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THE NEWEST PROPERTY: REPRODUCTIVE TECHNOLOGIES AND THE CONCEPT OF PARENTHOOD

Kermit Roosevelt III*

I. INTRODUCTION

Normative sentiments about property rights in the human body tend to determine how the fundamental question of positive law is framed. "Is the body nothing more than property," ask those who oppose the commodification and loss of dignity lurking in an affirmative response.¹ "Can individuals not control even their own bodies," is the question favored by those who see autonomy enhanced by the free trade of human body parts.² This article intends no polemic in favor of either perspective; this article goal is argumentatively modest but descriptively more grand. It asks whether the law recognizes property rights in the human body. Finding an affirmative answer, it goes on to draw out some implications of these rights. More specifically, it argues that the existence of property rights in human reproductive materials forces us to reconceptualize parental rights.

Thus far nothing is novel. For decades, courts and com-

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² See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 303-20 (Peter Laslett, 2d ed. 1967); Moore, 793 P.2d at 515 (Mosk, J., dissenting).
mentators have declared that the engine of biotechnical innovation will drive family law in unpredictable directions at great speed. The claim of this article is actually somewhat reactionary: that scientific joyrides need not bring chaos to the law. The existence of property rights in reproductive materials should produce a property-derived understanding of parental rights, but it need not work much change in existing doctrine. All recent Supreme Court parental rights cases may be assimilated into the framework I propose, and this framework offers a quick and decisive resolution to otherwise intractable problems of family law created by new reproductive technologies. The rules of this property model are, of course, only default rules. Subject to certain constitutional restrictions, the state has ample power to restrict property rights in the body, and such restrictions may be wise.

II. THE BODY AS PROPERTY

Treating the body as property is, in some views, inherently wrong. It carries the historical stigma of slavery, the imprisonment of debtors and husbands' dominion over wives. But the opposition here is directed largely at the idea that one person's body could become another person's property, and as such, it is fundamentally misguided. Property, as the cliché goes, is a bundle of rights: namely, the rights to possess, to use, to exclude others from use and to transfer. Some of these rights—possession, use and exclusion—are obviously fundamental to human dignity and implicit in the concept of ordered liberty. It is my property right to possess


5. See infra text accompanying note 75.


7. This is the familiar language of substantive due process, see, e.g., County of Sacramento v. Lewis, 118 S.Ct. 1708, 1716-17 (1998), and some property-style rights to one's body do receive substantive due process protection. See, e.g., Rochin v. California, 342 U.S. 165 (1952) (forced stomach pumping violates Fourteenth Amendment). But the larger point is simply that these
my body that is rendered inalienable by the Thirteenth Amendment's prohibition of slavery; my right to exclude others from the use of it that is protected by laws against battery; my right to use it myself that underlies freedom of contract and various liberty interests. The idea that property rights provide the appropriate theoretical grounding for many of our most treasured liberties is a common feature of property scholarship. The next logical step from the determination that people are not the property of others is empowering them to use their own property. This empowerment is a primary focus, for example, of the Civil Rights Act of 1866.

Without any property rights in the body, we would have the odd result that others have as much claim to our bodies as we do—that, for example, I have no more right to my kidneys than a patient needing a transplant. Thus, with respect to some of the rights in the bundle, the determination that the body counts as property is both obvious and correct. It is not the enforcement of these rights, but their lapse, that threatens human dignity.

Indeed, the idea that the individual has rights in his own body superior to those of any other party has a long and dis-
tinguished philosophical history. Rights of use and exclusion are uncontroversial. The controversial issue really is the transferability of parts or elements of the body. This issue of transferability has grown more pressing as medical technology has grown more impressive. When science tells us that it is possible to accomplish something new, we must decide if we should. Again, it is not my purpose to argue for any particular moral position on this question. I intend only to look at our laws and our practices to see what answers they give. To what extent, then, is the body as property transferable?

A. The Body Generally

It is little exaggeration to say that everything that can be used can be transferred. Blood, hair, sweat, semen, teeth, urine and pieces of skin and muscle have all been sold without controversy. The Uniform Anatomical Gift Act allows for postmortem transfer of a wide range of body parts.

Despite the near universal reach of the rights of use and exclusion, and the very broad reach of transferability, courts have in some contexts refused to recognize property rights in

12. See, e.g., Locke, supra note 2, at 305; See also C. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 3 (1962) (discussing the importance of self-ownership to the individualist theorist of the seventeenth century).

13. The transferability of the entire body, at least before death, is obviously precluded by the 13th Amendment. The question of property rights in corpses is somewhat more complex. Although a corpse is usually not considered part of the decedent’s estate, next of kin enjoy a quasi-property right to control disposition of the remains. See, e.g., Toliver v. Odom, 870 F.2d 304 (5th Cir. 1989). Cases dealing with damage to corpses in transit, which have held uniformly that human remains are “goods” covered by the Warsaw Convention, seem to reflect a more unalloyed property conception. See, e.g., Onyeamusi v. Pan Am, 952 F.2d 788, 793 (3d Cir. 1992). Jurisdictions differ on whether survivors’ property (or “quasi-property”) rights in corpses may be offended by incineration of organs or unconsented-to autopsies and experiments. Compare Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) (finding property right violated by cornea harvesting), with Tillman v. Detroit Receiving Hospital, 360 N.W.2d 275 (Mich. Ct. App. 1984) (refusing to recognize property right). See generally Michelle Bourianoff Bray, Note, Personalizing Personality: Toward a Property Right in Human Bodies, 69 Tex. L. Rev. 209 (1990); Michael H. Scarmon, Note, Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred with Their Bones?, 37 S.D. L. Rev. 429 (1991-92).


16. Id. § 1(1) (defining “anatomical gift” as “all or part of a human body”).
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surgically removed body parts. What these cases turn on, however, is the absence of any expression of intent to retain an ownership interest. This should not be taken to suggest that such ownership interests cannot be asserted, as the above discussion of the recognized transferability of many body parts shows. Indeed, the relation of individuals to their bodies features most of the rights in the property bundle. There may be additional rights—for example, the government likely cannot requisition your heart and compensate you under the Takings Clause—but the property rights exist. Therefore, it is hard to make sense of, much less to advocate, the position that the human body is not property.

Much of the resistance to admitting the property nature of individuals' relations to their bodies stems from the commodification argument. It is harmful to our idea of people as beings worthy of respect, the argument goes, if we simultaneously price them, spleen to pancreas and so on. This might be an argument for prohibiting the sale of bodily organs; as such, it has won victory in a limited arena. Roughly speaking, the sale of nonrenewable body parts is prohibited. Thus corneas, livers and even kidneys, one of which we can very well do without, are taken off the market. But if this argument is extended to a broader range of biological material, then it is best understood as merely an admonition not to employ the rhetoric of property when talking about people. In terms of our actual practices, the simple truth is

17. See, e.g., Moore v. Regents of Univ. of Cal., 793 P.2d 479 (Cal. 1990) (dismissing conversion claim based on physicians' use of excised spleen); Browning v. Norton-Children's Hospital, 504 S.W.2d 713 (Ky. 1974) (refusing to hold doctor as a bailee of amputated leg).
19. See Wagner, supra note 8.
20. See, e.g., Radin, supra note 1.
21. See Moore, 793 P.2d at 497, (Arabian, J., concurring) (inveighing against regarding "the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity"); See generally Radin, supra note 1.
22. This is only roughly true because eggs are, properly speaking, nonrenewable; each woman has a finite supply.
that much biological material is property and recognized as such. It is bought and sold every day.\textsuperscript{24}

B. Reproductive Material

The transferability of reproductive material is particularly well established. The sale of sperm and eggs is commonplace, and it appears never to have been suggested that such transactions have no legal effect.\textsuperscript{25} Moreover, given the alarming prospect of the misappropriation of genetic material, the protection afforded by a property interest seems eminently desirable.\textsuperscript{26} However, courts have generally faced the issue of whether sperm is property under more difficult circumstances—after the death of the donor—without

\textsuperscript{24} For example, there are more than four hundred blood centers in the United States that daily collect, buy and market blood products. \textit{See} ANDREW KIMBRELL, \textsc{The Human Body Shop: The Engineering and Marketing of Life} 20 (1993). The United States is the world leader in exporting blood, which constitutes a two billion dollar industry. \textit{See} id. at 21.

\textsuperscript{25} Again, this is not to say that restrictions on the sale of reproductive materials might not be wise. Although the American Association of Tissue Banks notes that financial compensation for blood and reproductive cells is "condoned by society," the American Fertility Society guidelines suggest that monetary compensation beyond expenses not be offered to donors. \textit{See} STANDARDS FOR TISSUE BANKING §§ C1.210,220 (American Association of Tissue Banks 1984). This would not, however, alter the conclusion that reproductive material is property; many forms of property (for example, the shares of closely-held corporations) have restrictions on alienability. \textit{See} Lori B. Andrews, \textit{My Body, My Property}, Hastings Center Report 28 (Oct. 1986).

\textsuperscript{26} For example, a couple attempting in vitro fertilization would certainly be wronged if a physician intentionally destroyed their eggs or sperm, and still more so if he provided them to a third party without the couple's knowledge. \textit{See}, e.g., Del Zio v. Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y. filed April 12, 1978) (awarding $50,000 for emotional distress when a doctor deliberately destroyed the contents of the petri dish in which in vitro fertilization was being attempted with the woman's egg and her husband's sperm); \textit{See generally}, William Boulier, \textit{Note, Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts}, 23 Hofstra L. Rev. 693 (1995); Jennifer Long Collins, \textit{Note, Hecht v. Super. Court: Recognizing a Property Right in Reproductive Material}, 33 U. LOUISVILLE J. FAM. L. 661 (1995). People obviously care a great deal about what happens to their reproductive material; in particular, they do not want that material used to produce children without their consent. \textit{See}, e.g., Davis v. Davis, 842 S.W.2d 588, 601, 603 (Tenn. 1992) (referring to the "anguish of... unwanted parenthood" and holding that "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood"). A damages remedy against a doctor who does so will not undo the psychological harm, but it will provide a deterrent. Criminal sanctions have also been suggested. \textit{See} Kristi Ayala, \textit{The Application of Traditional Criminal Law to Misappropriation of Genetic Materials}, 24 AM. J. CRIM. L. 503 (1997).
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reaching conclusive results.

In perhaps the most famous case, a decedent's girlfriend waged a six-year legal battle to obtain control of fifteen vials of frozen sperm he willed to her. The California Court of Appeals wavered in its determination that the frozen sperm was property of the estate, and the California Supreme Court, denying review, decertified the last appellate opinion. Thus the legal dispute came to an end without creating conclusive precedent. Given that sperm and eggs do bear all of the ordinary attributes of property, however, it is hard to deny that their possessors have property rights in them.

