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Assisted Reproductive Technology and the Threat to the Traditional Family

by

RADHIKA RAO*

Society is currently undergoing a reproductive revolution. Grandmothers may now give birth to their own grandchildren.1 Battles for custody may take place between a child's two biological mothers.2 And families may be formed by means of the commercial exchange of reproductive goods and services in the marketplace, rather than the loving interchange of those entwined in close relationships.

Professor John Robertson enthusiastically embraces the technologies that make all of these developments possible. Advocating the presumptive primacy of procreative liberty, he concludes that almost every practice necessary to procreate should receive constitutional protection.3 Professor Dorothy Roberts is more skeptical of the benefits to result from the new reproduction. Although these technologies may enhance individual liberty, she demonstrates that they also reflect and reinforce racial hierarchy.4

These two scholars approach the reproductive revolution from very different angles, but in one critical respect they arrive at the same

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[951]
result. Both Roberts and Robertson believe that assisted reproductive technologies are essentially conservative: instead of threatening traditional families, these technologies merely replicate them, allowing infertile couples to create biologically-related children.

There is much truth to this view. In the short run, it is clear that courts and legislatures are straining to squeeze technologically-formed families into the traditional pattern. Ultimately, however, assisted reproductive technologies possess the potential to undermine the traditional paradigm in three fundamental and possibly far-reaching ways. First, these technologies threaten the traditional understanding of families as the mere reflection of biological facts, revealing that they are instead the product of social choices. Second, assisted reproductive technologies destroy the traditional opposition between the realm of family and the realm of market. And, in so doing, these technologies promote a world of private ordering, where family ties are not automatically assigned by biology, but are instead a matter of individual choice, and thus contingent and revocable.

I. Professor Roberts

I begin with three reflections—friendly amendments to Professor Roberts' argument. After that, I will offer a broader response. On the whole, I find Professor Roberts' arguments to be quite convincing. I agree that assisted reproductive technologies both reflect and reinforce racial hierarchy in all the ways that she has detailed. Many of the inequalities that Professor Roberts describes, however, are not a product of the technologies themselves, but rather of background inequalities that pervade our society. Thus the maldistribution of assisted reproductive technology, to the extent that it merely mirrors existing inequality, is no more troubling than the maldistribution of any valuable resource.

But there is a way in which disparities in the distribution of assisted reproductive technology are uniquely troubling, and that is their potential to exacerbate inequality. Some of these technologies may eventually enable the creation and selection of offspring with those traits that society deems desirable, granting the power to produce "designer children." Already, preimplantation diagnosis permits couples

5. See Id.
who possess the genes for Tay Sachs disease, cystic fibrosis, muscular dystrophy, and hemophilia to genetically screen and selectively implant embryos that are free from those traits, resulting in the birth of healthy children.\(^7\) As the mapping of the human genome proceeds apace, new reproductive technologies may ultimately make it possible to select for many other offspring traits as well, such as alcoholism, Alzheimer's disease, breast cancer, manic depression, musical ability, obesity, and even sexual orientation.\(^8\) By allowing those who are rich and powerful to pass on genetic privileges to their progeny in perpetuity, however, these technologies risk creating entrenched caste hierarchies.\(^9\) In *Plyler v. Doe*,\(^10\) the Supreme Court expressed concern


8. See Michael J. Malinowski, *Coming Into Being*, 45 Hastings L.J. 1435, 1444 (1994) ("Within several years, prenatal tests may be widely available to identify predispositions for alcoholism, Alzheimer's disease, arthritis, various cancers, dementia, diabetes, dyslexia, glaucoma, heart disease, hypertension, manic depression, schizophrenia, and fundamental personality characteristics such as sexual orientation."); Sandra Blakeslee, *Perfect Pitch: The Key May Lie in the Genes*, N.Y. Times, Nov. 20, 1990, at C6 (describing the identification of a single gene for perfect pitch, which is thought to correlate with musical ability); Geoffrey Cowley \\& Elizabeth Leonard, *Made to Order Babies*, Newsweek, Winter 1990/Spring 1991, at 94 (noting that "stuttering, obesity, and reading disorders are all traceable to genetic markers").

