2016 WL3190556 (C.D. Cal. June 6, 2016); Pierson, *supra* note 247. Cook filed an additional lawsuit in federal court in Los Angeles, asking that court to overturn the California state law on the grounds that surrogacy contracts are unconstitutional. A federal judge dismissed Cook's lawsuit without ruling on the merits, stating that Cook's claims should be decided by California's state courts—which have so far ruled against her. Pierson, *supra* note 247.

250. *Cook*, 2016 WL 3190556, at *3.

251. *See* Greg Moran, *Surrogate Mother Has Twin Girls*, SAN DIEGO TRIB. (Nov. 22, 2001), http://legacy.sandiegouniontribune.com/news/metro/20011122-999_7m22twins.html.

252. *Id.*

yers, suggesting a power imbalance. While experts say it is impossible to foresee all the difficulties and issues that may develop in a surrogate parenting arrangement, many believe the legal battle between Beasley and Wheeler/Berman could have been prevented:

> "If they knew in the beginning about the one-child arrangement and selective reduction, why wasn't any of this documented in her written agreement?" asked Zager [of the Organization of Parents Through Surrogacy]. "Why did Ms. Beasley agree to sit on a table and have multiple embryos planted in her? Why did she agree to travel to the United States to be a surrogate, knowing she would not get support from the British government, which is hostile to surrogacy anyway and what did she expect to get out of this? You have to wonder whether she had the proper guidance and counseling before agreeing to this [situation]."[253]

Ideally, with proper guidance and counseling, the contract would be written and reviewed by all parties to ensure consent is truly voluntary.

Similarly, two potentially complicating factors in the *Cook* case were that the intended father and the surrogate likely did not go through a scrupulous agency, and the contract was simply poorly worded. At forty-seven, Melissa Cook was quite a bit older than a typical surrogate.[254] Further, the surrogate and the intended father never spoke before the contract was signed and the surrogate was implanted, and the broker did not have a home study with the intended father.[255]

These facts might suggest that the contract should not be enforceable for reasons outside of a general public policy against surrogacy or selective termination; indeed, contracts entered into without the true voluntary consent and understanding of both parties should not be enforced. It makes sense for traditional contract principles to govern these cases of surrogacy-gone awry. In a case where consent is legitimate and proper counseling is available, the wishes of the contracting parties should be honored.

In another highly publicized case, Crystal Kelley, a woman who had contracted to act as a gestational surrogate carrier for an infertile couple, refused to terminate the pregnancy, as the intend-

253. Bryan Robinson, *Fetuses and Surrogacy Lose in Legal Battle*, ABC NEWS (Aug. 14, 2016), http://abcnews.go.com/US/story?id=92627&page=1.

254. O'Reilly, *supra* note 243.

255. *Id.*

ed parents had requested.[256] Under their surrogacy contract, the surrogate agreed to selective fetus reduction and/or "abortion in case of severe fetus abnormality."[257] The request to terminate came after the parties learned that the fetus suffered from severe birth defects that would leave the child with only a 25 percent chance of having a "normal life."[258] The intended parents already had three special-needs children and wanted to spare another child from suffering.[259] Kelley, who described herself as "always" against abortion, refused to terminate the pregnancy.[260]

The case was ultimately settled and Kelley retained custody of the baby, but the validity of the contract was undermined when Kelley chose to move and give birth to the baby in Michigan, a state that does not recognize the validity of surrogacy contracts.[261] The child's medical problems turned out to be much more extensive than initially thought.[262] Unable to care for the child herself, Kelley placed "Baby S" with an adoptive family, and the intended father agreed to give up his parental rights as long as he and his wife could keep in touch with the adoptive family about the baby's health.[263]

One might ask how Kelley, like Cook, came to sign a contract in which she agreed to selective reduction if she was "always" against abortion. Perhaps the issue here lies only with contract law and consent, rather than with a global problem concerning selective reduction clauses.

