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MAKING CONNECTIONS: INDIVIDUALS, FAMILIES, COMMUNITIES

A few weeks ago, the premiere issue of a magazine entitled *Family Life* appeared on the newsstands. One of its founders, Jann Wenner, is also the publisher of *Rolling Stone*. Not surprisingly, this fact has led some observers to describe the new magazine as part of a larger cultural shift, and it's clear that those involved in the project see it this way as well. "Now that family life is central to our own lives and to the country," writes Nancy Evans, the publication's editor-in-chief, "it seemed high time that there be an intelligent, sophisticated magazine that addresses the issues." But the point here is not just that the editor can take the centrality of her subject for granted. Ms. Evans believes that she and her readers are linked by a common experience, and when she refers to it, the tone of her writing is both resolute and unexpectedly elegiac. *Family Life*, she tells us, grew out of the need to "celebrate and nurture these few years called childhood." "Many of us," she adds, "have discovered that raising a family has not taken us off track (as we feared) but has put us right back on the track we may have lost." At such moments, she is not merely pointing to the demographic reality that the baby boomers now have children of their own. She is also testifying, at least provisionally, to a moral reorientation.

One goal of this *Report* is to expand the frame of reference within which our discussions of family life take place. Specifically, we wish to explore an evolving network of human connections, not only within families, but also between individuals, families, and their

To make its research readily available to a broad audience, the Institute for Philosophy and Public Policy publishes this quarterly newsletter. Articles are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Institute or its sponsors.

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communities. The title of this issue assumes that these connections are crucial to human experience, the formulation of social policy, and philosophical reflection.

In the pages that follow, a legal scholar and a philosopher examine the law emerging in response to the new reproductive technologies, suggesting that social and affective ties are frequently becoming more critical than biological ones in determining parental rights and obligations. A sociologist asks what has made teenage childbearing the focus of a public policy debate, directing special attention to the controversy over making long-term contraceptives available to young women in school-based clinics. Three feminist scholars observe how social and economic conditions, as well as ethnic and cultural differences, influence family structure, and in doing so they articulate a feminist ethos of social responsibility that draws on the traditions and historical experiences of people of color. A policy analyst examines specific measures that would assist working parents, single or coupled, in providing for their children and in preparing them for a radically changing economy and social world.

In the light of these essays, what becomes interesting about a venture such as *Family Life* is not the colorful advertisements for \$60 sweat pants or \$90 soccer gloves, or the article recommending animal entertainers for your child's birthday party. ("Animal acts are not cheap," the writer concedes. "We're still gulping

from the bill. But it's amazing what you'll do for your kids.") Flipping past all that, readers may look instead at the magazine's "Washington Report Card," which gives the number for the Children's Defense Fund legislative hotline and enlists support for a proposal that would grant all families a \$1,000-per-child tax credit. They may read about a company that has made a fortune marketing all-cotton children's clothing while paying 50 percent of its employees' child care costs. They may notice Robert Coles advising parents to set their children an example of altruistic service, followed by a description of five ways to help provide needy students with clothing, school supplies, and scholarships for after-school programs.

To a skeptical eye, these may be only sidelights. But we might also interpret them as efforts to express and cultivate a social and moral awareness that nostalgia cannot teach.

The Institute wishes to thank the Maryland Humanities Council for supporting the publication of this *Report*. In November, the Council is sponsoring a one-day conference on the theme "Family: Myth and Reality"; a detailed announcement of this event appears on page 23. The photographs in this issue are the work of Michela S. Caudill, artist-in-residence at the Woodbourne Center in Baltimore. They are part of a larger body of photographs which will be exhibited at Loyola College in the fall of 1994.