9. The U.S. experience with eugenic sterilization illustrates the danger of discriminatory exercise of the power to manipulate reproduction. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding Virginia law authorizing sterilization of mentally retarded persons in state institutions because:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

In *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Supreme Court referred to this problem when it stated:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.
about the denial of public education to illegal alien children because this might "promote the creation and perpetuation of a subclass of illiterates within our boundaries." But if educational inequalities are troubling because they could perpetuate a caste system, then what about genetic inequalities?

Professor Roberts also relies upon the distinction between negative and positive rights to support her argument that the government need not affirmatively assist the fertility industry. I would like to sketch out this argument a little further and also point out that the line between negative and positive procreative rights is less clear than it might appear. The abortion funding cases demonstrate that recognition of a negative right to procreate does not imply a positive right to call upon the state for assistance in procreation. Therefore, even if there is a constitutional right to be free from state interference with the use of reproductive technology, it does not follow that the state possesses an affirmative obligation to furnish reproductive goods or services to those who cannot afford their high price.

But I think it is possible to take Professor Roberts' argument one step further. If government need not supply the financial resources necessary to exercise the right to procreate, then it is not clear why government must supply the legal resources necessary to exercise the right either. Thus, there is a good argument that courts can refuse to enforce procreative contracts and legislatures can decline to enact the legal infrastructure necessary to engage in these technologies.

Although the Court was alluding to the problem of governmental power, disparities in private power to select offspring traits also threaten principles of equality.


11. See, e.g., Harris v. McRae, 448 U.S. 297, 316 (1980) (holding that the constitutional right to an abortion does not impose an affirmative obligation upon the government to provide the financial resources necessary to exercise the right by subsidizing abortions because, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."); Maher v. Roe, 432 U.S. 464, 473-74 (1977) (holding that the constitutional right to an abortion is only a negative "right protect[ing] the woman from ... interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.").

12. Professor Robertson is the best known proponent of the view that there exists a negative constitutional right to procreate by means of assisted reproductive technology. See e.g., Robertson, CHILDREN OF CHOICE, supra note 3. For the views of one skeptic regarding the constitutional basis and extent of this right, see Rao, supra note 3, at 1484-85.

13. More than one court has refused to enforce a surrogacy contract under this rationale. See, e.g., Doe v. Kelley, 307 N.W.2d 438 (Mich. Ct. App. 1981) (holding that the fundamental right to bear or beget a child was not infringed by the state's refusal to enforce a
course, the problem with this argument is that the characterization of procreative rights as "negative" or "positive" will always depend upon the baseline against which government action is measured.  

Finally, Professor Roberts strives to envision a new model of rights—one that takes into account the experiences of the disempowered. One way to reconceive the model of rights is to recognize that assisted reproductive technology involves many, often conflicting constitutional rights, and to respect the constitutional rights of each of the different parties involved. In the typical surrogacy contract, for example, the surrogate mother promises, in exchange for payment: (1) to refrain from smoking cigarettes, drinking alcoholic beverages, or ingesting other substances that may be harmful to the fetus; (2) to abort if the fetus is physiologically abnormal, but otherwise to carry the pregnancy to term; and (3) to relinquish her parental rights to the resulting child after birth. Such a contract clearly involves conflicting rights. If a court holds that the infertile couple’s right to procreate requires enforcement of such a contract, it will be denying the surrogate her constitutionally-protected rights to

surrogacy contract based upon state law prohibiting the payment of fees for adoption); In re Baby M., 537 A.2d 1227 (N.J. 1988) (holding that the right of procreation does not require government enforcement of a surrogacy contract).

14. Like the question of whether governmental action imposes a penalty or withdraws a subsidy, the characterization of a constitutional right as negative or positive also depends upon the baseline against which it is measured. See, e.g., K. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415 (1989) (arguing that the characterization of unconstitutional conditions as "coercive" is a conclusory label that draws upon a normative baseline); Cass Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 9 (1992) (arguing that "the description of a right as positive or negative depends on the baseline").

15. In the pointed words of one California court, constitutional rights "have a way of bumping into each other in cases involving husbands, wives, and unmarried individuals when all are claiming parental rights." Anna J. v. Mark C., 286 Cal. Rptr. 369, 380 (Ct. App. 1991). See also Smith v. Organization of Foster Families, 431 U.S. 316, 346 (1977) (stating that:

[i]t is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another thing to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right . . . .