Like the question of posthumous reproduction, the question of what happens when the sperm and the egg combine is more difficult. At some point the embryo becomes a fetus, and at some point the interest of the gamete providers is no longer a property interest. With respect to very early embryos, however, the need for recognition of property rights seems just as great as with respect to sperm and eggs. Judicial treatment of embryos has not been uniform. In York v. Jones, after three unsuccessful attempts at in vitro fertilization with the Jones Institute, the Yorks asked for the release of one of their frozen embryos in order to try the procedure at a different clinic in California. When the Jones Institute refused to release the embryo, the Yorks sued. Denying the de-


30. See infra Part V.D. (discussing posthumous reproduction).

31. Like posthumous reproduction, it will be considered in greater detail in a subsequent section.

32. Allegations of misappropriation of embryos have occurred and may be expected to continue. In one well publicized case, five embryos created and frozen by a couple pursuing in vitro fertilization were allegedly thawed and given to another couple, producing twins. See Susan Kelleher, Family Feels Whole After the Birth of a Baby Boy, ORANGE COUNTY REG., Feb. 4, 1997, at B1. The embryo creators' suit for custody of the twins, now eight years old, is pending. Id. Other alleged misappropriations by the same clinic have given rise to numerous lawsuits. See generally, Rebecca S. Snyder, Reproductive Technology and Stolen Ova: Who is the Mother, 16 LAW & INEQ. J. 289 (1998) (discussing cases).

fendants’ motion to dismiss, the court had no difficulty in finding that the Yorks had a property interest in the embryo and that their contract with the Jones Institute created a bailment.\textsuperscript{34} Consequently, the court ruled, the Jones Institute was obligated to return the embryo.\textsuperscript{35}

Vindicating the property interests of the Yorks against third parties was an easy result to reach. However, in \textit{Davis v. Davis},\textsuperscript{36} the opposing parties were divorcing spouses. They sought to conceive through artificial insemination and had frozen seven fertilized ova.\textsuperscript{37} Both their attempts to conceive and their marriage failed, and in the divorce proceeding, both sought control of the frozen embryos.\textsuperscript{38}

Mary Sue Davis had originally intended to use the embryos herself. Junior Davis wished them to remain frozen while he decided whether or not he wanted to become a parent. By the time the case reached the Tennessee Supreme Court, both Mary Sue and Junior had remarried, and Mary Sue’s intention had changed. She then wanted to donate the embryos to a childless couple, while Junior wanted them to be destroyed.\textsuperscript{39}

The Tennessee court rejected the idea that embryos could be the subject of property interests, finding that they occupied an “interim category” between property and personhood.\textsuperscript{40} Junior and Mary Sue nonetheless had “an interest in the nature of ownership, to the extent that they have decision-making authority concerning the disposition of the pre-embryos.”\textsuperscript{41}

The judicial trend, perhaps motivated by a desire to protect the interests of parties such as the Yorks, has been to accord gamete providers at least the functional equivalent of property rights. At least one court has held it “clear” that the

\begin{itemize}
  \item\textsuperscript{34} \textit{Id.} at 425.
  \item\textsuperscript{35} \textit{Id.}
  \item\textsuperscript{36} \textit{Davis v. Davis}, 842 S.W.2d 588 (Tenn. 1992).
  \item\textsuperscript{37} \textit{See id.} at 591-92.
  \item\textsuperscript{38} Some authorities characterize a fertilized ovum as a “pre-embryo” until fourteen days after fertilization. \textit{See} American Fertility Society, \textit{Ethical Considerations of the New Reproductive Technologies}, 53 J. AM. FERTILITY SOC. NO. 6, 31s-36s (June 1990); \textit{John A. Robertson}, \textit{Children of Choice} 101 (1994). For the sake of simplicity, I will use the term “embryo” regardless of maturity.
  \item\textsuperscript{39} \textit{See Davis}, 842 S.W.2d at 590.
  \item\textsuperscript{40} \textit{Id.} at 597.
  \item\textsuperscript{41} \textit{Id.}
relationship is "in the nature of a property interest." Given that gamete providers have rights to possess their embryos, to use them and to donate them to or withhold them from others, it is hard to deny that embryos constitute property.

The significance of finding that embryos constitute property may not be obvious. If property rights in reproductive materials and embryos are functionally preserved by the existing legal regime, it might seem that little turns on an explicit recognition of the property status of such material. Indeed, it might be supposed that preservation of the rights and avoidance of the rhetoric is desirable in order to avoid corrosive commodification. One might argue, then, that the best course of action would be to treat reproductive material as property but continue to speak gingerly of "quasi-property" and "interim categories." The next section of this article argues that explicit acceptance of the fact that reproductive material is legally property will have at least one salutary consequence. It will explain why parental rights cases come out the way they do; it will reveal property rights as the hidden variable of family law.

III. OF PARENTAGE AND PROPERTY

I have argued thus far that, at least with respect to reproductive material, property rights in the body are recognized both by law and by customary practice. The preceding analysis, admittedly, paints with a broad brush. There are some complexities I have not addressed. For example, the status of biological property still within the body will be important in later discussions. The objective in this section is to seek out the source of parental rights. There will be significant legal implications if the source of parental rights is, as I shall argue, property rights.

A clarifying note or two is in order at this point. First, the claim is not that parental rights are or resemble property


43. These rights are recognized by Davis and York.
rights. Although historically, the two were strongly associated, the idea of one person having property rights in another is repugnant to modern sensibilities, and it is emphatically not the proposition I advance. My contention is simply that the best way to determine who has parental rights in any given instance is to look to who held the property rights in the reproductive material at the beginning of gestation. Second, the argument that parental rights "really" flow from property rights is not an argument of metaphysics, one to be derived in pure abstractions unrelated to our culture and practices. Nor is it purely a normative argument that for various reasons the legislature should decide and proclaim that this relation between rights exists.

I propose that the model of parental rights flowing from property rights is the best interpretation of the existing legal doctrine. Although I will employ some thought-experiments, designed to highlight the inadequacies of other theories, the principal merit of my analytic framework is its ability to reconcile various judicial decisions that might seem otherwise inconsistent. I will then argue that this framework brings order to unsettled areas of family law created by new reproductive technologies, though the result will depend on the answers society gives to the various questions these technologies present.

A. The Source of Parental Rights

The parent-child relation is a cord woven of distinct threads. In what has been called the "customary" model, a husband impregnates his wife, who gestates the child; upon

45. By "gestation" I mean gestation culminating in birth. The distinction is important given the possibility of conception followed by uterine lavage, a technique that creates embryos within the body and then extracts them.
46. For example, Lehr v. Robertson, 463 U.S 248 (1983), held that biological fathers had a "unique opportunity" to forge a constitutionally protected relationship with their children, but Michael H. v. Gerald D., 491 U.S. 110 (1989), upheld a California law providing a conclusive presumption that the husband of a married woman was the father of children she bore.
47. It is often suggested that maternal and paternal rights are constructed differently. I believe the difference is overstated, and I attempt to show that on the model I put forth, mothers and fathers gain their rights in much the same way. See infra Part III.A.
birth, both spouses possess parental rights and responsibilities. The common law presumption of legitimacy awarded paternal rights to a woman’s husband regardless of whether extended physical absence made biological paternity impossible. Post-birth adoptions, although not existing at common law, are undoubtedly of ancient vintage. Adoption, however, works a transfer of parental rights and does not affect the initial vesting of parental rights. The focus of this article is on the original possessors of parental rights.

Genetic relation, gestation and social relationship are separate strands of the parental bond, but until relatively recently they were not readily separable. Modern technology now allows for a dizzying variety of variations on the customary model, and as the cord unravels, we must decide which thread to follow. This article suggests that we need a new thread—one based on property—for children can now be brought into the world under circumstances that baffle all the traditional indicia of parenthood.

When disputes over parental rights arise, a rational and predictable resolution is important not only to the parties before the court, but to all those seeking to create families by nontraditional means. Determining in whom parental rights initially vest is essential to this purpose because, unlike

48. See, e.g., Hill, supra note 3, at 355 n.10.
49. See Traci Dallas, Note, Rebutting the Marital Presumption: A Developed Relationship Test, 88 COLUM. L. REV. 369, 371 (1988). The presumption has been relaxed in most states by giving various parties the ability to rebut it.
51. See Hill, supra note 3, at 354 and 354 n.8.
52. Artificial insemination is actually quite old, but its widespread use is a creature of this century. Other techniques of assisted reproduction, such as in vitro fertilization, are much more recent arrivals.
53. See Hill, supra note 3, at 355 n.10 (setting out 16 permutations).
54. Fears that courts may be similarly baffled are not groundless. A California court recently confronted a situation in which a married couple had purchased sperm and an ovum from anonymous donors. See Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 4 Dist. 1998). The resulting embryo was implanted in a surrogate, who carried the child to term. Before birth, however, the couple divorced, and the ex-husband denied any responsibility for the child. The ex-wife sued for support and the trial court found that the ex-husband was not the legal father—and neither was the ex-wife. The child had no legal parents. Id. at 282. The trial court’s decision did not survive appellate review; the court of appeals characterized it as “extraordinary” and reversed. Id. Still, it reveals something of the confusion under which courts are operating. See generally Jerald V. Hale, From Baby M. to Jaycee B.: Fathers, Mothers, and Children in the Brave New World, 24 J. CONTEMP. L. 335 (1998).
property rights, parental rights are not freely transferable. Laws against baby-selling ensure that they may not be sold at all, and even private uncompensated transfers lack binding legal effect.

Of the elements mentioned above, genetic relation might seem to have the strongest claim of being the essential precursor of parental rights. Yet a glance at our laws shows that this is clearly not the case. Not only did the marital presumption vest parental rights in a man who might not be the biological father, but the Uniform Parentage Act, as well as most states, allow donors of reproductive material to avoid parental rights altogether.

Gestation is the next obvious candidate. This too proves inadequate, although the failure is not as clearly demonstrable. It is logically conceivable that a surrogate who gestates a couple’s embryo should thereby gain parental rights, even if the parties intend otherwise. Nonetheless, the principle that gestation alone does not suffice has fairly broad intuitive appeal. In any event, the cases have consistently denied that parental rights vest in a gestational surrogate, so gestation itself cannot be the fundamental determinant of parental status.

Social relationship cannot be the root of parental rights for the obvious reason that a social relationship takes time to

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56. See, e.g., Sporleder v. Hermes, 471 N.W.2d 202, 211-12 (Wis. 1991). Pre-conception “adoption” is a special case because no rights exist pre-conception, and it might appear that there can, thus be no transfer. However, if it were true that, for example, parental rights vested automatically in the genetic parents of a child, then any agreement to the contrary would work a real, if perhaps unacknowledged, transfer of the rights and be subject to governmental regulation.


58. See Anne Reichman Schiff, Frustrated Intentions and Binding Biology: Seeking AID in the Law, 44 DUKE L.J. 524, 533-39 (1994); Michael J. Yaworsky, Annotation, Rights and Obligations Resulting from Human Artificial Insemination, 83 A.L.R. 4th 295 (1991). Some state statutes provide that parental rights of sperm donors are avoided if and only if the sperm is provided to a licensed physician. This provision has upset some parenting agreements. See infra Part IV.A. But, the point is simply that if rights can be avoided (rather than terminated), genetic connection cannot be fundamental.

develop. Although gestation seems to play a role similar to social relationship in some of the case law, allowing the perfection of otherwise potential parental rights, 60 we have seen that gestation by itself does not suffice. 61 Where custody disputes arise over newborns, the outcome clearly cannot depend on a relationship that does not yet exist.

Finally, parenthood is not simply a creation of the state. While state law determines many of the parameters of the nature and vesting of parental rights, it operates within constitutional constraints. A state may not terminate parental rights without violating the Due Process Clause of the Fourteenth Amendment unless it shows that the parent is unfit, 62 and it may not vest those rights in whichever parties it selects. 63

The popular academic response to the unraveling of the parental tie is that the essential link is intention. 64 Yet intention, if taken as the fundamental source of parental rights, requires some odd epicycles in the theory of parenthood. For one, it suggests at first glance that unplanned pregnancies do not produce parents. One possible resolution to this difficulty is the claim that intention is just a trump; if no intention exists, biological parents are parents. 65 The problem with this resolution is that in many cases intention should not trump biology. We might imagine a disturbed couple, desperate for a grandchild, who sabotaged their

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60. See infra text accompanying note 108.
61. See supra text accompanying note 59.
63. For example, it would be clearly unconstitutional for a state to enact a law under which parental rights to newborns were assigned to whichever couple scored highest on a "parenting test." The basic problem with such a law would be its inconsistency with the constitutional restrictions on termination of parental rights. See, e.g., id. Of course, vesting rights in a different couple is not precisely the same as terminating the biological parents' vested rights. In some circumstances, such as artificial insemination, this distinction is meaningful: the donor's rights are not terminated but never come into being. But to be realistic, such a law would unquestionably be experienced as taking the low-scoring couple's child away, rather than as preventing them from having children. Even taken as a restriction on who may have children, the law would fall under Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), which recognizes a fundamental right to procreate.
64. See, e.g., Hill, supra note 3, (advocating intent-based understanding of parenthood); Schiff, supra note 58 (same); Marjorie, Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. REV. 297 (1990) (same).
65. See, e.g., Hill, supra note 3, at 387.
daughter's birth control. We find it harder, I think, to imagine that they thereby secure another child of their own.