Defining Families: The Impact of Reproductive Technology

Over the past few decades, scientists and physicians have developed various forms of assisted reproduction — technologies that make possible the creation of children outside of the normal reproductive process. These technologies have become so familiar that we easily forget how revolutionary they once seemed. It has been just fifteen years since the first “test-tube baby” was born in Great Britain, giving rise to dramatic speculations about the human future; by now, the practice of in vitro fertilization has resulted in the births of many thousands of children. Reproductive technology has enabled many previously infertile couples to play a biological role in the creation of their families. And scientists continue to refine their ability to extract, preserve, transfer, manipulate, and combine male and female gametes by means other than coital reproduction.

A Child Essentially One's Own

If we ask how it is that reproductive technologies have come to be so widely accepted, and even routine, one answer may be that a fairly conventional vision of the family lay behind them from the start. The motive for developing these technologies was to help create nuclear families — families composed of a husband, a wife, and their biological children. It is a sign of the cultural power of this family ideal that so many couples remain determined to achieve it, even in the face of the expense and uncertainty associated with some of the newer technologies. These couples are not only seeking the love and companionship that children can provide, or the opportunity to nurture and protect. Many of them presumably share a deeper, more elusive desire as well, one that they believe can only be satisfied by some form of biological involvement in the creation of a child. That is to say, they wish to have children that are *essentially their own*.

Until the advent of reproductive technologies, the fulfillment of this wish was possible only for couples able to conceive and gestate without assistance. Reproductive technologies have extended the possibility to those who are unable to procreate naturally. Yet the impact of these technologies may exceed, and to

some extent confound, this limited goal. This is because the technologies do not merely enable couples previously diagnosed as infertile to reproduce. They also allow third parties to become biologically involved in the making of a child; and as a result, they raise questions about what it actually means for a child to be essentially one's own. For instance, in the case of artificial insemination, a wife may be impregnated not with her husband's sperm, but with that of a donor. With in vitro fertilization, the ovum may be donated, fertilized in the laboratory, and then implanted in the woman's uterus. And in surrogacy arrangements, a third party may become biologically involved in one of two ways. If a couple's own gametes are fertilized in vitro, and the resulting embryo is implanted in the womb of another woman, that woman bears the child as a *gestational surrogate*. If, however, the surrogate is inseminated artificially with the husband's sperm, she conceives and bears the child for the couple as a *genetic surrogate*.

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Thus, as Victor Weedn has observed, reproductive technologies have made it possible for a child to have as many as five parents: a genetic father, a rearing father, a genetic mother, a gestational mother, and a rearing mother. Of course, most of the families resulting from the use of these technologies will not be quite so elaborate. Nonetheless, it remains true that where there used to be only two ways of obtaining children — through natural parenting or through adoption — there are now intermediate possibilities.

Consider the example of surrogacy. A surrogacy arrangement may allow a man in an infertile marriage

to become a biological father; from one point of view, it gives him a chance at something like natural parenting. But since the birth mother in a surrogacy contract is relinquishing the child she has borne, the arrangement is, from another point of view, like an adoption. This is all the more true in genetic surrogacy, where the surrogate has contributed the ovum as well as the gestational site, and the man's wife has no biological tie to the child she will help to raise.

Inevitably, these new forms of biological involvement, and the social arrangements that accompany them, have raised important legal and ethical questions. We address two of them: first, the extent to which these technologies are subject to the regulatory regime of adoption or the laissez-faire regime of unassisted "natural" reproduction; second, the extent to which these technologies can be used in creating and legitimizing alternative families.

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The Importance of Biological Ties

In our society, biological ties have been crucial to our characterization of the family and to the legal status that families enjoy. Fertile couples are free to have as many children as they wish, whatever their capacities as nurturers and providers, while adoptive parents are carefully screened and subject to elaborate regulations. Although in theory the rights of natural parents may be restricted in order to promote the best interests of the child, it is widely assumed that the child's best interests lie in being raised by the natural parents. Judges rarely inquire into such matters except when something goes wrong: when the parents' claims conflict, as in divorce and custody disputes (where the mother was, until recently, presumed the better parent), or when there are indications of abuse or neglect. Proposals for licensing natural parents meet with much the same resistance as proposals for deregulating adoption.