Michael H. v. Gerald D., 491 U.S. 110 (1989) (rejecting the idea that it is possible to "expand a 'liberty' of sorts without contracting an equivalent 'liberty' on the other side" and observing that, in this case, "to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa.").

be free from physical invasions into her body and to raise her biological child. Therefore, a court presented with such a contract cannot merely consider the rights of the infertile couple in isolation. Rather, it must take into account all of the parties involved and all of the ways in which they experience liberty through various categories and clauses of the Constitution. Such a complete and comprehensive mode of constitutional rights analysis would advance the process of constructing a framework that gives voice to those who lack power.

II. Professor Robertson

Although Professors Robertson and Roberts approach these issues from very different angles, they both arrive at essentially the same result. Both Roberts and Robertson believe that assisted reproductive technologies (ARTs) pose no threat to traditional conceptions of the family: “Rather than undermine or alter

17. A long line of cases establishes this right to freedom from physical intrusions upon an individual’s body, which I have elsewhere termed the right to privacy of person. See, e.g., Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 269 (1990) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1894))); Winston v. Lee, 470 U.S. 753, 764 (1984) (stating that forcible removal of a bullet from an accused person’s body “would be an ‘extensive’ intrusion on [his] personal privacy and bodily integrity”). See also Rao, supra note 3, at 1488 & n. 37.

18. The right to be free from state interference with parental autonomy—which I have elsewhere termed the right to privacy of parenting—possesses an equally ancient pedigree. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of abuse or neglect before state can constitutionally terminate parental rights); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating statute that automatically deprived unwed biological fathers of their children upon the mother’s death); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (overturning statute requiring parents to send children to public school); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down state statute prohibiting parents from teaching children foreign languages). See also Rao, supra note 3, at 1489 & n. 38.

19. See David Faigman, Measuring Constitutionality Transactionally, 45 Hastings L.J. 753 (1994) (arguing for a transactional approach to constitutional adjudication that would require courts to aggregate constitutional rights, rather than measure liberty in a fractured and myopic way through the constricting lenses of individual amendments).

20. In the words of Professor Roberts, the new reproductive technologies “are more conforming than liberating: they more often reinforce the status quo than challenge it.” Roberts, supra note 4, at 935. Roberts acknowledges that these technologies possess the potential to “free outsiders from constraints of social convention and legal restrictions,” enabling single women, lesbians, and gay men to have children. Id. She believes, however, that “these technologies rarely achieve their subversive potential. Id. Most often they complete a traditional nuclear family by providing a married couple with a child. Id. Rather than disrupt the stereotypical family, they enable infertile couples to create one.” Id.

21. Professor Robertson also believes that assisted reproductive technologies (ARTs)
productive technologies are fundamentally conservative: instead of threatening traditional families, assisted reproductive technologies merely replicate them, allowing infertile couples to create biologically-related children.

conceptions of the family, the demand for ARTs unfolds within the prevailing family paradigm of couples having and rearing biologically-related offspring.” Robertson, Assisted Reproductive Technologies, supra note 3, at 927-928. Even the use of gamete donors and surrogates, he observes, “poses no threat to understandings of the family, even though they create families in which a gamete source or even gestating mother is absent.” Id. Robertson concludes that “the overall effect [of ARTs] on the shape and conception of family is likely to be small” for primarily two reasons:

One is that the goal of the couple using these techniques is to replicate the coitally-conceived family as much as possible. The second is that since all of the techniques are more closely tied to coital conception than is adoption, none of them alone, nor all of them together, are more radical or likely to have as great an effect on participants and offspring as adoption, which occurs much more frequently and has long been assimilated into our understandings of family.