A property-derived understanding of parental rights resolves the above two examples quite easily. With regard to unplanned pregnancies, it is clear that there has been no transfer of property rights, and parental rights will vest in the original owners of the reproductive materials. Similarly, where one party causes another to procreate, their intention to create a child does not alter the existing configuration of property rights.

An additional problem with the theory of intention as a trump is that it does not explain how intention can prevent parental rights from vesting. Where there are more than two parties contending for parental status, intention may be able to play such a role. Assuming a child can have only two parents and intention trumps, then the claims of the intending parents will defeat other claims. In the case of a single woman artificially inseminated with sperm from a known donor, however, it is not clear by what means the donor's rights are avoided.

Finally, if a physician either accidentally or intentionally inseminates a woman with donor sperm against her wishes or without her knowledge, we are again confronted with a

66. That in some cases intention cannot do so is quite clear. If an unmarried couple has intercourse following an agreement that the man shall have no parental rights or obligations, courts have been uniform in holding that such contracts have no legal effect. See, e.g., Straub v. Todd, 645 N.E.2d 597 (Ind. 1994); Estes v. Albers, 504 N.W.2d 607 (S.D. 1993). For a property-based analysis of such agreements, see infra Part V.A.3.

67. However, it seems relatively clear that on the intention model, there can be more than two intending parents. More significantly, if intention is not necessary to parental rights, it is somewhat mysterious how the existence of intention defeats otherwise adequate claims. In a surrogacy case, for example, it would seem more reasonable that the surrogate and the intending parents would all have parental rights. It could be maintained, of course, that if any claimant is an intending parent, intention becomes a necessary condition. This proposal too has difficulties. Consider a couple that has intercourse using contraception. One of them, desiring a child, foils the contraceptive device. It runs against intuition and justice to suppose that a woman could in this way obtain a child without allowing the man parental rights, and the case is still worse if the duplicitous party is the man. See, e.g., Hughes v. Hutt, 455 A.2d 623 (Pa. 1983) (holding allegations of fraud with respect to contraception irrelevant to paternity).

68. "Avoided" and not "extinguished." The issue of what might happen to parental rights that have vested is beyond the scope of this article.

69. The idea is distasteful, but the first recorded artificial insemination in
situation in which neither gamete provider intends to procreate. The woman clearly does not intend to; the donor intends to create a child but not to be its parent, and it is the intent to be a parent that the intention theorists look to. The intention model, as supplemented by the biological default required to explain allocation of parental rights in unintended pregnancies, apparently suggests that each becomes a parent. Yet it seems more plausible to argue that the donor, who would have no parental right if his sperm were provided to a willing recipient, does not become a parent in this case either.

Once again, understanding parental rights as rooted in property reaches results consistent with our intuitions and with existing law. Donors who relinquish property rights in their reproductive materials cannot become parents of the resulting children regardless of how those children are conceived.

The theory of intention-based parenthood is obviously attractive. In at least some cases, almost everyone would agree that the intentions of the parties should control. Indeed, the intention-based model is far and away the most popular academic position. But as the above discussion shows, its the United States apparently was performed without the woman's awareness or consent. See Gene Corea, The Mother Machine 12 (Harper & Row Publishers, Inc. 1985).

70. See supra note 65 and accompanying text.

71. Whether the physician might have support obligations is a different question.

72. Perhaps the most compelling cases are presented by nontraditional family arrangements. Under current law, lesbian co-parents may have difficulty defeating the parental claims of a known sperm donor who originally agreed to avoid parental rights. See Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994). Should the same lesbian couple later separate, the woman without a biological connection to the child may have no rights at all to continued contact, despite a co-parenting agreement. See, e.g., In re Z.J.H., 471 N.W.2d 202 (Wis. 1991). See generally Tsippi Wray, Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families, 21 Hamline L. Rev. 127 (1997). These situations could, of course, be greatly simplified by recognition of same-sex marriages.

73. In addition to the sources cited supra note 64, see, for example, Denise E. Lascarides, A Plea for the Enforceability of Gestational Surrogacy Contracts, 25 Hofstra L. Rev. 1221 (1997); Andrea E. Stumpf, Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 Yale L.J. 187 (1986). If the hegemony of the intent-based theory is less than total, it may be so only because the theory finds surrogacy contracts enforceable. See, e.g., Hill, supra note 3. The approval of surrogacy creates a schism among the feminist theorists: some maintain that intent-based parenthood nonetheless promotes gen-
operation is theoretically dubious.

On a more practical level, states wishing to retain some control over family arrangements might find the intention model alarming. For example, a state might want to limit the number of legally recognized parents to two, or set a minimum age for non-coital parenthood. If intention is conceded to be the trumping element of parenthood, restraining parenthood within such a conceptual bound would seem to require mind control: the state cannot simply refuse to honor certain contracts, or prohibit certain actions, but must prevent people from forming certain intentions, since it is intentions (not contracts or actions) that determine who is a parent. Proceeding on the basis of property rights, by contrast, allows the state some room to regulate. For example, a state may refuse to recognize multiple ownership of reproductive material or the transfer of such material to persons under a certain age.

None of this is to suggest that the intention model does not usually reach desirable results. That it so often does is undoubtedly a primary reason for its wide popularity. But it does not follow that intention should be the basic concept of our model. Intention may, and indeed should, be the animating spirit of our conception of parenthood, but without a body of law to inhabit, it is a wandering ghost.

Recognizing this, most intention theorists turn to contract law, for contract is the traditional legal vehicle for expressing intent. Yet contract law by itself is equally under equality. See, e.g., Shultz, supra note 64 (some find surrogacy unacceptable), and Radin, supra note 1, at 1932. For an insightful discussion of feminist reactions to new reproductive technologies, see Linda J. Lacey, "O Wind, Remind Him That I Have No Child": Infertility and Feminist Jurisprudence, 5 Mich. J. Gender & L. 163 (1998). For a rare criticism of the invocation of intent, see Janet L. Dolgin, The "Intent" Of Reproduction: Reproductive Technologies and the Parent-Child Bond, 26 Conn. L. Rev. 1261 (1994).

74. Both these goals make some public policy sense. It might be in the best interests of children to prevent the possibility of 20-person custody battles; it surely is to prevent six-year-olds from being legal parents. The possibility of pre-intercourse agreements about parental rights poses the same problem for a state wishing to regulate family structure.

75. It has been suggested that state laws regulating assisted reproduction may run afoul of the procreative liberty interest. See Robertson, supra note 38, at 38-40; Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 Harv. L. Rev. 669 (1985). This is an immensely complex issue, requiring first a stipulation of the meaning and scope of the right to procreate, and is addressed in the context of particular reproductive technologies.

76. See supra note 75.
availing because there is nothing that can be legally contracted for to produce the desired results. Contracts for transfer of parental rights are void and even criminal;\(^7\) that is the purpose of baby-selling laws.\(^7\) The proponents of intention-based parenthood do not suggest that sales of parental rights should be permitted. A standard surrogacy contract providing that the intending parents will pay expenses of pregnancy and that the surrogate will surrender the child upon birth may be made, at least in some states,\(^7\) and may be evidence of intent, but this is not the same thing as using contracts to determine in whom parental rights vest. A standard surrogacy contract does not contain any mechanism by which parental rights vest in the intending parents, rather than the surrogate. Nor does the intention model offer a means by which this might be done. Because the intentional model determines parenthood by looking to intent, fixing parenthood by contract would seem to require a contract for a certain intent. That is an unusual contract at best, and if the surrogate secretly breaches it (she accepts payments but intends all along to keep the child) no contract remedy can change her intent nor, presumably, alter the fact that her intent has made her a parent.

In order to allow contracts to determine the vesting of original holders of parental rights, our analysis must start at a different level. The problems created by the subjective and invisible nature of intent are resolved by the conventions of contract law, which tells us how to give intentions binding force. Contract, in turn, operates within parameters set by property law, which tells us what may be transferred, and by whom. This issue—the extent of the ability to transfer property rights in reproductive materials—is the proper focus of the debate over nontraditional reproduction. If parental rights are understood as flowing from property rights, then contractual transfers of property will legally determine in


\(^7\) See, e.g., \textit{R.R. v. M.H.}, 689 N.E.2d 790, 796 (Mass. 1998) (refusing to enforce surrogacy contract, comments that "[t]he statutory prohibition of payment for receiving a child through adoption suggests that, as a matter of policy, a mother's agreement to surrender custody in exchange for money (beyond pregnancy-related expenses) should be given no effect in deciding the custody of the child"); \textit{In re Baby M.}, 537 A.2d 1227, 1240-41 (N.J. 1988) (discussing New Jersey baby-selling statute).

\(^7\) See \textit{R.R.}, 689 N.E.2d at 793-94 (discussing state surrogacy laws).
whom the parental rights vest. This result allows intention
to have predictable legal effect and allows parties to collabor-
atively arrange parental rights within clear limits set by the
states. Therefore, viewing parental rights as flowing from
property rights is the best way to fulfill the aspirations of the
intention model while recognizing the authority of the states
to regulate the creation of the family. The remainder of the
article argues that such a view is not only normatively desir-
able but also positively accurate.

IV. THE THEORY APPLIED: COITAL REPRODUCTION AND
EXISTING CASELAW

Part IV and Part V of this article argue that a property-
based understanding of parental rights provides the best way
to grapple with the issues presented by nontraditional repro-
ductive techniques. Part III has already suggested that such
an understanding avoids some of the theoretical difficulties of
the intention model. But normative appeal and theoretical
clarity are not, by themselves, enough. Whatever the attrac-
tions of a different understanding of parenthood might be,
they are unlikely to be persuasive if the understanding is
radically different from our customary approach. The claim
of this article has a positive dimension as well. Not only does
the property model provide the best path into the future, but
it furnishes the best understanding of the past. The tradi-
tional understanding of the origins of parental rights holds
that a mother’s rights come from biology, and a father’s from
relation to the mother. This part argues, to the contrary,
that both parents’ rights stem from property.

A. Property and Parental Rights

The traditional understanding of parental rights derives
from two ancient principles, the presumption of biology, and

80. See, e.g., Janet L. Dolgin, Just a Gene: Judicial Assumptions About Par-
enthhood, 40 U.C.L.A. L. REV. 637, 642-644 (1993); Hill, supra note 3 at 370, 372
(stating that while pervasive legal principle provides that “the mother of the
child is the woman who bears the child,” fatherhood “is a status accorded to
men who entertain certain kinds of relationships with the mother and the
child”); Mary L. Shanley, Unwed Fathers’ Rights, Adoption, and Sex Equality:
Gender-Neutrality and the Perpetuation of Patriarchy, 95 COLUM. L. REV. 60,
68 (1995) (“[U]nder the common law, a man’s legal relationship to his offspring
was determined by his relationship to their mother.”).
the presumption of legitimacy, which respectively determined the parental rights of mothers and fathers. The presumption of biology "reflects the ancient dictum 'mater est quam gestation demonstrat' (by gestation the mother is demonstrated)." It is not clear from this phrasing whether the focus is on genetic or gestational relationship, and it may even be wondered if the concept of genetic connection had an independent existence. Historically, gestation proved genetic parentage beyond doubt, so it was unnecessary to distinguish between gestational and genetic mothers.