In opening up a range of reproductive options between natural parenting and adoption, the new reproductive technologies may force us to confront the disparity in the legal and social treatment of the two standard ways of obtaining children. We must determine whether the privileged status of natural parenting will be extended to assisted reproduction, or whether assisted reproduction will be heavily regulat-

ed, as adoption is, in "the best interests of the child." In deciding how to regulate new reproductive technologies, we will be deciding the importance of biological involvement and genetic contribution in conferring the authority to raise children.

Thus far, the claims of the new technologies to be assisting natural reproduction rather than offering new forms of adoption appear to have prevailed in this country. As Elizabeth Bartholet points out, there is almost no protective regulation in the United States to govern reproductive technologies. The legal response has not been univocal, however; it varies with technology, gender, marital status, and sexual orientation. If we look only at the example of artificial insemination by a donor, it might appear that a laissez-faire regime has prevailed. Courts and state legislatures in this country generally permit a woman, married or not, to conceive a child with a stranger's semen, without the stranger acquiring any parental claims, as long as procedures securing his anonymity are respected. The donor is free to contract away any rights flowing from his genetic connection to the child, and he is bound by his signature despite any subsequent misgivings he may have.

Accordingly, a semen donor has never succeeded in establishing his parental rights against an inseminated mother who followed the statutory procedure for donor insemination. As of 1990, statutes in 31 states had made the donor insemination recipient and her consenting spouse the legal parents of any resulting children, and 18 of these statutes explicitly provide that the sperm donor is not the legal father. The purpose of such laws is to guarantee that the family created by donor insemination looks like one created through natural parenting; the child is to have only one father. Still, Professor Bartholet argues that the laws governing parental rights in donor insemination cases actually constitute an absence of regulation, since they ensure "that the state will not engage in the parental screening or other inquiries that it insists on in the traditional adoption context."

Couples desiring children have far less freedom to treat a stranger's womb, in contrast to a stranger's semen, as a reproductive aid. In many states a biological mother cannot be compelled to relinquish her parental rights to the child she has borne, even if she contracted with a couple to bear the child as a surrogate. Specifically, 11 of the 17 states that have laws addressing surrogacy have banned enforcement of commercial surrogacy contracts, and one — Michigan — has criminalized participation in a surrogacy arrangement. Florida prohibits commercial surrogacy but allows surrogacy without payment, with a 7-day postnatal withdrawal option (a provision similar to that found in all state adoption statutes). Only two states, Arkansas and New Hampshire, explicitly per-

mit surrogacy and provide that the married couple who enter into an appropriate surrogacy contract thereby become the child's legal parents.

It may not be surprising that the parental rights of an anonymous sperm donor do not have the same force as those of a birth mother in a surrogacy arrangement. Under Anglo-American family law, paternity has long been defined not only on the basis of a man's biological relationship to a child, but also according to his social relationship with its mother. For example, the law has established a strong presumption of paternity in the husband, and until recently American courts allowed a husband to "legitimate" his wife's child by adoption without the knowledge or consent of its biological father. In contrast, the law traditionally gives great weight to the parental rights of a birth mother.

There is a second element that helps account for the disparate legal reception accorded to donor insemination and surrogacy, and that is the difference between donating gametes and providing gestation. In the well-known *Baby M* case (1988), the New Jersey Supreme Court held that even if this difference lay only "in the time it takes to provide sperm for artificial insemination and the time invested in a nine-month