22. Although the contours of the family have varied among different social classes and at different historical time periods, the traditional nuclear family has been the norm throughout most of American history. See Katherine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 Va. L. Rev. 879, 879 n.1 (1984) (“The private, largely self-contained, marriage-centered nuclear family has been the norm throughout most of American history.”); Kris Franklin, “A Family Like Any Other Family:” Alternative Methods of Defining the Family in Law, 18 N.Y.U. Rev. L. & Soc. Change 1027, 1032 (1990-91) (“Our cultural ideology assumes that everyone should live in some form of nuclear family, and that the nuclear family is ideally suited to modem American society.”). The paradigmatic family consists of two heterosexual, married adults and their biological or adoptive children. See Martha Minow, All In the Family & In All Families: Membership, Loving, and Owing, 95 W. Va. L. Rev. 275, 279 (1992-93) (“Lawful family membership traditionally depended upon marriage, birth of a child to its biological parents, and adoption.”). Indeed, this vision is so pervasive that some commentators unreflectively refer to the “traditional” family without providing any definition of its content. See, e.g., Note, Looking for a Family Resemblance: The Limits of the Functional approach to the Legal Definition of Family, 104 Harv. L. Rev. 1640 (1991); Amy L. Brown, note, Broadening Anachronistic Notions of “Family” in Proxy Decisionmaking for Unmarried Adults, 41 Hastings L.J. 1029 (1990). This cultural ideal continues to dominate the social and legal mythology, even though it is at odds with the reality of most modern families. See Only One U.S. Family in Four is “Traditional”, N.Y. Times, Jan. 30, 1991, at A19 (reporting that, according to the 1990 census, only 26% of the nation’s households consist of two parents of the opposite sex living together with children). At the 1981 White House Conference on Families, for example, the National Pro-Family Coalition adopted this definition, proposing that a family consists solely of “persons who are related by blood, marriage, or adoption.” See Franklin, supra, at 1029. And this vision of the family is arguably enshrined in the Supreme Court’s constitutional jurisprudence as well. See Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 471, 491-92 (1983) (arguing that “marriage and kinship are still the touchstones of constitutional adjudication in family-related cases” and that “the 50 or so Supreme Court decisions that now touch on family interests effectively define a ‘family’ as persons related by blood, marriage, or adoption”).

HeinOnline -- 47 Hastings L.J. 957 1995-1996
There is much truth to this view. In the short run, it is clear that courts and legislatures are straining to squeeze these technologically-formed families into the traditional mold. Representative of this phenomenon are the state statutes that provide that the "father" of a child created by the artificial insemination of a married woman with donor sperm is the married woman’s husband, and that the sperm donor possesses no legal rights. By designating the husband as the legal father and by denying the presence of the sperm provider, such statutes attempt to shore up the traditional conception of the family.

However, revolutions do not take place in a day. Ultimately, assisted reproductive technology possesses the potential to radically destabilize and disrupt the traditional conception of the family, as is suggested by the fact that conservative organizations such as the Catholic Church are deeply opposed to almost all such technologies. At

23. A typical example is California Family Code section 7613, which provides:
   (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived . . . .
   (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.

CAL. FAM. CODE § 7613 (West 1996). The California statute is modelled on section 5 of the Uniform Parentage Act (1973), which has been adopted, with minor variations, in eleven other states as well.

24. In the same vein, courts also strive to restructure the families that result from reproductive technology so that they resemble the traditional model of just two parents of the opposite sex. See, e.g., Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (acknowledging that child possessed two biological mothers but concluding that "for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible); Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (1986) (extending parental status to genetic father of child born of artificial insemination of unmarried woman, while denying parental status to mother’s female companion even though she participated in the conception and rearing of the child).

25. In his most recent encyclical letter “On the Value and Inviolability of Human Life,” Pope John Paul II condemned assisted reproductive technologies, stating:
   The various techniques of artificial reproduction, which would seem to be at the service of life and which are frequently used with this intention, actually open the door to new threats against life. Apart from the fact that they are morally unacceptable, since they separate procreation from the fully human context of the conjugal act, these techniques have a high rate of failure: not just failure in relation to fertilization but with regard to the subsequent development of the embryo, which is exposed to the risk of death, generally within a very short space of time. Furthermore, the number of embryos produced is often greater than that needed for implantation in the woman’s womb, and these so-called ‘spare embryos’ are then destroyed or used for research which, under the pretext of scientific or medical progress, in fact reduces human life to the level of simple ‘biological material’ to be freely disposed of.
the most obvious level, assisted reproductive technologies enable the formation of families by gay men, lesbians, single people, and postmenopausal women, visibly assaulting the traditional image of the two-parent, heterosexual, biologically-connected family. But even when employed by heterosexual married couples to produce families identical in all outward respects to the conventional model, assisted reproductive technologies insidiously undermine the traditional paradigm from within in three fundamental and potentially far-reaching ways. First, assisted reproductive technologies threaten the traditional understanding of families as the mere reflection of biological facts, revealing that they are instead social constructs. Second, assisted reproductive technologies destroy the traditional opposition between the family and the market by assembling families in the commercial exchange of reproductive goods and services on the marketplace, rather than forging them from the loving interchange of those entwined in close relationships. And, in so doing, assisted reproductive technologies promote a world of private ordering, where family ties are not automatically assigned by biology, but are instead a matter of individual choice, and thus contingent and revocable.