In each of these surrogacy-cases-gone-awry, failure to enforce the contract would create results that were unintended by the parties, resulting in the separation of twins or the birth of a child with severe birth defects. In the case of Melissa Cook's triplets, since reduction was not compelled, the question became who should have custody of the children.[264] The biological mother was an anonymous egg donor and the biological father did not want

256. Elizabeth Cohen, *Surrogate Offered $10,000 to Abort Baby*, CNN (Mar. 6, 2013), http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. Campanile, *supra* note 241.

the third child.[265] Separating triplets by putting only one of the children up for adoption seems unnecessarily cruel and a result not advocated by anyone. And what if one or more of the children were born with defects—would the surrogate bear some responsibility?

Of course, in *Roe v. Wade*, the Supreme Court recognized that a pregnant woman has the constitutional right to terminate the pregnancy prior to the point of viability.[266] Further, this right does not extend to the natural father or spouse, who has no right to force his wife to have an abortion, veto the decision, or even be given notice of it.[267] Thus, it follows that such a right belongs to the woman who is carrying the baby, and not to the intended parents, even if they are biologically related to the child. Furthermore, contract law should not have the power to take the constitutional right to privacy away from a pregnant woman.[268] Refusing to compel termination based on a contract clause in an otherwise enforceable contract is not inconsistent with the general principle that the gestational carrier is not the legal parent of the child and that the contract should otherwise control the determination of who is the parent. Rather it recognizes and respects the fundamental right of all women, surrogate or otherwise, to make decisions regarding their own bodies.

That said, while it seems rightly to be settled law that a court cannot compel a pregnant woman to terminate a pregnancy against her wishes, selective reduction or termination clauses can still be enforced with a remedy other than specific performance. Intended parents can still be permitted to sue the surrogate for

265. O'Reilly, *supra* note 243.

266. *See* 410 U.S. 113, 153, 164 (1973) (holding that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," but "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician").

267. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897 (1992) (holding that "the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion") (citing Planned Parenthood of Cent. Mo. v. Danford, 428 U.S. 52, 69 (1976)). The *Casey* Court reasoned that, "[t]he women most affected by this law—those [victims of abuse] who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger." *Id.* (alteration in original).

268. Furthermore, instances of compelled medical procedures in any case are rare. *See* Naoki Kanaboshi, *Competent Persons' Constitutional Right to Refuse Medical Treatment in The U.S. and Japan: Application To Japanese Law*, 25 PENN ST. INT'L L. REV. 5, 30–32 (2006) (outlining courts' reasoning behind not compelling medical procedures).

damages based on a decision to either continue or terminate the pregnancy against the express wishes of the intended parents as expressed in the contract.

Where a surrogate agrees, through contract, to terminate a pregnancy under certain circumstances, one might argue that she waived the constitutional right to privacy. In many instances, the Supreme Court has held that constitutional rights can be waived.[269] For example, an individual can waive the right to trial before a judge or jury, as long as the waiver is "done with sufficient awareness of the relevant circumstances and likely consequences";[270] an individual can waive the right to remain silent or the right to counsel provided "the waiver is made voluntarily, knowingly and intelligently";[271] and an individual can waive the right to be present at trial, as long as the absence is voluntary.[272]

While specific performance generally is not,and should not be available in a suit against a surrogate who waived her right to privacy, no court has yet ruled on whether monetary damages are available where the surrogate decides to continue with a pregnancy against the intended parents' wishes. A few state statutes, however, have paved the way for a fair understanding of how to deal with such contract clauses. New Hampshire's surrogacy laws, for example, were amended in 2014 to provide some protection for surrogacy agreements.[273] As amended, the statute provides that agreements that meet the minimum requirements set forth in the statute, including a written provision outlining how decisions regarding termination will be made, are presumptively valid and enforceable.[274] The statute also provides that parties are entitled to "all remedies available at law or equity," unless they agree otherwise, suggesting that a termination provision would be enforceable under state law.[275] Nevada's surrogacy law,

269. *See generally* Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). *See, e.g., infra* notes 270–72 and accompanying text.