Because of its ambiguity, the historic principle can be read to rely on either genetics or gestation. Courts have differed in their resolution of the issue in response to the modern ability to separate the two. Johnson v. Calvert held that either genetics or gestation could be used to establish a mother-child relationship and that intention should only be invoked to break the tie. Belsito v. Clark, by contrast, held that genetic contribution controlled and the egg donor had exclusive maternal rights. Identifying with certainty whether the presumption of biology is historically premised on genetics or gestation may be impossible to do. However, a sensible interpretation, which is consistent with either alternative, may be fashioned from a property-based understanding.

On this account, the presumption is simply that the woman who bears a child holds property rights in the embryo at the beginning of gestation. This could be so either because the egg was originally hers, which would historically be the case, or because an embryo had been given to her. The growth of in vitro fertilization and surrogacy arrangements has made the proposition that women gestate only their own embryos less universally true. Appropriately, it has produced a corresponding erosion of the presumption, as Johnson shows. Johnson's use of the intentions of the parties, seen

81. Hill, supra note 3, at 370.
83. The court found that both the ovum donor and the gestational host qualified as mothers under the language of the California version of the Uniform Parentage Act and, refusing to hold that both had maternal rights, awarded them to the egg provider. Id.
85. See Johnson, 851 P.2d at 781 (disclaiming reliance on evidentiary presumption).
as intentions about the ownership interests in the embryo, tallies well with this understanding. To recast Johnson's intention-based analysis within the property framework: the presumption is that the woman who bears a child holds property rights in the embryo at the beginning of gestation. But if the parties have arranged otherwise—if the surrogate has received the embryo without gaining rights to it, as is clearly the case in gestational surrogacy—Johnson will give legal effect to the actual arrangement despite the presumption. It is thus relatively easy to see the presumption of biology in both its historic and modern forms as providing for maternal rights derived from property rights.

Paternal rights, at first glance, are somewhat harder to assimilate into the property model. The presumption of legitimacy awards paternal rights to the husband of the woman who bears the child. Historically, the presumption was irrebuttable and could not be defeated by the fact that the husband was not present at the time of conception. Now statutory, the presumption is still irrebuttable in some states, and other states limit the parties who may offer rebuttal.

This legal framework might suggest that paternal rights are traditionally derived from social relationships, which seems to be the dominant understanding. However, it is equally plausible to see these paternal rights as derived from property rights. Historically, the marital relation was understood to merge man and wife—or rather, to merge the woman into her husband. The doctrine of coverture rendered all of the wife's property the husband's. It logically follows that a husband would have property rights in his wife's eggs and


87. See In re Findlay, 170 N.E. at 472; Hill, supra note 3, at 372-74; Schiff, supra note 58, at 529-30. An exception to the presumption existed where the husband was impotent. This is hard to explain as anything other than a rule that parental rights could not vest in an impotent man, but as such it is merely a legal reflection of what would have been an historical fact.

88. See Hill, supra note 3, at 373; Schiff, supra note 58, at 530 n.20.

89. See supra note 82.

90. JESSE DUKEMINIER ET AL., PROPERTY 367 (Little, Brown & Company 3d ed. 1993); Dolgin, supra note 73, at 645 n.33.

91. See Shanley, supra note 80, at 67-68.
consequently parental rights to resulting children. Furthermore, the biological father of a child conceived by an adulterous union would not have such rights. This result may be understood as following from a rule that third parties are estopped from asserting their rights to genetic material gestated by a married woman, or that paternal rights cannot vest outside of marriage, or perhaps simply that parental rights are derived solely from women's reproductive material.\textsuperscript{92}

Policy considerations favoring the preservation of the marital relationship and the avoidance of the stigma of illegitimacy\textsuperscript{93} undoubtedly played a role in the construction of the traditional legal framework, and I do not mean to claim that the framework follows directly from property rules unshaped by such values. The point is simply that the inflexible laws of paternity were historically matched by, and can be understood as consequences of, similarly strict laws concerning marital property: if the wife's legal identity was absorbed by the husband's, her biological, and thus legal, children would naturally be his legal children. We should not accept the values that shaped the law of parental rights, but we simply blind ourselves if we deny their role.\textsuperscript{94}

The rigidity of the law with respect to paternity and marital property has significantly decreased,\textsuperscript{95} and it might be wondered whether the application of the property model is limited to ancient regimes we have done well to overthrow. Given the diverse status of the presumption of legitimacy in the laws of the several states,\textsuperscript{96} it is impossible to maintain that property law necessarily determines family law.\textsuperscript{97} That

\textsuperscript{92} These latter rules are suggested by the fact that at common law, illegitimate children had no rights against their biological fathers and could not be legitimized by their parents' subsequent marriage. \textit{Id.} \textit{See also} Stephen L. Sass, \textit{The Defense of Multiple Access (Exception Plurium Concubentium) in Paternity Suits: A Comparative Analysis}, 51 TUL. L. REV. 468, 498-99 (1991).

\textsuperscript{93} \textit{See} Hill, supra note 3, at 372. These policy concerns may explain the presumption of legitimacy for children born into a marriage; they do less to explain why men were shielded from all responsibility for children they sired outside a marriage. \textit{See} Shanley, supra note 80, at 69.

\textsuperscript{94} \textit{See} Shanley, supra note 80, at 67.

\textsuperscript{95} \textit{See} DUKEMINIER ET AL., supra note 90, at 368 (discussing the Married Women's Property Act); CAL. EVID. CODE § 621(c)-(d) (West Supp. 1991) (repealed 1992) (allowing husband or wife to rebut presumption of legitimacy).

\textsuperscript{96} \textit{See} supra note 86-88 and accompanying text.

\textsuperscript{97} An investigation of the relationship between state laws of paternity and marital property might turn up interesting correlations, but is unnecessary to
is not my contention. It suffices to note that the basis for a property-derived understanding of the presumption of legitimacy still exists: spouses retain property rights in each other’s bodies. 98

A more serious test for the property model is provided by the recent case law concerning the rights of unwed fathers. A line of Supreme Court cases culminating in Lehr v. Robertson 99 holds that unmarried biological fathers do not automatically enjoy full parental rights.

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship . . . . 100

The children of biological fathers who do not grasp the opportunity may constitutionally be adopted following only a showing that such resolution is in the best interests of the child. 101 Because adoption terminates parental rights, and because parental rights may not constitutionally be termin-

the argument of this article and somewhat outside its scope. That such correlations could exist does not seem implausible; reform in both areas is, if not linked, likely driven by similar social forces.

98. For example, spouses have the primary right to donate each other’s organs after death. See Uniform Anatomical Gift Act § 3(a), 8A U.L.A. 13-14 (Supp. 1990). An interesting consequence of the property model is that, given the current state of marital property law, a “reverse” presumption of legitimacy might apply. Historically, coverture gave husbands rights to their wives’ property but not the reverse; thus women did not have parental rights to their husbands’ illegitimate offspring. If the persistence of the presumption rests on the fact that spouses have property rights in each other's bodies, the current mutuality should imply that women are presumptive mothers to their husbands' children by other women. This argument has been entertained, though skeptically, by at least one court. See In re Moschetta, 30 Cal. Rptr.2d 893, 896-97 (Cal. App. 1994). The difficulty with it is that the presumption is nugatory if rebuttable, and if conclusive it divests the other women of rights to property within their bodies, which might well be unconstitutional. It deserves serious consideration nonetheless, for it represents an analytical attempt to bring gender equality to this area of the law, something this article will suggest is sorely needed. See infra text accompanying notes 218-226; see also Buzzanca v. Buzzanca, 72 Cal. Rptr.2d 280, 282 (Ct. App. 1998) (suggesting similarity between artificial insemination and gestational surrogacy).


100. Lehr, 463 U.S. at 262.

101. Quilloin, 434 U.S. at 254-56.
nated without a showing of unfitness, the best reading of this line of cases is that unwed fathers who do not develop relationships with their children never attain full constitutionally protected parental rights.

This legal regime might seem difficult to assimilate within the property model. If a man has property rights in his sperm, and if parental rights flow from those property rights, why should unwed fathers not enjoy full parental rights? The answer, again hidden by the historic convergence of gestation and biology, is that the parental rights that vest at the beginning of gestation are only potential. Something more is required to perfect them. After Lehr, this is clearly the doctrine with respect to unwed fathers. What is not generally noted, and obscured by the confluence of gestation and genetics, is that this condition should, constitutionally, apply equally to men and women.

This proposition has never been voiced by a court, and might seem contrary to Lehr, which upheld a statute that granted veto power in adoption proceedings to all illegitimate mothers and only some putative fathers. Yet it seems a requirement of equal protection. Lehr is best understood as resting on the implicit premise that states may provide that gestation suffices to perfect parental rights. That is, a mother's nine months carrying a child may constitute the sort of "substantial relationship" that Lehr demands. Marriage, less controversially, does the same for both spouses: married parents each enjoy full parental rights, both at common law and under the statutory regimes of most states.

102. See id. at 255.
103. See Hill, supra note 3, at 377-78.
104. The "biological connection" mentioned by the Lehr court is probably intelligible only as a property interest. If the connection is understood as a genetic relationship, then unwed fathers' twins must have the same rights.
105. Lehr, 463 U.S. at 262.
106. See id. at 266.
108. Lehr, 463 U.S. at 267. This point was conceded arguendo by the Caban majority, see 441 U.S. at 389, and explicitly put forth by the dissents. Caban, 441 U.S. at 398-99 (Stewart, J., dissenting); Id. at 404 (Stevens, J., dissenting). A test case for this reading of Lehr would require application of a gender-based adoption consent distinction to an unwed couple that had procreated via gestational surrogacy.
109. See supra text accompanying notes 81-88.
The presumption of legitimacy and the unwed father cases converge on the question of a man's rights with respect to children he fathers with a married woman. In such cases, an irrebuttable presumption might seem to deny the natural father the ability to perfect his parental rights, even if he had taken actions to perfect the "potential" parental rights defined by Lehr.

The Supreme Court affirmed the constitutionality of a law denying the putative father the ability to rebut the presumption against procedural and substantive due process challenges in Michael H. v. Gerald D. The failure of the substantive due process claim is easily understood from the property perspective. The law at issue simply prevented men from asserting continued property rights in reproductive material gestated by married women. Since even potential parental rights never vested in Michael, and since the law did not broadly restrict his ability to procreate, no fundamental right was at issue.

An equal protection claim, which Michael did not raise, is harder to dismiss, and the Colorado Supreme Court, in R. McG., held a similar law unconstitutional on this ground. That court accepted the equal protection argument that the statute discriminated by allowing natural mothers (the adulterous wives) but not putative natural fathers (their lovers) to rebut the presumption. If the statute is understood as working at the level of property, this argument is not overwhelming. The state's interest in protecting the marital union is ample justification for preventing men from asserting continued property rights. On this understanding, their parental rights never vest and are never violated. The state may also allow the natural mother and presumed father (and, under some statutes, the child) to hold the natural father responsible by effectively allowing them to determine whether he will be treated as a legal father.

The equal protection argument that has bite relies on a

111. See infra text accompanying notes 253-255 (discussing procreative liberty).
113. R. McG., 615 P.2d at 670-72.
114. See supra text accompanying note 111.
The newest property

comparison between betrayed wives and betrayed husbands. These people are similarly situated in a way that the married natural mothers and the unmarried natural fathers in *R. McG.* were not. If the betrayed husband is presumed the father of his wife’s adulterously conceived children, there is a question as to why the betrayed wife does not enjoy the same presumption with respect to her husband’s adulterously conceived children. Where the woman with whom the straying husband conceives the child is married, the answer may be simple: in choosing between the two marriages, the state minimizes disruption by leaving children with their gestational mothers. Where she is unmarried, the principle that defeats the wife’s claim (and, conversely, grants the unmarried female lover parental rights but denies them to an unmarried man who conceives a child with a married woman) is not obviously apparent.