First, assisted reproductive technologies challenge the traditional conception of the family as a natural human formation stemming from biological connections rather than cultural choices. The law clearly embodies this vision of the family as a "natural" entity that is recog-

On the Value and Inviolability of Human Life, Evangelium Vitae, addressed by Pope John Paul II, March 30, 1995, Chapter 1, paragraph 14. In the same encyclical, the Pope also expressed reservations about prenatal diagnosis, observing:

Special attention must be given to evaluating the morality of prenatal diagnostic techniques which enable the early detection of possible anomalies in the unborn child. . . . When they do not involve disproportionate risks for the child and the mother, and are meant to make possible early therapy or even to favor a serene and informed acceptance of the child not yet born, these techniques are morally licit. But since the possibilities of prenatal therapy are today still limited, it not infrequently happens that these techniques are used with a eugenic intention which accepts selective abortion in order to prevent the birth of children affected by various types of anomalies. Such an attitude is shameful and utterly reprehensible, since it presumes to measure the value of a human life only within the parameters of 'normality' and physical well-being, thus opening the way to legitimizing infanticide and euthanasia as well.

Id. at Chapter III, para. 63.

26. See, e.g., Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (artificial insemination by donor sperm enabled lesbian woman to have a child); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (1986) (artificial insemination by donor sperm allowed single woman to have child); A 59 Year-Old Woman Becomes A Mother, USA TODAY, Jan. 7, 1994, at 11A (egg donation enabled postmenopausal woman to become a mother).
nized rather than constructed by the state. The very concept of family privacy—the constitutional doctrine protecting a "private realm of family life which the state may not enter"—presupposes a "natural family" that exists apart from and prior to the state. Implicit in this image, but seldom articulated, is the fundamental assumption that the natural family consists of two heterosexual parents and their biological children. This image is reinforced by the other connotation of the word "natural," which implies that the family flows ineluctably from biology. The legal concept of the "natural" family thus harnesses a word with multiple meanings, allowing each sense of the word to strengthen and sustain the other.

This vision of the family as the mere embodiment of biological reality, however, becomes difficult to maintain in the face of rapid ad-

27. See Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (stating that the natural family has "its origins entirely apart from the power of the State . . . [and that] the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights"). See also Frances Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. ReF. 835, 846 (Summer 1985) (critiquing the "natural law" belief that the family exists as a natural human formation, not created but merely recognized by the state").


29. One exception is the acknowledgement by the Supreme Court in Smith v. OF-FER, 431 U.S. at 843, that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element."

30. So deeply rooted is this image in our culture that it is often perceived as the embodiment of biological reality. As anthropologist David Schneider points out:

So much of kinship and family in American culture is defined as being nature itself, required by nature, or directly determined by nature that it is quite difficult, often impossible, in fact, for Americans to see this as a set of cultural constructs and not the biological facts themselves.

David Schneider, AMERICAN KINSHIP: A CULTURAL ACCOUNT 116 (2d ed. 1980). See also David Schneider, A CRITIQUE OF THE STUDY OF KINSHIP 165 (1984) (stating that "there is an assumption that is more often than not implicit, sometimes assumed to be so self-evident as to need no comment, but an assumption that is . . . widely held and necessary to the study of kinship—the assumption that blood is thicker than water").

31. In the same way, the legal presumption of paternity blurs together the biological and normative bases for fatherhood. As Professor Marjorie Shultz points out:

Paternity-by-presumption rules . . . [though they] purport[ ] to be an inference about biological fact may actually grow out of a normative aspiration and may readily be transformed into a prescriptive command about marriage and family, often without acknowledgment that such a transformation has taken place. The important issue becomes not who is, but who should be having sex with the mother: her husband. Thus the social construct, in fact normative and mutable, draws substantial but disguised legitimacy from the representation that it simply expresses "givens" of nature.

vances in reproductive technology. By deconstructing parenthood into its component parts, assisted reproductive technologies make it possible to have at least three different biological parents—the two gamete providers and the gestator. But when some biological progenitors are not deemed "parents" and others with no biological connection to the child are considered "parents," it becomes clear that biological connections are neither necessary nor sufficient to form families. Indeed, assisted reproductive technologies call into question even the relevance of biology to the traditional paradigm. In *Johnson v. Calvert*, for example, use of in vitro fertilization forced the California Supreme Court to determine who is the mother of a child conceived from the egg of one woman but gestated in the womb of another. Such disputes between genetic and gestational mothers graphically demonstrate that the question of motherhood cannot be resolved by resort to biology. And if families are not "natural" entities predicated upon biological connections, then they necessarily involve social choices by the state.