270. *Brady*, 397 U.S. at 742, 748.

271. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

272. Taylor v. United States, 414 U.S. 17, 20 (1973) (holding that a defendant's right to be present may be effectively waived by voluntary absence).

273. *See* S.B. 353, 2014 Sess. (N.H. 2014); *see also* Rich Vaughn, *New Hampshire Passes New, Improved Surrogacy Law*, INT'L FERTILITY L. GRP. (July 25, 2014), https://www.iflg.net/new-hampshire-passes-new-improved-surrogacy-law/.

274. N.H. REV. STAT. ANN. § 168-B:10–11 (2016).

275. *Id.* § 168-B:18. *See generally* Deborah L. Forman, *Abortion Clauses in Surrogacy*

amended in 2013, though expressly precluding specific performance as a remedy for a breach of a selective termination clause, also provides that the parties are otherwise "entitled to any remedy available at law or equity."[276] These statutes suggest the possibility of enforcing a selective reduction or termination clause, though not necessarily through specific enforcement.

Ninety percent of parents in the United States exercise their autonomy to abort a fetus found to have Downs Syndrome.[277] This is a concern. Our society ought to promote conditions for flourishing for people with Downs Syndrome so that parents may freely choose to have a child with Downs Syndrome, and in making that choice affirm the dignity of life.

Neither the private choice to select for healthy genes nor a laissez-fair attitude to ART expresses an absence of the recognition of the dignity of the disabled. In the first case, the intending parent reasonably, rationally, and compassionately wants to have the healthiest possible child. In the second case, the laissez-faire policy is intended to sustain the conditions for parents to have a say in their own family planning. In neither case is the parent or the policy expressing any attitude or perspective on identifiable persons.

Accordingly, selective termination clauses should be enforced in the same manner as other clauses in the contract. When the parties agree to selective termination, the clause does not take away the surrogate's right to choose—she makes the choice by signing the contract. The clause grants the intended mother the right to choose, respecting and honoring her reproductive freedom. Such agreements need not be treated differently from other personal service contracts—in which parties often contract for services that require significant sacrifice in exchange for financial gain. Such contracts are routinely upheld in the name of individual autonomy and mutual gain.[278]

Contracts: Insights From a Case Study, 49 FAM. L.Q. 29 (2015) (discussing the unique issues that arise from such termination revisions and different possible legal approaches to surrogacy agreements).

276. NEV. REV. STAT. § 126.790 (2013).

277. June Carbone & Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FLA. INT'L U. L. REV. 287, 310 (2013).

278. As Deborah Forman noted in her article about selective termination clauses:

> [W]e routinely enforce contracts governing other services that impose serious physical risks or implicate privacy and bodily integrity. For example, if a

The intended parents initiated the process that led to the conception of the fetus, and they intended from the beginning to raise the child. Thus, the intended parents should have the responsibility and freedom to make choices, embodied in their agreement, regarding the child. Unless otherwise noted in the contract, the surrogate never had intent to parent the child and should not make such fundamental choices outside the scope of the agreement. When parties undertake substantial financial and emotional commitment in the effort to create a family, and their terms are agreed to by the parties to a contract, their legitimate expectations should be upheld.

Contract doctrine requires a commitment to be truly voluntary before promises are enforceable. Therefore, the best way to regulate this area is to require that parties have sufficient information and resources available before mutually assenting to the contractual terms. Physicians and agencies must play a role in expanding discussion of selective reduction or termination and ensuring the intended parents and surrogate have discussed the possibilities before proceeding.