pregnancy," that alone would "justify automatically divesting the sperm donor of his parental rights without automatically divesting a surrogate mother." Though in fact the court awarded Baby M to the couple who had contracted for her, it refused to treat the case as a contractual dispute; instead, it voided the contract, conducted a careful inquiry into the child's best interests, and gave the surrogate the visitation rights that the trial court had denied her. In deciding such cases, the courts have clearly been influenced by the fact that surrogacy looks far more like adoption than does donor insemination. What ultimately changes hands is not a vial of semen but a live baby, taken from a birth mother biologically and sometimes emotionally prepared to nurture it. Nonetheless, the time, effort, risk, and attachment involved in gestation may not keep it from being treated as a contractual service when it is not conjoined with a genetic link. In the California case *Johnson v. Calvert*, a court awarded exclusive custody to the genetic parents of a child born to a gestational surrogate, terminating the surrogate's parental rights, and at least two other courts have issued declaratory orders that make the genetic mother the legal mother of a child carried by a gestational surrogate.



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The *Johnson* court made its decision on two grounds that reflect the ambivalence and complexity of the legal response to the new reproductive technologies. First, the court emphasized the genetic link between the couple and the child, citing twin studies purporting to show the contribution of genetics to intelligence and other important human traits. As Rochelle Cooper Dreyfuss and Dorothy Nelkin argue, the court defined the child as a "genetic entity" and assumed that "shared genes are the crucial basis of human relationships." At the same time, in cutting off the surrogate's visitation rights, the court also emphasized that it wished to establish a family with the normal complement of parents, on the grounds that "two parents are better than three."

These two rationales — asserting the importance of genetic connection, on the one hand, and that of the two-parent family, on the other — converged in *Johnson v. Calvert*, with the result that the parental rights of the contracting couple were upheld. But the two rationales diverge in cases of assisted reproduction where a third "parent" makes a genetic contribution to the child. And the "two-parent" rationale comes under challenge when the two prospective parents desiring children are not a husband and wife, or even a boyfriend and girlfriend, but a gay or lesbian couple.

Alternative Families

Legal efforts to limit the use of the new reproductive technologies to married, or at least heterosexual couples, have been made even in countries whose official policy favors "reproductive autonomy." For example, the French Senate is considering legislation that would restrict the use of in vitro fertilization and other fertility techniques to infertile heterosexual couples who are of reproductive age. By limiting the use of reproductive technology to heterosexual couples (though not necessarily married ones), the French law would prevent single women, and gay or lesbian couples, from receiving medical assistance in procreation. The obvious goal of such restrictions is to discourage the creation of alternatives to the nuclear family.

While such legal restrictions are rare in this country — only Connecticut and Oklahoma explicitly prohibit the use of donor insemination by unmarried women — 21 states require that artificial insemination be performed by a physician, and the medical establishment has generally served as the gatekeeper of reproductive technology, restricting its use to people it perceives to be fit parents — specifically, married couples.

Despite such laws, this medical monopoly has started breaking down. Largely because of the ease and safety of self-administration, donor insemination without the assistance of a physician is increasingly being employed by people who wish to raise children out-

side of traditional marriage. In most cases, the alternative families created in this way have not been hampered by the absence of legal recognition, since the adults forming them have long relied on informal norms to regulate their lives. However, in cases where disputes have emerged over parental rights, the courts have often taken the opportunity to try to provide the child with as close an approximation to a nuclear family as circumstances allow. One result of this tendency is that the rights of biological fathers — which have little force in cases of donor insemination involving a married woman — have more often been affirmed.

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For example, in *C.M. v. C.C.*, a New Jersey court held that a donor who had been dating a woman at the time she inseminated herself was entitled to "the privileges of fatherhood." The court based its decision on "a policy favoring the requirement that the child be provided with a father as well as a mother." Other courts may not have relied so explicitly on that policy, but they have generally recognized the parental rights of a semen donor who was acquainted with the recipient and agreed to inseminate her.