It is true that adoption also possesses the potential to upset the illusion that the family is a natural biological entity. This threat has been contained, however, by a system of legal regulations that reconstruct adoption in the image of the biological family. The central symbolic event is the issuance of a new birth certificate, which inserts the names of the adoptive parents as if they were the biological parents, eliminating all references to the biological family. In addition, adop-

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32. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (denying parental status to woman who gestated a child to whom she was genetically unrelated); *McDonald v. McDonald*, 608 N.Y.S.2d 477 (1994) (holding that egg donor was not child's mother). See also CAL. CIV. CODE § 7005 (providing that genetic father of a child born by artificial insemination with donor sperm is not the child's father).

33. California Family Code section 7613 provides, for example, that the father of a child created by artificial insemination of a married woman with donor sperm is the married woman's husband. CAL. FAM. CODE § 7613 (West 1996).

34. 851 P.2d at 776.

35. See Schultz, *supra* note 31, at 318 ("[B]oth for mothers and fathers, biological givens and empirical facts can no longer be assumed to drive the legal assignment of parental status. [B]ut once biological justification is undermined, choices must be made.").

36. As Professor Bartholet observes:

Our law designs adoptive families in imitation of biology. The central symbolic event is the issuance of a new birth certificate for the child and the sealing of the old certificate, together with other adoption records. The goal is to ensure that the birth parents, the child, and the adoptive parents can all proceed with their new lives as if the child had never been born to the original parents. The central legal event in adoption is issuance of the adoption decree, which completely severs the legal relationship between the child and the birth family, transferring to the adoptive family all rights and responsibilities. Legally as well as symbolically,
tive parents are often "matched" with children who resemble them in order to mimic the biological family.\textsuperscript{37} Thus the laws regulating adoption only serve to underscore the importance of biology, reinforcing the centrality of the biological paradigm.

Of course, families were never truly "natural"—the state has always played a role in shaping them.\textsuperscript{38} Yet assisted reproductive technologies irretrievably expose the fact that families are not biologically determined, but rather are socially constructed by the state. All of the various permutations and combinations made possible by these technologies are visible evidence of the socially contingent character of the term "family." And, by eroding the traditional conception of the family as a "natural" biological entity, assisted reproductive technologies liberate us, leaving us free to create new meanings of family.

Second, assisted reproductive technologies destroy the dichotomy between the family and the market. The traditional conception of the family relies not only upon its status as a "natural" institution grounded in biology, but also upon its opposition to the market. Unlike the market, which assumes autonomous individuals interacting at arms-length, the family envisions close relationships based upon ties of love and affection.\textsuperscript{39} And unlike the market, where individuals are

\begin{itemize}
\item it is as if the child were born to the adoptive parents. This promotes a rigid separation of the birth from the adoptive family, reinforcing notions that the true family is the closed nuclear family ....
\item 37. Bartholet explains the way in which the matching process enshrines the biological family:
\begin{quote}
"The parental screening ... process favors married couples who look as if they could have produced the child they will adopt.... The rules for matching waiting children with prospective parents are designed to maximize sameness and avoid what is seen as dangerous diversity within families. Originally the goal was literally to match—to give prospective parents children with similar physical features and mental characteristics, so that the parents could pretend to the world and even to the child that this was their biologic child.
\end{quote}
\textit{Id.} at 49. Although this process has been tempered in recent years due to the scarcity of healthy babies, Bartholet observes, this process "still governs with respect to those attributes deemed most important," such as one's age, race, or religion. \textit{Id.} at 72.
\item 38. \textit{See, e.g.,} Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding statute enacting conclusive presumption that the husband of a child born to a married woman is the child's father, thereby denying parental rights to biological father); Lehr v. Robertson, 463 U.S. 248 (1983) (sustaining statute granting more procedural rights to biological mother of child than to biological father); Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding state law allowing biological mother's husband to adopt child over objection of biological father).
\item 39. \textit{See, e.g.,} Judy Areen, \textit{Baby M. Reconsidered}, 76 GEO. L.J. 1741 (1988) (arguing that "surrogacy forces us to confront the differences between two of our most fundamental institutions—the family and the market). As Professor Areen observes:
\end{itemize}
supposed to maximize their own selfish interests, families are presumed to act as units whose members willingly sacrifice themselves for the good of the community.\textsuperscript{40} Thus the ideology of family law assumes that the family is premised upon the ethos of altruism, as opposed to the market, which operates upon the ethos of individualism.\textsuperscript{41}