Historically, the discrepancy in treatment is almost certainly due to the visible fact of gestation: it would have seemed absurd for the law to provide that a wife who does not conceive or give birth is the mother of a child conceived and birthed by her husband’s unmarried lover. This causal explanation, however, does not suffice as a justification. If the presumption of legitimacy prevents parental rights from vesting in the first place, as I have argued, then the fact of gestation is irrelevant. This is so because the effect of gestation, as I have analyzed it, is merely to perfect existing parental rights; gestation, by itself, does not create the rights. The best justification, which is not necessarily an entirely satisfactory one, is that a woman conceiving with a married man retains her reproductive material within her body. For parental rights not to vest in her, she must be deprived of rights to biological property within her body as a consequence of conceiving with a married man—an approach whose constitutionality must be doubtful. Conversely, a rule which

115. *See supra* text accompanying notes 112-113.

116. The differential in treatment is not insignificant. It appears even more starkly when the status of the lovers of adulterous spouses is compared. Here, the rule allows women but not men to exercise parental rights to children conceived with married partners. In addition, where both progenitors are unmarried, the woman may prevent the man from attaining parental rights simply by marrying another man before the child is born. *See U.P.A. § 4(a)(1), 9B U.L.A. 298 (1987).*

117. This sort of expropriation is in some ways quite similar to the stomach
provides that men constructively abandon sperm to married women does not divest them of rights to property within their own bodies and, therefore, is not as constitutionally repugnant. 118

The above discussion certainly raises as many questions as it answers. The interaction of the presumptions of biology and legitimacy with modern techniques of reproduction is complex and will be analyzed in detail below. The aim of this part has been merely to argue that the existing legal treatment of coital reproduction is well explained by the property model of parental rights. The next test for the property model is its application to new reproductive techniques.

V. THE THEORY APPLIED: NONTRADITIONAL REPRODUCTION

The law governing nontraditional reproduction is unsettled. This is to be expected, given the novelty of the techniques employed. The lack of uniformity in the law makes it impossible to argue that current legal treatment is best understood as hewing to any particular understanding of parenthood. Therefore, the article now takes a normative tack, analyzing the issues posed by the new reproductive technologies from the perspective of the property model. In some instances, this produces clear legal results. In most instances, however, it merely suggests results that should be obtained in the absence of state regulation. I do not intend to enter the policy debate concerning the value and advisability of such regulation, although I do note constitutional concerns and discuss the form that such regulation must take.

A. Artificial Insemination

Artificial insemination is the oldest technique of non-
Despite its long history, however, the law governing the rights of donors and recipients is far from uniform. Much turns on the marital status of the recipient, and this factor provides a convenient disjunctive framework for analysis.

1. Married Recipients

Where the semen recipient is married, the Uniform Parentage Act (UPA), and fifteen state laws, provide that if the insemination is performed under the supervision of a licensed physician and with the consent of the husband, the husband is deemed the father of any resulting children. The donor retains neither rights nor obligations of parenthood. The more recent Uniform Status of Children of Assisted Conception Act (USCACA), and fifteen other state laws, direct the same result and omit the requirement of physician supervision. The husband may avoid legal fatherhood only by filing an action within two years of learning of the child's birth and showing that he did not consent to the insemination. This is roughly similar to what would be produced by the presumption of legitimacy in the absence of any specific legislative directive. Since the presumption itself is intelligible in the property model, this treatment of artificial insemination is as well. Legislatively granting the husband paternal rights also seems to be sound policy: if he has

119. See, e.g., Doe v. Doe, 710 A.2d 1297, 1306 (Conn. 1998). Artificial insemination is a procedure in which sperm is introduced into a woman's cervical canal or uterus by non-coital means.
126. One distinction is that only a nonconsenting husband possesses the effective power to rebut the presumption. The more significant discrepancy is that even if the husband does not consent, the donor holds neither rights nor responsibilities. See U.S.C.A.C.A. § 4, 9B U.L.A. 189 (West Supp. 1997). This treatment of donors maybe understood to reflect a presumption that donors intend to alienate their reproductive material. The wisdom of converting this presumption into a substantive rule of law unalterable by contract is questionable.
127. See supra text accompanying notes 89-97.
consented to the insemination, reasons for denying him parental status are difficult to conjure. More difficult issues arise in cases featuring unmarried recipients.

2. Unmarried Recipients

The USCACA denies parental rights and obligations to donors regardless of the marital status of recipients.\(^\text{128}\) Only fifteen states have adopted this broad avoidance of paternity,\(^\text{129}\) and some courts have taken the very different tack of analyzing conflicts between donors and recipients as though conception had taken place by intercourse.\(^\text{130}\) In *Jhordan C. v. Mary K.*,\(^\text{131}\) for example, the California Court of Appeals held that the parties' intentions were irrelevant and that the donor was the child's legal father because the semen had not been provided to a licensed physician, as required by the California statute. The court in *Thomas S. v. Robin Y.*\(^\text{132}\) similarly granted an order of filiation to a donor over the recipient's objections despite an agreement that the donor would have no parental rights or obligations.\(^\text{133}\) *Leckie v. Voorhees*,\(^\text{134}\) by contrast, held that parties' express intentions to avoid donor parental rights are to be given effect.\(^\text{135}\)

The ability of parties to contract around laws avoiding donors' rights is another area of doctrinal uncertainty, although the tendency is to uphold such agreements. In *In re R.C.*,\(^\text{136}\) the Colorado Supreme Court honored the parties' intentions, reasoning that the legislature had not intended to prevent contractual stipulation. *McIntyre v. Crouch* went so far as to hold that a law preventing donors from obtaining parental rights would be unconstitutional as applied to a donor who had contracted for such rights.\(^\text{137}\)

The above issues are not very difficult if the property


\(^{129}\) See supra notes 123-124.

\(^{130}\) See Schiff, supra note 58, at 538-39.


\(^{133}\) See *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377 (Fam. Ct. 1993). The New York Supreme Court did not discuss the agreement and persistently characterized the issue as one of termination of parental rights. See 618 N.Y.S.2d at 300-01.


\(^{135}\) *Id.* at 521-23.


model is applied. The only important fact to keep in mind is that statutes and contracts regarding donor's rights determine in whom parental rights vest; they do not transfer or terminate rights. Given that such contracts do not attempt something that states have forbidden, they should generally be effective. To achieve the desired results, they need only specify who holds property rights in the reproductive materials, and this is just a garden-variety contract of sale. For much the same reason, however, statutes that dictate results unalterable by contract will likely withstand constitutional challenges. Such statutes merely provide non-waivable rules of property, and given that these rules usually allow the parties ample means to effect their procreative intent, they do not unduly burden procreative liberty.

The wisdom of statutory rules that cannot be avoided by contract is another question. Those statutes that limit the power of contract typically do so by conditioning parental status on the presence or absence of a physician. If the sperm is provided to a physician, the donor is not considered the father; if not, he is. Assuming that most donors do not desire parental status, this might encourage the use of a physician. But scholars tend to believe that physician involvement serves no medical purpose, and in reality most in-

139. See supra text accompanying note 55.
140. See infra Part V.C.1. Defining the scope of the procreative liberty interest is obviously essential to an examination of the constitutional questions posed by state laws assigning parental status. Supreme Court decisions, notably Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), suggest a fundamental right to decide whether to “bear or beget a child.” The separability of different components of the procreative process forces us to ask which are the fundamental elements of the right; I shall argue that the right is in essence the right to decide whether or not to create a child of whom one is a legal parent.

From this perspective, the laws at issue in Jhordan C. and McIntyre are constitutional because they do not prevent any person from making the choice; they merely prescribe procedures that determine legal consequences. The Jhordan C. statute allowed for avoidance of donor rights by doctor supervision; the McIntyre statute allowed for retention by coital reproduction. The McIntyre statute would be unconstitutional as applied to a man who could not reproduce coitally but could donate sperm; this, however, was not the case. Further issues, notably the relationship between the rights of privacy and procreation, are considered as they arise.

141. See supra text accompanying notes 120-122.
142. See Schiff, supra note 58, at 545-49.
spermatizations take place without a doctor's supervision. Given these two facts, requiring physician participation to avoid donor rights seems to amount simply to a trap for the unwary. Conversely, the purpose behind preventing donors from retaining rights when the sperm is provided to a physician is obscure. It is hard to imagine what interest the state might have in preventing men from becoming fathers by insemination rather than by coitus. These are, however, simply policy questions, and their resolution does not turn on a particular understanding of parental rights.

The more serious problem created by the use of artificial insemination centers on its use by nontraditional families—notably, lesbian co-parents. The fact that same-sex marriages are not legally recognized hampers lesbian co-parents faced with filiation actions by sperm donors. Care in the arrangement of the insemination should be able to avoid the donor's rights reliably. The more intractable problem is that the unavailability of marriage also prevents parental rights from vesting in the unrelated partner. The consequence of this is that only the biological mother is a legal parent, and the non-recipient's rights upon the dissolution of the relationship may be quite limited. Nancy S. v. Michelle G. featured a custody battle between a lesbian couple. Two children had been conceived by artificial insemination, and the court, holding that the biological mother was the only legal parent, affirmed a decision awarding her sole custody.

Existing law offers few options for lesbian couples trying

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144. See generally Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L. J. 459 (1990).


146. At least one commentator has suggested that the relationships of "involved donors" should be accorded some measure of legal protection against the wishes of lesbian co-parents. See Fred A. Bernstein, This Child Does Have Two Mothers... and a Sperm Donor with Visitation Rights, 22 N.Y.U. REV. L. & SOCIAL CHANGE 1 (1996). The fair way to evaluate this proposal, I suggest, is to imagine it applied to a married heterosexual couple.


149. See Id.
to give legal effect to a mutual parenting agreement.\textsuperscript{150} They may endure unnecessary medical procedures to allow one partner to gestate the other's fertilized egg, although the legal consequences are uncertain.\textsuperscript{151} They may also arrange for the adoption of the child by the unrelated partner, and such arrangements have been held to create joint parental rights.\textsuperscript{152} The property model allows a substantially simpler route to vesting parental rights in both partners: the unrelated partner can simply obtain property rights in the donor's semen.\textsuperscript{153} Recognizing parental rights as derived from property rights allows certainty and simplicity in effectuating the intentions of lesbian co-parents.

\textsuperscript{150} These may take the form of contracts attempting to allocate rights in case of the dissolution of a relationship, see, e.g., Sporleder v. Hermes, 471 N.W.2d 202, 211 (Wis. 1991) (holding co-parenting contract void), or they may be more informal understandings. In Holztmann v. Knott, 533 N.W.2d 419, 434 (Wis. 1995), the court partially overruled Sporleder, holding that courts may exercise their equitable powers to grant visitation rights on the basis of a co-parenting agreement. This is still a far cry from granting such agreements legal effect.

\textsuperscript{151} Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), held that gestation and biological relation both sufficed to establish a mother-child relationship, and that intention must be considered to break the parity. If the parties' intentions were that both should have parental rights, a court might so find. \textit{But see} Belrito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994) (holding biological relationship dispositive in gestational surrogacy case).


\textsuperscript{153} The ability of an unmarried woman to purchase donor sperm for insemination is not absolutely established, although it has been suggested that restrictions are unconstitutional. \textit{See generally} Holly J. Harlow, \textit{Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor}, 6 S. CAL. REV. L. & WOMEN'S STUDIES 173 (1996). In cases where a lesbian couple is trying to arrange parental rights, however, that hurdle has obviously been crossed. In such situations, there is no clear reason not to treat a woman in possession of donor sperm as a donor if she then provides the sperm to her partner. If men can provide sperm to women and arrange to avoid or retain parental rights by contract, equal protection demands an explanation for why women cannot as well. One answer would be a state policy against two-mother families, but such arrangements are relatively widespread, as the mere existence of the lesbian co-parent cases demonstrates. The effect of the discrimination is thus merely to create an imbalance of legal power within such families—hardly a substantial state interest. The property model, of course, suggests that such women should be treated exactly as male donors. One of the most interesting consequences of new reproductive technologies is that they reduce the effect of the traditional sex roles imposed by biology and offer the possibility of true gender-neutrality in law. \textit{Cf.} Buzzanca v. Buzzanca, 72 Cal. Rptr. 280, 282 (Ct. App. 1998) (noting that gestational surrogacy provides "no reason to distinguish between husband and wife").
The principle of effectuating the parties' intentions leads to the overwhelming question of artificial insemination: why should it be treated differently from sexual reproduction? Here again, I will argue, the property model explains the existing law better than its competitors and gives both states and private parties greater ability to produce predictable legal results.