II. THE LAW, TECHNOLOGY, AND THE MARKET: WHY MARKET FREEDOM AND CONTRACT LAW ARE THE BEST FORUMS FOR ADDRESSING MOST ETHICAL ISSUES ARISING FROM ART

Since agricultural advancements, reproduction has moved from being primarily social to being primarily private in the factors of its determination.[279] Today, the forces that reproduced class structures along racial lines are weakening as we move from status to contract.[280] Family now, more than any time in human history, is

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player for the NFL decided that he no longer wished to risk the potential for long-term brain damage from participating in the sport, a court would not compel him to play, but would award the team damages for his breach of contract.

Forman, *supra* note 275, at 45.

279. *See* CHRISTOPHER RYAN & CACILDA JETHÁ, SEX AT DAWN: THE PREHISTORIC ORIGINS OF MODERN SEXUALITY 10–15 (2010) (discussing the societal changes that occurred when people began living in settled agricultural communities). "With agriculture, virtually everything changed: the nature of status and power, social and family structures, how humans interacted with the natural world, the gods they worshipped, the likelihood and nature of warfare between groups, quality of life, longevity, and certainly, the rules governing sexuality." *Id.* at 14.

280. *See* Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formulations and Rights*, 36 CARDOZO L. REV. 1027, 1031 (2015) (arguing that non-traditional families should not be required to "wait for government approval to attain

voluntary and private by virtue of consent and the range of possible familial structures.[281]

The family can be considered a private institution as opposed to a public institution. In a private institution, the participants are the stakeholders. With the exception of children under the age of eighteen, participants are members voluntarily. In a public institution, on the other hand, the participants are not stakeholders, rather general members of the public and are ultimately influenced or affected by the institution involuntarily. Therefore, because the family can be considered a private institution consisting of voluntary members, the state has no authority or interest in intervening absent serious identifiable harms to identifiable persons.[282]

The paramount importance of autonomy in family planning is especially clear in light of the vast emerging technologies available in this area. The infinite bounds of technology are possibly beyond our comprehension. Certain technologies are difficult to predict or anticipate, in essence mandating a lag or gap in the law.[283]

As discussed in prior parts of this article, this disconnect is especially notable in the area of reproductive technology, where, for example, it is now possible to cryopreserve human embryos,[284] cloning is a real possibility,[285] it is possible for a woman born with

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status equivalent to their married counterparts, or, in the case of intended parents who are not biologically related to their intended children, their biological counterparts; instead, such partners and intended parents should be able to secure their rights through private contract").

281. *See id.* at 1027–34.

282. Some thoughtful people might say that it was a mistake to treat domestic violence as a private matter rather than a matter of public concern. However, domestic violence may be distinguished in two ways: (1) the prevalence of foresight and consent in the case of reproductive autonomy and ART is missing in a domestic case; and (2) in the case of domestic violence, there is a clear identifiable harm to an identifiable person.

283. Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1836 (2009).

284. *See supra* Part I.C.

285. Dana Dovey, *The Science of Human Cloning: How Far We've Come and How Far We're Capable of Going*, MED. DAILY (June 26, 2015, 9:00 AM), http://www.medicaldaily.com/science-human-cloning-how-far-weve-come-and-how-far-were-capable-going-340006 (citing *Cloning*, NAT'L HUMAN GENOME RES. INST., https://www.genome.gov/25020028/ (last visited Dec. 16, 2016)). It is generally accepted that reproductive human cloning is theoretically possible; however, legal and ethical concerns make it probably that cloning will remain limited to therapeutic research. *See* Rachael Rettner, *Could Humans Be Cloned?*, LIVESCIENCE (May 16, 2013, 5:57 PM), http://www.livescience.com/32083-cloning-people-biology.html. Current goals for therapeutic cloning (i.e., techniques that do not in-

no reproductive organs to grow a womb and gave birth,[286] and uterus transplants are performed.[287] Public law cannot anticipate the bounds of science in the formation of family and is not equipped to respond to the myriad questions that go along with cultural shifts. But what is clear is that as technology continues to evolve, a growing disconnect between law and technology is inevitable.