Of course, this has always been a false dichotomy: the family and the market were never really distinct in these ways.\textsuperscript{42} Rather, families have long served economic functions\textsuperscript{43} and markets have often con-

The market envisions autonomous individuals trading at arms length. . . . Moreover, self-interested behavior is not only acceptable in the market but also is assumed to benefit society. In the family, by contrast, relationships are premised on caring as much as on self-gratification. \textit{Id.} at 1742. Professor Frances Olsen also describes the different assumptions underlying the family and the market:

In contrast to the market, in which universal selfish behavior is supposed to result in the betterment of society, the family has generally been expected to be based on less individualistic principles. The good of all is to be achieved not by each family member’s pursuit of individual goals, but rather by sharing and sacrifice among family members.


\textsuperscript{40} The premise that family members will act to further the common good is embodied in our constitutional law. \textit{See, e.g.}, Parham v. J.R., 442 U.S. 584 (1979) (“The law’s concept of the family rests on a presumption . . . that natural bonds of affection lead parents to act in the best interests of their children.”); Prince v. Massachusetts, 321 U.S. 158 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder). This assumption, moreover, also underlies the traditional common law. For example, parents are expected and obliged by law to support their children. \textit{See, e.g.}, Roe v. Doe, 272 N.E.2d 567 (N.Y. 1991) (enforcing parental obligation to support child).

\textsuperscript{41} Professor Frances Olsen first coined a version of this phrase. \textit{See Olsen, supra} note 39, at 1505 (“The morality of altruism has been supposed to animate the family to the same extent that the morality of individualism has been supposed to pervade the marketplace.”). \textit{See also} Areen, \textit{supra} note 39, at 1744 (stating that judges must “determine whether the market’s ethic of individualism or the family’s ethic of altruism will shape the issue of surrogacy.”).

\textsuperscript{42} For a good description and analysis of the market/family dichotomy, see Olsen, \textit{supra} note 39.

\textsuperscript{43} For example, the family serves as an important mechanism of property distribution. Indeed, some have argued that the family is central to capitalism. \textit{See, e.g.}, Friedrich Engels, \textit{The Origin of the Family, Private Property, and the State}, in \textit{The Marx-Engels Reader} 734-36 (R. Tucker ed. 1978) (arguing that the nuclear family, by enforcing monogamy and thereby ensuring certainty of parentage, promotes the system of private property ownership essential to capitalism).

Along the same lines, many modern economists characterize marriage as an economic institution that maximizes household wealth by means of the division of labor between spouses. As Judge Richard Posner observes:
sisted of ongoing relationships characterized by altruistic principles. By fostering the free trade of sperm, eggs, and gestational services, however, assisted reproductive technologies threaten to expose the falsity of this dichotomy in the most obvious way. When families are assembled by means of arms-length transactions between individuals who purchase and sell the raw materials with which to produce a child, this dramatically reveals the commercial nature of families, blurring the boundary between the realm of the family and the realm of the market.

Finally, by freeing families from biology and allowing families to be formed in the marketplace, assisted reproductive technologies move us closer towards a world of private ordering, where not only the form but also the content and the extent of family obligations may become the product of individual choice. At the present time, family obligations automatically and inevitably follow biological connections. Assisted reproductive technologies, however, create families as a matter of individual agreement, moving towards a model of contractual parenthood. Once again, Johnson v. Calvert best exemplifies this phenomenon with its holding that motherhood is to be deter-


44. For the view that commercial transactions are not isolated events between atomistic individuals, but instead typically occur in the context of ongoing relationships, see, e.g., Ian Macneil, The New Social Contract: An Inquiry Into Modern Contractual Relations (1980) and Stewart Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract, 11 L. & Soc. Rev. 507 (1977).