3. Distinguishing Coitus

What distinguishes intercourse from artificial insemination? In the majority of cases, artificial insemination is undertaken with the intention that the donor shall have no parental rights, and intercourse is not.\(^{154}\) If this is the relevant distinction, however, then the different legal consequences are simply a matter of effectuating intent, and parties should be able to provide otherwise by contract. However, while sperm donors have had some success in asserting parental rights provided for by contract,\(^{155}\) male partners to intercourse have uniformly failed in similar contractual attempts to avoid parental status, as the next paragraph discusses. That seems the correct result; allowing men to do so would seriously undermine the principle that support obligations are non-waivable. Therefore, this section argues that the property model provides states with theoretically sound methods of combating agreements designed to avoid parental obligations.

Cases thus far have not presented the strongest fact patterns. In Straub v. Todd,\(^ {156}\) the couple engaged in a sexual and emotional relationship both before and after the child's

\(^{154}\) With respect to artificial insemination, U.S.C.A.C.A. § 4 codifies the tendency by providing that, as a general rule, donors are not treated as parents. With respect to intercourse, people often intend not to produce children, but less often intend to produce children of which they are not the parents. The common sense psychological intuition underlying both tendencies is that women who wish to have a child are more likely to want to conceive through intercourse if the prospective biological father is someone with whom they intend to raise the child. This would certainly be true, for example, with women married to infertile men; they are likely to prefer artificial insemination to intercourse with a donor. The tendencies are of course not universal. See, e.g., In re R.C., 775 P.2d 27 (Colo. 1989) (artificial insemination with alleged agreement retaining parental rights); Straub v. Todd, 645 N.E.2d 597 (Ind. 1994) (intercourse with written nonsupport agreement).

\(^{155}\) See supra text accompanying notes 136-137.

\(^{156}\) 645 N.E.2d 597 (Ind. 1994).
birth. Todd (the woman) wanted a child, and when Straub
demurred, she secured his cooperation by signing an agree-
ment stipulating that he would "not be held responsible fi-
nancially or emotionally." In Estes v. Albers, the parties
were friends, and the man agreed to father a child after the
woman orally promised not to hold him responsible for sup-
port. He never attempted to deny legal parentage and in fact
stipulated it on several occasions. On their facts, then,
both cases were relatively easy: contracts eliminating support
obligations are void as against public policy. The harder
question arises where the agreement purports to prevent pa-
rental rights from vesting.

Neither Straub nor Estes necessarily resolved the issue
of whether a male partner to intercourse can avoid parental
rights, but both men argued that they should have the legal
status of sperm donors. Both courts emphatically rejected
the argument, although it is not clear whether their stated
reasons suffice to support a general rule preventing coital
partners from avoiding parental rights. Estes was an espe-
cially easy case because the man had stipulated to parental
status; this fact will generally not be present.

In Straub, the Indiana Supreme Court mustered three
arguments to support its result. First, Indiana had no stat-
te regulating the rights and obligations of sperm donors,
and the parties had not complied with the physician involve-
ment provision of the UPA. This argument provides slen-
der support for a general rule because many states have
eliminated the requirement of physician involvement, and
some have allowed parties to contract around a statute im-
posing such a requirement. Second, the Straub court found
that the agreement was "nothing more than paper-shuffling
to achieve...deprivation of support." This argument can
as easily be applied to sperm donation: a couple may have a
relationship of any sort, apart from marriage, and still ar-
range for the man to have no support obligations for a child

157. Id. at 598.
159. Id. at 608-09.
160. See Straub, 645 N.E.2d at 599-600; Estes, 504 N.W.2d at 609.
161. Straub, 645 N.E.2d at 599; Estes, 504 N.W.2d at 609.
162. Straub, 645 N.E.2d at 601.
163. Id. at 601 n.9.
conceived by insemination. Third, the court noted that intercourse served as consideration for the agreement, a traditional ground for holding a contract void. This is not readily apparent from the facts of the case, and could certainly be avoided in future cases by a well drafted contract: a woman could, for example, pay for the sperm.

A final argument, which has been used to reject claims of "contraception fraud," is that some conduct is so intensely private that courts should not intrude. In a number of cases, men have tried (with no success) to avoid support obligations, and even to recover punitive damages, on the grounds that women lied to them about their use of contraception. The courts' refusal to intervene is a consequence of the privacy of intercourse. The problem with this argument, as applied to pre-intercourse agreements about parental status, is that artificial insemination, involving the decision "to bear or beget a child," is equally private from a constitutional perspective. If courts may not "intrude" to enforce contracts providing that men shall have no parental rights to children produced by intercourse, it is hard to see how they may do so to enforce such contracts with respect to artificial insemination. Conversely, given that they can do so with artificial insemination, it seems clear that constitutional privacy cannot prevent them from doing so with respect to intercourse.

Existing law thus seems to provide no theoretically adequate barrier to such agreements. Indeed, on the intention model, states would be powerless to avoid their legal effect. Even if unenforceable on public policy grounds, a contract purporting to avoid parental rights is good evidence of intent, and if intent is fundamental, it determines in whom the rights vest. The property model, by contrast, provides states with several methods of rendering such agreements ineffectual.

First, a state could provide that property inside the body

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164.  Id. at 601.
168.  See Stephen K., 164 Cal. Rptr. at 619.
This would prevent men from transferring property rights to semen in their bodies, and parental rights would vest in them at conception. This is a broad rule with far-reaching and perhaps undesirable consequences, as the discussion of surrogacy will show. Second, states could dictate that delivery of semen to unmarried women via intercourse is ineffective as a transfer of property rights. This rule would be the converse of that applicable to married women under the presumption of legitimacy. Finally, state law could stipulate that transfer of semen via intercourse is effective as to parental rights, but that the original owner retains liability for support. This rule, the most narrowly tailored to the state interest in ensuring support, may seem odd in its separation of rights and liabilities. But there is no obvious policy reason to prevent parties from divesting themselves of the rights. Furthermore, the retention of liability without ownership exists in our law already, for example, in the treatment of environmental liability under CERCLA. Again, I make no argument as to the wisdom of these several approaches. The claim is simply that the property model allows clarity and predictability in the determination of parties' rights, and permits states to pursue policy objectives better than existing alternatives.

B. Surrogacy

Surrogacy contracts provide for the gestation of an embryo by a woman who promises to surrender the child at birth to the intending parents. Ordinary surrogacy arrangements feature artificial insemination of the surrogate with sperm from the husband of the intending family. Gestational surrogacy involves in vitro fertilization of an embryo and implantation in a surrogate who has no genetic connection to the resulting child. Many different permutations of

170. See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 936 (1982) (arguing that it is appropriate "to call parts of the body property only after they have been removed from the system").
171. See infra text accompanying notes 189-192.
172. See supra text accompanying note 111.
175. See id.
these models are imaginable, depending on the sources of the gametes and the marital status of the surrogate and intending parent(s). This discussion will focus on the ordinary arrangement.

The cramping effect of non-waivable rules about parental rights becomes immediately apparent when surrogacy is compared to artificial insemination. The same rules that honor the parties' intentions in the ordinary artificial insemination case—by avoiding the donor's rights and awarding parental status to the recipient's husband—thwart them in the ordinary surrogacy case.

To some extent, these consequences can be avoided within the existing legal framework. The husbands of married surrogates can execute affidavits of non-consent, and intending fathers can contractually provide for parental rights. However, parties attempting to determine parental rights by contract encounter difficulties with two further aspirations of surrogacy agreements. Under current law, they cannot prevent parental rights from vesting in a biologically related surrogate, and they cannot cause rights to vest in an intending mother that does not provide the gametes. These two limitations on the efficacy of contract become important in two distinct cases: (1) conflicts between the surrogate and the intending parents and (2) conflicts between the intending parents after performance of the surrogacy contract.

One important point must be made before beginning the analysis of these two conflicts. My intent is to examine the legal consequences of a surrogacy contract from the property

176. For a few examples, the gamete providers could be anonymous donors. The intending parents could be a single man or woman, or a gay couple.


178. See McIntyre v. Crouch, 780 P.2d 239, 244 (Or. App. 1989) (law preventing a donor's contractual retention of rights unconstitutional). In re Adoption of Matthew B.-M., 284 Cal. Rptr. 18 (Ct. App. 1991), reached the same conclusion in the context of a surrogacy agreement. I believe these cases are wrongly decided, as discussed supra note 96, but they show that donors have some ability to retain rights within the existing legal regime.


180. See Moschetta v. Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994). Gestational surrogacy agreements appear to have different legal consequences. If the intending parents are the gamete providers, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), and Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994), held that they are the legal parents.
model, which I believe is the best way to understand current law. The conclusions that I reach are not intended as normative prescriptions, for I maintain an agnostic stance about the wisdom of permitting surrogacy. However, the property model serves to clarify the issues and suggests the form that restrictions should take.

1. Intending Parent-Surrogate Conflicts

a. Surrendering the Child

The most salient locus of conflict between the surrogate and the intending parents is the surrogate’s promise to surrender the child. The USCACA offers two alternatives for resolving such disputes. The first alternative provides that the surrogate retains the right to revoke the agreement without liability during the first 180 days of pregnancy.\(^1\) Upon retraction, the rights of the parties are determined without reference to the surrogacy agreement, and the surrogate and the sperm provider will be the legal parents. The second alternative simply provides that surrogacy agreements are void in their entirety.\(^2\)

No court has yet enforced a surrogacy agreement,\(^3\) and only two states have passed laws making them enforceable.\(^4\) While surrogacy has been the subject of widespread condemnation,\(^5\) a number of commentators, especially those favoring the intention model of parental rights, take the position that the claims of the intending parents should have priority over those of a surrogate.\(^6\)

\(^{181}\) U.S.C.A.C.A. § 5A. This right belongs only to surrogates who provide the egg.

\(^{182}\) U.S.C.A.C.A. § 5B.


\(^{186}\) See, e.g., ROBERTSON, supra note 38, at 131; Hill, supra note 3; Shultz,
Those arguing for the enforcement of surrogacy contracts face an immediately troubling dichotomy. Either the contract is for personal services or it is a contract for sale; it is hard to imagine any other characterization of a deal whereby the surrogate gestates and delivers a baby. If it is a service contract, it is not specifically enforceable, and a surrogate who announces her intention to breach and repudiates the contract cannot be forced to surrender the baby if she carries it to term.\textsuperscript{187} If it is a contract for sale, it appears that it must be for the sale of a baby (or, more accurately, of parental rights), which is not only unenforceable, it is illegal.\textsuperscript{188}

This disjunctive difficulty highlights the shortcomings of the intention model. Arguing that intention should determine parental status is well and good, but when the ways to implement intention are criminal or ineffectual, aspirations are unavailing. There is simply no way to produce the desired result.

The property model approaches the problem from a slightly different perspective. If parental rights are determined by antecedent property rights, then the parties holding rights in the gametes at the beginning of gestation are the parents. If the surrogate can transfer her rights in the egg, presumably to the intending mother, then the intending parents will be the legal parents. Given this, the contract must be a personal service contract for gestation, since parental rights vest initially in the intending parents and are never transferred. There can be no question of baby-selling, since the child is simply given to its legal parents. Specific performance would not be needed as a remedy for the surrogate's refusal to turn over the child; retention would be kidnapping and criminal law would intervene. Repudiation of the contract by either party would not alter the allocation of parental rights since these would be fixed at the beginning of gestation. In short, absent some rule preventing such a

\textsuperscript{supra} note 64.