It is frequently said that the law lags behind technology,[288] and is widely understood as a result, that technology inevitably creates legal issues. It is virtually impossible for judicial case law to keep up with the rapid pace of progress and technology in today's world, and the legitimate expectations of society that develop alongside. Notions of justice change subtly over time. As the law evolves, struggling to respond to developing issues related to new technology and to accommodate technological advances,[289] yet newer technology takes hold, that technology calls into question existing perspectives and paradigms in public and private life.

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volve embryo transfer to a womb) include development of patient and disease specific therapies for certain conditions, and replicating a patient's own cells for tissue replacement. Dovey, *supra* note 285.

286. Patrick Sawyer, *Woman Born With No Womb Gives Birth to Miracle Twins*, TELEGRAPH (Jan. 31, 2015, 8:51 AM), http://www.telegraph.co.uk/news/health/news/11381463/Woman-born-with-no-womb-gives-birth-to-miracle-twins.html. The mother, Hayley Haynes, discovered that she was genetically male at the age of nineteen, when she grew concerned because she had never begun menstruating. *Id.* In 2007, a specialist found a tiny womb that had been missed by earlier scans, and Hynes began a course of hormone treatments to balance her levels of progesterone and estrogen and encourage uterine growth. *Id.* By the time Hynes' womb was ready for IVF, her doctors estimated that she had a 60 percent chance of becoming pregnant. *Id.*

287. Denise Grady, *Hopeful Start for First Uterus Transplant Surgery in U.S.*, N.Y. TIMES (Mar. 7, 2016), http://www.nytimes.com/2016/03/08/health/uterus-transplant-cleveland-clinic.html.

288. *See, e.g.*, Lyria Bennett Moses, *Agents of Change: How the Law 'Copes' with Technological Change*, 20 GRIFFITH L. REV. 763, 764 (2011) [hereinafter Moses, *Agents of Change*] (discussing the wide variety of terms used in law journals to "bemoan[] the law's inability to keep pace with technological change"); Lesley Swanson, *The Era of Cyber Warfare: Applying International Humanitarian Law to the 2008 Russian-Georgian Cyber Conflict*, 32 LOY. L.A. INT'L & COMP. L. REV. 303, 305 (2010) (noting that "there is no provision in international humanitarian law . . . that explicitly outlaws cyber warfare or computer network attacks . . . [because] the law of war dates back to the nineteenth century and has not yet been updated for applicability in the Information Age"); Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1836 (2009) (noting that "[l]egal delay is caused by the dynamic and unpredictable nature of technological innovation"); Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up With Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 241 (2007) [hereinafter Moses, *Recurring Dilemmas*] (noting that "technological change is often the occasion for legal problems" and that "tension between law and technology . . . is often reflected in metaphors involving competitors in a race with law the inevitable loser").

289. Moses, *Agents of Change*, *supra* note 288, at 765.

Thus a growing law/technology disconnect is inevitable:

> Although not every technology generates litigation and legal scholarship, technological change is often occasion for legal problems. The tension between law and technology has been observed by multiple authors and is often reflected in metaphors involving competitions in a race with law the inevitable loser. Those using these metaphors are generally concerned about the law's failure—whether or not they regard it as inevitable—to cope with technological change, especially rapid or accelerating change. Scholars have used metaphors of the law falling behind technology in contexts as diverse as railroads, *in vitro* fertilization, computers, and the Internet.[290]

Unsurprisingly, rapid and unpredictable reproductive technological developments have posed significant legal challenges for courts over the years.[291] The legal system has yet to establish consistent guidelines that adequately protect the non-traditional family forms that result from scientific advancements. For instance, through the use of ART, a child can be born with five adults who could possibly make a claim for parental status: a surrogate (birth mother), a biological mother (ova donor), a biological father (sperm donor), an intended mother, and an intended father. Under the traditional definition of family, the only people who would be completely excluded from the definition of "parent" would be the two individuals who orchestrated the creation of the child, since they have no biological or physical connection to the child.[292] However, under a more modern approach to family formations, if all five parties consent, the resulting child could have two primary parents (the intended parental parties) and three other parental figures, who may play a cursory or involved role in that child's life.