45. Thus, fathers possess the duty to support their biological offspring even when conception occurred without their knowledge or consent. See, e.g., Hughes v. Hutt, 455 A.2d 623 (Pa. 1982); Pamela P. v. Frank S., 88 A.D.2d 865 (N.Y. App. Div. 1982); Stephen K. v. Roni L., 105 Cal. App. 3d (1980).
mined according to the parties' intentions. State statutes governing artificial insemination with donor sperm also effectuate individual intent by expressly requiring a husband's consent in order to establish his fatherhood.

But biological bonds, because reflexive and irrevocable, may prove more reliable than voluntarily assumed contractual commitments. When family members come together as a matter of choice, on the other hand, their commitment to each other may accordingly become both contingent and revocable. Although voluntary agreements enhance individual autonomy, they also threaten to produce conditional parents whose sense of duty is limited to and contingent upon performance of the contract. Thus, in at least two instances, the parties to a surrogacy contract initially rejected children born with medical problems. Moreover, parenthood by consent may encourage the attitude that family relationships can be freely entered and exited, accepted or rejected. This appears to be the reasoning of

46. Johnson v. Calvert, 851 P.2d 776 (1993). See also Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding, in a battle between divorcing spouses for custody of seven frozen embryos, that husband's intent not to procreate outside marriage should prevent his involuntarily becoming a father).

47. See, e.g., CAL. FAM. CODE § 7613 (West 1996) (“If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.”) (emphasis added).

48. In the words of David Schneider: Because “Blood Is Thicker Than Water,” kinship consists in bonds on which kinsmen can depend and which are compelling and stronger than, and take priority over, other kinds of bonds. These bonds are in principle unquestioned and unquestionable. They are states of being, not of doing or performance—that is, the grounds for the bonds “exist” or they do not, the bond of kinship “is” or “is not,” it is not contingent or conditional, and performance is presumed to follow automatically if the bond “exists.”

David Schneider, A Critique of the Study of Kinship 165-66.

49. In 1983, Christopher Ray Stiver was born suffering from a severe strep infection and microcephaly, a congenital disorder usually associated with mental retardation. The contracting father refused to consent to medical treatment and disclaimed responsibility for the child. Only when paternity tests, revealed to the parties on the Phil Donahue television show, indicated that the husband of the surrogate was the genetic father, did the biological parent's agree to accept the child. See Areen, supra note 39, at 1747 & n.28.

A similar case arose in 1986, when a woman with a history of drug abuse that was not known to her family contracted to become a surrogate mother for her sister. At birth, the child tested positive for the HIV antibody, and all parties refused custody. See id. at 1747 & n.29.

50. See Carl Schneider, Surrogate Motherhood from the Perspective of Family Law, 13 HARV. J.L. & PUB. POL’Y 125, 131 (1990) [hereinafter Schneider, Surrogate Motherhood] (stating that surrogacy is troubling because it “seem[s] likely to weaken the sense of automatic and ineradicable commitment between family members.”); Katherine Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293, 295 (1988) (arguing that “the law should focus
John Buzzanca, who with his wife Luanne commissioned a gestational surrogate to carry to term an embryo produced from anonymously donated eggs and sperm. One month before the baby was born, however, Buzzanca filed for divorce and repudiated his obligations to the child. Buzzanca based his refusal to pay child support upon the fact that he was not the child's biological father, but a court has since ruled that Buzzanca owes child support because he participated in the child's conception by signing the surrogacy contract.\textsuperscript{51} Thus the privatization of the family is not without risks for children.\textsuperscript{52}

Paradoxically, the families formed with the assistance of reproductive technology, though driven by a belief in the importance of biology, ultimately undermine the significance of biological ties. In so doing, they expose the state's involvement in the creation of families, they blur the boundary between the family and the market, and they promote the privatization of the family. Thus, assisted reproductive technologies do not simply transform the ways in which we create families. More fundamentally, they transform our very understanding of the term "family."


\textsuperscript{52} See generally Jana Singer, \textit{The Privatization of Family Law}, 1992 WISC. L. REV. 1443 (describing and evaluating the process whereby private norms and decisionmaking have supplanted state-imposed rules and structures for governing families in a variety of areas).