A further legal question confronting some alternative families is whether the lesbian partner of a woman who has received donor insemination can claim parental rights to the resulting child. Until recently, most courts were reluctant to grant such rights, but this may now be changing. According to the Lesbian and Gay Rights Project of the American Civil Liberties Union, lesbians seeking to become the adoptive parents of their partners' children have won at the trial court level in "probably hundreds of cases," most of them on the West Coast. In Vermont and Massachusetts, two states in which lesbian partners have been refused permission to adopt a partner's child, appellate courts will be reviewing the cases and issuing rulings later this year. Two other states, Florida and New Hampshire, have laws specifically prohibiting adoptions by partners of the same sex, but the Florida law is currently under legal challenge.

Meanwhile, alternative families have begun to win formal recognition from employers, insurers, and government agencies, and they will continue to receive

judicial assistance in defending their arrangements against the claims of third parties and in resolving their own disputes about those arrangements.

Two Parents, Not Three

The extension of legal recognition to alternative families has sometimes been criticized on the grounds that such recognition erodes the privileged status of the nuclear family. But the challenge posed by new family structures may not lie primarily in the legal realm at all. For example, such structures may offer a model of child-rearing that is a more modest, and therefore more acceptable, alternative to the nuclear family than the collective child-rearing arrangements of communes or kibbutzim. Critics of such arrangements have worried that the child of many is the child of none; they cite the findings of psychologists suggesting that children do better having a stable, intimate relationship with at least one adult.

Yet there is no reason to think that a cooperative child-rearing arrangement among three or four adults would preclude the child's attaining stable intimacy with one or all of them. Now that reproductive technology makes it possible for more than two adults to have a biological role in the creation of a child, why shouldn't social arrangements develop that acknowledge this reality? In custody cases involving surrogacy, most courts have assumed that the child could only belong to one conventional family or the other, rather than to an extended family created by the surrogacy arrangement. Although this assumption may reflect the way the options have been framed by the contending parties, it does not necessarily reflect the best interests of the child.

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Other observers are concerned that even the modest proliferation of parents in "uncontested" surrogacies will lead to confusion for children and adults alike. The procedures established to maintain the anonymity of genetic parents in adoption and donor insemination are attempts to avoid such confusion — to ensure that the legal parents are the child's only parents. But confusion does not necessarily lead to conflict; and although it is certainly destructive for a child to be subject to protracted custody battles, there are no grounds for assuming that such conflicts will be more

frequent or harsh with three- or four-parent families than with two-parent families. For all we know, role ambiguity may actually ease conflict. The participants in a surrogacy arrangement sometimes struggle for custody, but at other times they evolve warm, if unconventional, relationships. In some successful surrogacies, the participants describe themselves as forming an extended family, in which the surrogate becomes an aunt or godmother to the children she gestates and her own children become their cousins. If it is indeed true that such arrangements threaten the monopoly of the nuclear family, that is a problem for its defenders, not for the children brought up in alternative families.

In some cases, children would do better being raised in families other than their own; in other cases, adults would do better having children other than their own as companions, protégés, or heirs.

To a large extent, the defense of the nuclear family as an institution rests on two claims: that it is the most effective means of satisfying the emotional and practical needs of children, and that it can best accommodate the desire of adults to have children. Yet in practice, the nuclear family can fall short in two typical ways. In some cases, children would do better being raised in families other than their own; in other cases, adults would do better having children other than their own as companions, protégés, or heirs. Moreover, the two justifications for the nuclear family sometimes conflict: the child's interests may be ill-served by giving the biological parents the satisfaction of raising that child. Assessing whether the nuclear family makes good on its claims is a matter of fact, interpretation, and value; it depends on how well children and adults fare under its auspices, on what alternatives we compare it to, and on how we understand the needs and desires that it is supposed to satisfy.

Avoiding Extremes

It is true that the greater reproductive freedom made possible by technology has its dark side. In states where surrogacy has been outlawed, critics have successfully argued that it too easily leads to the exploitation of less affluent women, who are induced to sell not only their gestational services, but also their as-yet-uncreated children. There are concerns that in vitro fertilization, by separating conception from the rest of the gestational process, may strengthen a growing trend toward viewing the pregnant woman and her

fetus as separate entities, often with adverse interests. And although the development of reproductive technology was spurred by the desire of infertile couples for children, there are fears that children procured through this technology will be wanted for the wrong reasons, as market goods whose characteristics may be selected in advance, rather than as uniquely valuable persons.