There are endless examples in which the existence and use of ART, together with the outdated notion of the primacy of biology,

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290. Moses, *Recurring Dilemmas*, *supra* note 288, at 241 (explaining why technological change tends to generate legal problems and identifying four types of legal problems that frequently follow technological change).

291. *Id.* at 239–41.

292. *See, e.g.*, DeBoer v. DeBoer, 509 U.S. 1301 (1993) (holding that an "unrelated" person may not retain custody unless a child's birth parents are unfit, and returning the two-year-old child to birth parents); In the Matter of Welfare of D.L., 486 N.W.2d 375 (Minn. 1992) (granting custody of three-year-old African American child to her biological grandparents, rather than to the white foster parents who had raised her from birth); *see also* White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (holding that former same-sex partner lacked standing as an "interested party" under a Missouri Uniform Parentage Act provision that permitted any interested party to bring an action to determine the existence of a mother-child relationship).

have led courts to reach unintended results for both the biological and intended parents. Take the well-publicized, controversial case of *In re Baby M*, decided in the 1980s.[293] In the case of this typical surrogacy contract, the surrogate changed her mind after giving birth and did not want to give the baby up to the intended parents.[294] The court refused to enforce the contract, and, contrary to the contract terms, the surrogate ended up having visitation rights with the baby.[295] In similar cases, the surrogate has ended up with full or joint custody.[296]

Another case involved a surrogate who gave birth to twins.[297] The intended parents, however, decided they did not want a boy and, disregarding the requirements of their contract, picked up only the female baby.[298] In the end, the surrogate, who already had three kids, kept the male twin and adopted him.[299] In another case, Barbara and David hired a surrogate, Jamie, who donated her egg and gave birth to a baby girl.[300] Jamie then changed her mind and refused to give up the baby to the intended parents, one of whom was the biological father.[301] The couple fulfilled every part of their obligation, continuing to pay Jamie's medical bills,

293. 537 A.2d 1227 (N.J. 1988).

294. *Id.* at 1236.

295. *In re* Baby M, 542 A.2d 52, 55 (N.J. Super L. 1988).

296. *See, e.g.*, Jo McFarlane & Polly Dunbar, *Surrogate Mother Who Agreed to Give Birth to a Baby For a Gay Couple She Met in Burger King Wins Custody of the Boy After Judge Finds She Was 'Manipulated and Exploited'*, DAILY MAIL (July 2, 2016, 7:28 PM), http://www.dailymail.co.uk/news/article-3671887/Surrogate-mother-agreed-birth-baby-gay-couple-met-Burger-King-wins-custody-boy-judge-finds-manipulated-exploited.html (discussing a woman who was granted full custody of the baby she bore for a gay couple who "manipulated and exploited" the woman); Vanessa Allen et al., *'I couldn't give my baby away... they only wanted a toy': Surrogate Mother Fought Legal Battle After Learning That Would-Be Parents Were Violent*, DAILY MAIL (Feb. 15, 2011, 11:14 AM), http://www.dailymail.co.uk/news/article-1356176/Surrogate-mother-wins-case-baby-giving-birth.html (discussing Miss N, who was granted full custody of the baby she bore for a couple after she learned the husband was "controlling and violent"); *Surrogate Mom Is Given Joint Custody of Her Daughter*, DESERET NEWS (Sept. 27, 1991, 12:00 AM), http://www.deseretnews.com/article/185216/surrogate-mom-is-given-joint-custody-of-her-daughter.html?pg=all (discussing when surrogate Elvira Jordan was granted partial custody of the baby she bore for a couple who divorced).

297. Judy Mann, *Nature Too Chancy for Contracts*, WASH. POST (Apr. 22, 1988), https://www.washingtonpost.com/archive/local/1988/04/22/nature-too-chancy-for-contracts/a46cdd8e-39c6-4517-8be3-e9e9ce1d00c3/.