\textsuperscript{187} This conclusion may not be obvious. The reasoning is as follows. The surrogate's personal service contract may not be specifically enforced. \textit{See, e.g., RESTATEMENT (SECOND) OF CONTRACTS} § 367 (1981). Therefore if she announces a breach, her obligation to perform is eliminated and replaced with the obligation to pay damages for breach, since that is the only remedy available. If she then "performs" anyway but does not offer the performance as a cure for breach, the performance cannot be claimed by the intending parents.

\textsuperscript{188} \textit{See supra} text accompanying note 55.
property transfer, surrogacy contracts should have full legal effect in determining parental rights.

All this depends on the ability of the surrogate to transfer rights to her egg. Such transfers are relatively uncontroversial in the case of egg donors, but the surrogate is different—not because she gestates the egg, which by itself gives her no rights, but because the egg never leaves her body. The legal effect of a surrogacy contract thus turns on the alienability of property within the body.

This is a basic question, but it must not be misconstrued. Allowing alienation of property inside the body would not permit alienation of biological property that has been pronounced inalienable. It would not allow the sale of any body parts that are not already freely transferable. It would merely allow the transfer of rights to take place without separating the property from the body.

There are policy concerns on both sides. Denying legal effect to transfers of property within the body is one way, as discussed above, to distinguish between intercourse and sperm donation. It also provides a convenient way to limit the effect of surrogacy agreements and, given the differential in treatment of gestational and ordinary surrogacy, seems to be the current state of the law. However, it produces some unpalatable results. The consequence of allowing transfers of property rights to take place only outside the body is to grant legal effect only to gestational surrogacy arrangements, or ones in which an egg-providing surrogate submits to unnecessary egg extraction (via laproscopy) and embryo implantation. The policy reasons for creating incentives to such arrangements are opaque, and those opposing such arrangements would do better to advocate the prohibition of surrogacy entirely. Therefore, the rest of this article assumes that property inside the body is alienable.


190. No case has featured this fact-pattern, and quite probably a court would treat it no differently from ordinary surrogacy. That this would be theoretically hard to justify makes it no less likely.

191. One concern about alienability of property inside the body is that it might allow for effective pre-birth adoptions. If early embryos are property, purchasers of such an embryo, even inside a woman, might seem to obtain pa-
b. Abortion

The second, and fortunately more rare, potential area of conflict between intending parents and a surrogate is the abortion decision. Two questions are presented: (1) whether the surrogate may contract away her right to abortion and (2) whether the intending parents have a remedy against a surrogate who gets an abortion.

Analyzing the issue of the alienability of the abortion right requires a preliminary investigation into the nature of the right. The following paragraphs attempt first to define the contours of the right, since it is only once we know what would be surrendered that we may ask whether it may be. The right to an abortion stems from the right to privacy; Roe v. Wade held that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."192 Privacy is itself a concept of a certain mystery. It protects individuals from certain types of governmental intrusions, but the methods of identifying impermissible intrusions are notoriously elusive.193 Privacy is perhaps best understood as a right not to have government require certain types of behavior—those that "inform the totality of a person's life."194 The right to abortion exists, then, because forcing a woman to bear a child is "a totalitarian intervention into a woman's life."195

Privacy obviously encompasses more than abortion; most significant for this discussion, it guarantees a cluster of related rights centering around the creation of the family.196 Procreative liberty is also an aspect of privacy. Yet it is an

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194. Id. at 783.
195. Id. at 790.
196. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972) (recognizing rights to conceive and raise children); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing the right to decide "whether to bear or beget a child"); Meyer v. Nebraska, 262 U.S. 390, 393 (1923) (discussing rights to "marry, establish a home, and bring up children").
aspect that is analytically distinct from the abortion right. Procreative liberty speaks to individuals' ability to exercise choice with respect to procreation; the abortion right relates only to freedom from the servitude imposed by mandatory childbearing. The distinction is important because were the abortion right merely an aspect of procreative liberty, the right might be adequately vindicated by a legal regime that prohibited abortion but allowed termination of parental rights and responsibilities. For example, if procreative liberty alone were at issue, a surrogate (who is not the legal parent) would have no claim that her liberty was infringed by denying her an abortion.

The important consequence of this analysis for abortion is that the abortion right is a right to avoid gestation, not parenthood; to separate from the embryo, not to destroy it. The abortion right prevents the state from conscripting women's bodies into childbearing; if the state does not require gestation, it does not infringe that particular right. Destruction follows separation, but if separation could be achieved without destruction, proscribing destruction would not trench on the abortion right. There are still privacy concerns, on Rubenfeld's account; if the state required the woman to accept parental status it would similarly impose on her a role informing the totality of her life. This privacy violation, however, goes to procreative liberty; the state has prevented the woman from exercising choice about becoming a parent. Prohibiting destruction by a surrogate, however, would not raise an issue of privacy, even in its procreative liberty aspect, since the surrogate is not required to accept parental status.

This may have been conceptually rough going, but we are now in a position to consider the alienability of the abortion right.

197. See infra Part V.C.I.
198. See ROBERTSON, supra note 38, at 22-23 (distinguishing between procreative liberty and "liberty in the conduct of pregnancy"); Rubenfeld, supra note 193, at 790 (discussing abortion right); see also In re Baby M, 537 A.2d 1227, 1253 (N.J. 1988) ("The right to procreate . . . is the right to have natural children, whether through sexual intercourse or artificial insemination."). The distinction appears most sharply in the Supreme Court's invalidation of spousal notification laws. See Planned Parenthood v. Casey, 505 U.S. 833, 895-98 (1992). If the abortion right depended on procreative liberty, it would be shared between the parents, rather than being exclusively the woman's decision.
199. The same is true, a fortiori, of gestational surrogates.
right, and the analysis above will prove its worth. Allowing surrogates to contract away their right to abortion would enlist the coercive machinery of the state in the project of compelling them to bear children. This is a privacy violation, according to both Supreme Court precedent and the understanding of privacy developed above.201 More obviously, a state's specific enforcement of a personal services contract violates the Thirteenth Amendment as construed in Bailey v. Alabama."202 As a matter of constitutional law, a surrogate's promise not to abort cannot be specifically enforced.203 But, given the narrow scope of the abortion right, this is subject to technological change. Intending parents may not force a surrogate to continue her pregnancy, but if it becomes possible to terminate the pregnancy without destroying the fetus, a contract provision specifying that alternative would be enforceable.

The second issue is whether intending parents may recover damages from a surrogate who aborts. That surrogates have an inalienable constitutional right to end their pregnancies does not necessarily imply that an action for damages cannot exist. Individuals who enter into a personal services contract generally have a constitutional right not to perform; Bailey will prevent a state from using its criminal law to compel them to render services. However, this does not shield them from liability for breaching.

A distinction must be made at this point. Intending parents could seek damages on two grounds. First, they could simply sue in contract for failure to perform. While their ability to do so is hard to deny, the difficulty comes in the cal-

201. See Roe v. Wade, 410 U.S. 113 (1973); see supra text accompanying notes 192-195.
202. 219 U.S. 219, 238-44 (1911). For an argument that the abortion right flows directly from the Thirteenth Amendment, see Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 N.W. U. L. Rev. 480 (1990). If Koppelman is correct, then the right is clearly inalienable.
203. The Thirteenth Amendment argument has been canvassed in Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion, Note, 16 U. RICH. L. REV. 467, 470 (1982), and critiqued in Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, Note, 99 HARV. L. REV. 1936, 1938-39 (1986), on the grounds that the Thirteenth Amendment permits family relationships that compel the performance of personal services. Leaving aside the accuracy of the analogy between a surrogacy contract and a marriage, it is not the case that familial obligations (the author points, for example, to spousal duties to provide sex, id. at 1938) are enforceable by criminal sanctions.
calculation of damages. The value of gestation is that it turns an embryo into an infant, but pricing the child, which would be necessary to award expectation damages, is odious and inappropriate. The obvious solution is to turn to the reliance measure of damages, which aims to restore the parties to the positions they held before entering into the contract. On this approach, the intending parents would be able to recover all of the payments made to the surrogate, as well as any wasted costs incurred in reliance on the surrogate’s performance.

The second claim the intending parents could make would be a tort claim for destruction of the fetus. Many state laws allow pregnant women to recover for injuries resulting in the death of a fetus. Natural fathers cannot ordinarily maintain actions against women who abort. This is at least implicit in the Supreme Court decisions striking down spousal notification and consent requirements. As between two parents, the rule that the woman must be allowed freely to decide whether or not to abort makes obvious sense: with parental status in equipoise, her physical involvement in the pregnancy assumes decisive tie-breaking status. However, the issue posed in the surrogate context is somewhat different because the surrogate is, in the property model, not the mother. Her right to avoid unwanted gestation must, therefore, stand on its own.

The abortion right, as discussed above, does not include the right to destroy, but so long as separation and destruction are inextricable, tort liability for destruction casts a shadow of constitutional dimensions. Allowing the surrogate to abort while holding her liable for the death of the fetus is rather like the vindication of Shylock’s rights proposed by


205. See id. § 344 (discussing purposes of damages remedies); Id. § 349 (discussing reliance measure of damages); see generally, e.g., Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 988 F.2d 386 (3d Cir.1993) (discussing availability of different measures of damages).


207. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 895-98 (1992). If spousal notification is an undue burden, a potential spousal tort suit surely is as well.

208. See supra text accompanying notes 199-200.
Portia in The Merchant of Venice: the particular claim is upheld but liability is imposed for unavoidable consequences.\(^\text{209}\) Because state tort laws may not infringe on constitutional rights, no tort recovery is constitutionally permissible.\(^\text{210}\)

The final abortion question is whether the intending parents can require the surrogate to abort against her wishes. If the abortion right were an aspect of procreative liberty, intending parents would be the holders of the right. The analysis of Planned Parenthood v. Casey might then seem to suggest that no third party—including the surrogate—could be given a veto power over their exercise of the right.\(^\text{211}\) But what Casey’s analysis shows is precisely that the abortion right is personal to the pregnant woman and unrelated to procreation. Thus the issue is whether the procreative liberty interest of the intending parents can prevail over the surrogate’s right to bodily integrity.\(^\text{212}\) I think the answer that it cannot is fairly clear. One might question whether the surrogate’s actions can even infringe on the parents’ procreative liberty; a surrogate is not, after all, a state actor. The reason that the parents have even a colorable constitutional argument is that the state will declare them the parents of the child.\(^\text{213}\) In any event, their procreative argument is a weak one. Given the number of deliberate steps the intending parents have taken to set the process of procreation in motion, their arguments for avoiding unwanted procreation are severely attenuated. Therefore, in the absence of a contractual provision, the constitutional balance tilts in the surrogate’s favor.

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\(^{209}\) Portia upheld Shylock’s claim to a pound of flesh but warned “if in the cutting, thou dost shed/ One drop of Christian blood, thy lands and goods/ Are by the laws of Venice confiscate/ Unto the state of Venice.” WILLIAM SHAKESPEARE, The Merchant of Venice IV.i.309-12 (1597).

\(^{210}\) An analogy, though not a perfect one, may be drawn from the First Amendment context. State laws allowing tort recovery for disclosure of lawfully obtained private information are generally unconstitutional. See, e.g., Florida Star v. B.J.F., 491 U.S. 524 (1989). If a newspaper had promised not to disclose the information, and the information been disclosed in reliance on that promise, a contract remedy would not offend the First Amendment. Cf. Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976) (suggesting nondisclosure agreements as less restrictive alternative to gag orders).