In order to guard against such harms, we may decide that reproductive technology ought to be more strictly regulated. The challenge we face is to avoid the two extremes described by Will Kymlicka: on the one hand, "a Hobbesian world of markets in bodies and services," and, on the other, "an Orwellian world of parental licenses and judicial restrictions." If we respond successfully, the role of reproductive technologies in facilitating alternative parenting arrangements may prove to be healthy and liberating. The flourishing of families will depend on the capacity of our legal and social order to accommodate new forms of parenting, and on the capacity of the nuclear family to survive and flourish without a legal monopoly.

— David Wasserman and Robert Wachbroit

This article is adapted and condensed from an essay that first appeared in *Clinics in Laboratory Medicine*, vol. 12, no. 3 (September 1992). Sources: Victor N. Weedn, "Reproductive Patients," in American College of Legal Medicine, *Legal Medicine: Legal Dynamics of Medical Encounters* (C.V. Mosby, 1990); Ferdinand Schoeman, "Rights of Children, Rights of Parents, and the Moral Basis of the Family," *Ethics*, vol. 91, no. 6 (1980); H. LaFollette, "Licensing Parents," *Philosophy & Public Affairs*, vol. 9, no. 182 (1980); Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Houghton Mifflin, 1993); US Congress OTA BA-358, *Infertility: Medical and Social Choices* (1988); "Comment: The Unwed Father's Rights in Adoption Proceedings," *Albany Law Review*, vol. 40, no. 543 (1976); Rochelle Cooper Dreyfuss and Dorothy Nelkin, "The Jurisprudence of Genetics," *Vanderbilt Law Review*, vol. 45, no. 2 (1992); Robin Herman, "France Defines the Ethics of High-Tech Medicine," *The Washington Post* (April 20, 1993); D. Wikler and N.J. Wikler, "Turkey-Baster Babies: The Demedicalization of Artificial Insemination," *Milbank Quarterly*, vol. 69, no. 1 (1991); "Gay Adoption Cases Go to Appeals Courts," *The New York Times* (April 18, 1993); Ethics Committee of the American Fertility Society, "Ethical Considerations in the New Reproductive Technologies," *Fertility and Sterility*, supplement (1990); J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child* (The Free Press, 1973); L. Andrews, *Between Strangers* (Harper & Row, 1989); M. Field, *Surrogate Motherhood: The Legal and Human Issues* (Harvard University Press, 1988); Barbara Katz-Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (W.W. Norton, 1989); Will Kymlicka, "Rethinking the Family," *Philosophy & Public Affairs*, vol. 20, no. 77 (1991).

Thinking About Teenage Childbearing

Last December, the Baltimore city health department announced a pilot program designed to make the long-term contraceptive Norplant available to sexually active teenage women who could not otherwise afford it. The new program, funded by a private foundation, began in a public high school for pregnant teenagers and young mothers, and during the first four months, nine students received the contraceptive implant. In August the city health commissioner proposed extending the program to five additional school-based clinics which already offer an array of birth control methods.

Consisting of five small capsules inserted into the inner side of the upper forearm, Norplant achieves its

contraceptive effect by releasing a hormone (levonorgestrel) gradually over a period of five years. Reported side effects include weight gain and irregular bleeding. Because Norplant contains no estrogen, it does not present many of the health risks associated with oral contraceptives. If a woman decides to have the capsules removed, fertility is restored more quickly than with other hormonal methods. According to the Population Council, which sponsored the research leading to the development of Norplant, 1.8 million women have used the method worldwide, and clinical trials involving 30,000 volunteers have been conducted in 44 countries.

Baltimore is the first city in the nation to provide