298. *Id.*

299. *Id.*

300. Caitlin Keating, *Heartbroken Parents Left Paying Child Support After Surrogate Keeps Their Baby Girl*, PEOPLE (Mar. 7, 2016, 1:25 PM), http://www.people.com/article/heartbroken-parents-surrogate-keeps-child.

301. *Id.*

even after she indicated she would not give up the baby.[302] Despite spending $90,000 on legal fees, the couple was never able to get custody of their intended child, but is still required to pay child support.[303] In yet another case, a sperm donor, who signed documents waiving his parental rights, was nonetheless ordered to pay child support because a licensed physician was not involved in the artificial insemination process, as required by Kansas law.[304] Such unintended, and sometimes absurd, consequences would not occur had the contracts been upheld.

As assisted reproductive technology becomes more and more prevalent and as the technology continues to advance, such legal issues will continue to grow. There is a change taking place in society—contract is slowly replacing status. Because of rapid advances in reproductive technology, agreement, individual choice, and autonomy are replacing biological relationship. Freedom of contract has been pitted against public policy and is gaining ground.[305] Once family is viewed as a group of individuals who "choose" to be relatives, the natural limits of state regulation and the need for private agreement in the arena of emerging reproductive technologies becomes evident.

While the contours of reproductive technology seem endless and seem to create endless ethical questions, regulating such technology creates its own set of ethical issues. Legislation generally reflects the social mores of the particular time and place. But as the social mores change alongside changing technology, legislation has not effectively kept up.[306] While the parts above highlight the ways in which ART can be seen as threatening the purity of the mother and the family in general, on the flip side, regulating the use of ART can raise other ethical concerns.

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302. *Id.*

303. *Id.*

304. Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN (Jan. 24, 2014, 2:33 AM), http://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/.

305. *See, e.g.*, John Robertson, *Surrogacy Contracts Gain Legal Ground*, HASTINGS BIOETHICS F. BLOG (Dec. 1, 2015), http://www.thehastingscenter.org/surrogacy-contracts-gain-legal-ground/ (stating that "even when legislatures have not addressed the issue, courts are percipient enough to see the important role that contracts for gamete donation and surrogacy play in contemporary reproduction and family formation").

306. Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 508 (2005).

Because new technologies often serve more than one purpose, laws enacted to regulate their use can create unnecessary and often unforeseen social controversies. For instance, in the years following the now-infamous birth of "Dolly the Sheep," the first successful clone of an adult mammal, several states enacted broad and vaguely defined bans against "human cloning."[307] One of the key ethical issues with cloning is the moral status of the cloned embryo, which is created solely for destruction.[308] Cloning technology has been viewed as interfering with nature with no ethical backing.[309] However, scientists now highlight "therapeutic reasons" for cloning, "to make new organs to replace sick or damaged ones, and thus to save life rather than to make new and replicated human beings."[310] By lumping all uses of a technology together, such bans can "interfere with or impose special burdens" by setting "limitations on stem cell research, therapies, and cures" for diseases like Parkinson's and Alzheimers, and for certain spinal cord injuries.[311]

Technology will continue to plow forward regardless of regulation. People generally fear what is not known or understood, and change can be scary, but resistance to change cannot persist. Reproductive technology has great potential to improve reproductive health and the quality of life, and provides innovation and efficiencies whose value cannot be overstated. Regulation, on the other hand, can inhibit progress. The law must be nimble to keep pace with the progress of technology, the legitimate expectations of society, and changing notions of justice. Specifically, the law should continually examine and question forever changing tradi-

307. Julie Rovner, *Cloning, Stem Cells Long Mired in Legislative Gridlock*, NPR (May 16, 2013, 3:04 AM), http://www.npr.org/sections/health-shots/2013/05/16/184261714/cloning-stem-cells-long-mired-in-legislative-gridlock.

308. *Id.*

309. TORE YTTERLAND SILSET & MERETE LIE, SOCIAL AND CULTURAL PERSPECTIVES ON REPRODUCTIVE TECHNOLOGIES 2 (2007).

310. *Id.*

311. Missourians Against Human Cloning v. Carnahan, 190 S.W.3d 451, 452, 455, 460–61 (Mo. Ct. App. 2006). The case involved a pro-life advocacy group's challenge to the certified ballot title for the "Missouri Stem Cell Research and Cures Initiative" as "insufficient or unfair." *Id.* at 452. Plaintiffs argued that the purpose of stem cell research is irrelevant where it involves the creation of a human embryo, even "at the one-celled stage of human development," because such "virtually identical" genetic products constitute clones. *Id.* at 455. Another case, *Feminists Choosing Life of N.Y., Inc. v. Empire State Stem Cell Bd.*, involved a pro-life feminist group's challenge to the use of state funding "directly or indirectly utilized" for "human reproductive cloning." 87 A.D.3d 47, 51 (2011); *see also* David M. Panchision, *Repairing the Nervous System with Stem Cells*, NAT'L INST. OF HEALTH, https://stemcells.nih.gov/info/Regenerative-Medicine/2006Chapter3.htm.

tional gender roles and family formations. Political theorists and leaders from Montesquieu to Jefferson have asserted the need for the law, as society's "codified ethics,"[312] to "keep pace with the times"[313] and adapt "in such a manner to the people for whom they are framed."[314] Laws are most effective when adhered to by the majority of a community, where members hold each other accountable for breaking legal and social norms. As laws conflict with prevailing social values, they become less effective,[315] because community members find less moral incentive for holding themselves and each other accountable to them. This can sometimes lead to law-breaking.[316] But the law's failure to develop in tandem with social norms can also lead to new, creative readings of existing laws whose interpretations rely, in part, on social standards.

The most effective and efficient way for the law to keep pace with assisted reproductive technologies is through contract. Because family and intimate relationships are already highly unique and individual, and made more so through the endless possibilities of ART, they often do not fit within the limitations of government regulations, and may be more functionally structured through contracts. Families that do not fit the traditional mold should not have to wait for government approval to attain status equivalent to their married or biological counterparts. Instead, such partners and intended parents should be able to secure their rights through private contract.

Contracts between and among family members, and between family members and clinics should be enforced in the same ways that commercial contracts are enforced. People should be their own lawmakers when it comes to reproduction and their personal relationships. Recognition of family arrangements through contract is consistent with cultural and legal momentum, as technology continues to develop and the significance of biology continues to decrease.

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312. RONALD R. SIMS, ETHICS AND CORPORATE SOCIAL RESPONSIBILITY: WHY GIANTS FALL 22 (2003).

313. THOMAS JEFFERSON, JEFFERSON: POLITICAL WRITINGS 215 (Joyce Appleby & Terrence Balls eds., 2004).

314. M. DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 6 (Thomas Nugent trans., 6th ed. 1792) (1748).

315. Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* 1 (Nat'l Bureau of Econ. Res., Working Paper No. 20369, 2014).

316. *Id.*

CONCLUSION

There is a deep societal hesitance to allow technological possibilities and the market to facilitate the creation of non-traditional families. The reality, however, is that both technology generally, and reproductive technology specifically, are already intricately tied to the market. Very rarely do we see inquiry for inquiry's sake; more often we see inquiry based on utility and demand. Market demand and technological advances often develop in tandem and remain on the same trajectory. In most cases, the market is a necessary catalyst for technological change—commercialization is what propels technological advancements forward.

It is impossible and unwise to hold back the momentum of the market. As the market demand for alternate means of having children grows, alternative reproductive technologies grow along side. By necessity, the law must respond. As illustrated, the law too often lags behind technology, leaving unanswered ethical and legal dilemmas. A salient feature of private contracts is the ability to address the ever-growing individual and unique needs of parties based on the endless arrangements made possible by technology.

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