\(^{213}\) Absent state action, the parents would have no constitutional arguments at all. See infra text accompanying notes 268-269.
It is far less clear, however, that the surrogate’s right to refuse an abortion is inalienable. Compelled surgical procedures violate the right to bodily integrity, not privacy, and submission to an abortion is probably the sort of personal service contract that may be specifically enforced. A promise to accede to the intending parents’ demand for an abortion—apparently a common feature of surrogacy contracts, typically conditioned on the detection of certain birth defects—is constitutionally suspect, if at all, only under the general “shocks the conscience” test of substantive due process. Of course, such a substantive due process claim would have a good chance of succeeding, and even if the offense to conscience does not rise to a constitutional level, it seems unlikely that a state’s public policy would allow enforcement.

2. Conflicts Between the Intending Parents

Even after full performance of a surrogacy contract, problems persist because the intending mother does not have legally enforceable parental rights and will be disadvantaged in a custody battle with her husband, the biological father. Seymour v. Stotski awarded custody of a baby girl produced by a surrogacy agreement to the husband when the intending parents divorced. The wife lacked standing to pursue a parentage action because she “had no legal relationship to the child.” The legal weakness of the unrelated intending par-

214. The right to bodily integrity derives from traditional and common law antecedents. See, e.g., Vacco v. Quill, 117 S. Ct. 2293, 2301 (1997) (discussing right to bodily integrity). The point here is that surgical procedures do not standardize people in the way that motherhood does; thus it is not a privacy violation according to the Rubenfeld account. See Rubenfeld, supra note 193, at 789-90.

215. Such a passive and temporally-limited obligation does not have the overtones of slavery that activate Thirteenth Amendment concerns. The signing of a diploma, for example, may be compelled under ordinary principles of contract law, so not all actions can be characterized as personal service. See RESTATEMENT (SECOND) OF CONTRACTS § 367, cmt. b (1981) (discussing personal service).


217. See, e.g., County of Sacramento v. Lewis, 118 S. Ct. 1708, 1716-17 (1998).


219. Id. at 458. What makes Seymour especially disturbing is that the child was the product of donor sperm, insemination attempts with the husband’s sperm having failed. The husband thus lacked even the biological connection on which the intending father’s legal superiority usually rests. See also Doe v.
ent mirrors the inequality between lesbian co-parents in their rights with respect to a child conceived by artificial insemination. The disparity between the intending parents is perhaps more troubling because it is almost invariably gender-based: the intending father, but not the mother, will be a legal parent. By contrast, in artificial insemination cases with married couples, a consenting father will enjoy full parental rights and be at no disadvantage in a custody battle.

These issues are important; the facts of Seymour veered from substantial unfairness to overwhelming tragedy when, ordered by the court to surrender the child, Beverly Seymour shot her ex-husband dead as he tried to take the girl from her. One solution is to equalize the effect of the presumption of legitimacy and provide that wives are presumptively the mothers of their husband’s children. The problem with this is that a rebuttable presumption is nugatory, and a conclusive one divests women of property rights in material inside their bodies. Furthermore, a conclusive presumption is unacceptable as a general rule of law, since it would operate in the case of adultery as well. Since surrogates intend to divest themselves of such rights, allowing the transfer by contract is a sensible resolution. Just as in the case of artificial insemination, the property model allows for the donor’s rights to be not merely avoided, but transferred to the unrelated intending parent.

3. How Might Surrogacy Be Restricted?

No state has yet enforced a surrogacy agreement, and there are substantial policy arguments against enforcement if the surrogate recants. The current unenforceability of

Doe, 710 A.2d 1297, 1317 (Conn. 1998) (holding, in marital dissolution case, that ex-wife is not a parent of child conceived via ordinary surrogacy).
220. See supra text accompanying notes 147-149.
221. Why this is not an equal protection violation is a mystery to me. For evidence that the law is at least becoming more sensitive to such issues, see In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (pointing to similarities between artificial insemination and gestational surrogacy).
222. See supra text accompanying notes 147-149.
223. See supra text accompanying notes 147-149.
224. See supra text accompanying notes 147-149.
225. See supra text accompanying notes 116-118.
226. See supra text accompanying note 153.
227. Although my analysis suggests that surrogacy contracts should have
surrogacy contracts, however, does not seem to advance a coherent policy because it relies on equating surrogacy to baby-selling. Parties can make enforceable contracts simply by eliminating the surrogate's biological relationship to the child, and the result may be a greater use of gestational surrogacy.

Under the property model, states could use a number of different legal devices to restrict surrogacy agreements. They could, for example, provide that gestational mothers are legal mothers, criminalize gestation of another woman's child or merely prohibit payment for such gestation. The form of such restrictions on surrogacy will be determined in part by the nature of the substantive objections to the practice. Although there are a number of distinct contentions, the commodification argument discussed below occupies a dominant place in the literature, and this section assumes that it is the animating policy concern.

Margaret Radin provides perhaps the best and most complete statement of the commodification argument:

Market-inalienability [of surrogacy] might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply. There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Surrogates with "better" quali-

legal effect—since if the intending parents can buy the surrogate's egg, her gestation should not suffice to make her a parent—no one can deny the trauma inflicted on a surrogate by taking the baby from her. While the intending parents will suffer if she keeps the child, her renunciation of the contract may be evidence that she has bonded to the child in a way that they have not yet had an opportunity to do. Thus allowing the surrogate to recant might minimize the emotional harm to the parties.

There are also obvious problems with a legal regime under which the contract is simply unenforceable—in economic terms, it amounts simply to giving the surrogate a "put" option—but these may not be severe since only one percent of surrogate mothers refuse to surrender the child. See Lacey, supra note 73, at 193.

228. See In re Baby M., 537 A.2d 1227 (N.J. 1988). "Baby-selling" itself is of course a misnomer. Since parents do not own their children, they cannot sell them; what is sold in the paradigmatic "baby sale" is the parental rights. See Richard A. Posner, Sex and Reason 410 (1992). Posner also offers a brief but provocative rebuttal to the standard policy arguments against surrogacy, id. at 411-17, which is worth reading.

229. See supra text accompanying note 59.
ties will command higher prices by virtue of those qualities.\footnote{230}

Radin’s conception of personhood and the resulting commodification argument has been criticized strongly, but I think somewhat uncharitably, on the grounds that it both fails to provide a criterion of non-commodifiability and reaches results opposite to those its proponents seek. John Hill claims that “we cannot sort neatly between inherently intrinsic and extrinsic attributes on the basis of the attribute itself”\footnote{231} and concludes:

Indeed, it would be more logical, on this view, to place attributes such as character, personality, and intelligence, which generally are thought to be central to our innermost being, beyond the reach of the market and to permit the commodification of physical attributes such as eye color and sexual attractiveness. On such a view, prostitution would be permitted while teaching philosophy would be placed outside the realm of the market.\footnote{232}

The commodification argument can, however, meet these objections with only a minor adjustment. The focus should be on activities, rather than attributes, and the criterion should be shifted slightly, from the nature of the activity to its role in society. Deeming an activity market-inalienable on the basis of its proximity to personhood may give us the peculiar result that teaching philosophy should be market-inalienable. If the test looks to the role that the uncompensated activity plays in our society, however, this result is avoided. Unpaid philosophical instruction is not widely regarded as constitutive of selfhood, though its practitioners may find it so, and be deeply offended by those who perform for profit. But unpaid-for sexual intercourse, for example, plays a central role in the expression and constitution of love and romantic relationships. It is this fact, I think, that accounts for the belief that sex for pay demeans both its practitioners and society at large; payment for an activity undermines the perception of it as non-monetizable, and there are some things we do not like to see translated into currency.\footnote{233} Similarly, unpaid-for ges-

\footnote{230. Radin, supra note 1, at 1932.}
\footnote{231. Hill, supra note 3, at 413.}
\footnote{232. Id.}
\footnote{233. See generally GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 31-32 (1978). Calabresi and Bobbit call this the “costs of costing.” See id.}
tation is fundamental to the creation of the family.

The commodification argument should thus rest on the claim that paying for the service of gestation brings the taint of the market to an activity which is central to personhood. So phrased, it is not easily dismissed, and it is plausible to argue that, like prostitution, gestation for profit should be criminalized as an offense against the moral fabric of society. The argument should not, however, obscure the facts: (1) what is objectionable is not the sale of the egg but the sale of the service; (2) the surrogate mother has no parental rights; and (3) the intending parents are the legal parents of the child. That is, on the property model, a surrogacy contract (seen as the purchase of the surrogate's egg) does have the desired legal effect of making parental rights vest in the intending parents. "Refusing to enforce" such contracts, in the way that courts have done, simply leaves the child with a woman who is not its mother. 234

C. Embryos and In Vitro Fertilization

Another question raised by new reproductive technologies concerns the treatment of human embryos created for in vitro fertilization. In this procedure, a woman's egg is extracted and fertilized outside the body. The resulting zygote or "pre-embryo" is then implanted in a gestational host who carries it to term; it may also be frozen for later use. 235 Some of the issues created by this procedure may also fall under the rubric of surrogacy if the gestational host is not the intending mother. In such cases, as the preceding section suggests, the intending parents should be the legal parents because those holding property rights in the embryo at the beginning of gestation should receive parental rights.

The problems unique to in vitro fertilization arise when disputes occur about the ownership or control of pre-embryos. Such disputes may take two forms: (1) between intending parents and third parties and (2) between the intending parents themselves. Conflicts of the former sort are usually re-

234. This result could be justified by a rule providing that any payment in excess of the costs of pregnancy voids the transfer of rights in the surrogate's egg.

235. For a more detailed exposition of the in vitro fertilization procedure, see ROBERTSON, supra note 38, at 97-99.
solved fairly easily in favor of the parents. More difficulties intrude in the latter type of situations, where both parties raise constitutional claims and the conventional law of marital property seems inadequate.

Two cases have addressed the issue of the control of embryos produced by a couple that subsequently divorces. In Davis v. Davis, the Tennessee Supreme Court noted that contracts providing for contingencies such as divorce would generally be upheld. The court further stated that where no agreed-upon resolution exists, making one gamete provider a parent against his or her will would inflict a greater burden than denying the other one the opportunity to use the embryos at issue to procreate. Thus the party wishing to avoid procreation will ordinarily prevail. Disposition of the embryos implicated fundamental rights both to avoid procreation and to procreate. Dividing the embryos equally would clearly not protect this negative right, and the court concluded that the only acceptable resolution was to grant both parties veto power over their use.

A different approach was taken by the New York Supreme Court in Kass v. Kass. Reasoning that in vitro fertilization differed in no relevant way from in vivo fertilization, the court concluded that the wife must have the exclusive right to control the disposition of pre-embryos, just as she could choose whether or not to have an abortion. The husband's right to avoid procreation was held waived by his participation in an in vitro program. This decision betrays a serious understanding of either procreative liberty or privacy, perhaps both. Kass was reversed on appeal, and the New York Court of Appeals recently affirmed the reversal. While the ultimate court declined to provide a general

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237. 842 S.W.2d 588 (Tenn. 1992). See supra text accompanying notes 36-41.
238. Davis, 842 S.W.2d, at 597.
239. Id.
240. Id. at 604. If the party wishing to use the embryos had no "reasonable possibility" of procreation by other means, a different analysis might be called for. Id.
241. Id.
244. Id.
245. See infra text accompanying notes 266-267.
framework for resolving disputes over embryos, finding an unambiguous agreement between the parties, it rested its decision on the principle that the agreement should control.\textsuperscript{246}

1. \textit{Procreative Liberty Defined}

A resolution of the problems posed by disputes over embryos requires a preliminary inquiry into the nature of the right of procreation. As a general matter, we may define procreative liberty simply as the right to choose whether or not to become a parent, or, more precisely, to choose to create a child of which one is the legal parent.\textsuperscript{247} The uncertainty surrounding the concept of parenthood creates a corresponding indeterminacy within this definition. What follows is an exegesis that draws from the property model of parenthood.

a. \textit{The Right to Procreate}

There are two components to the positive procreative right: creating the child and acquiring parental rights.\textsuperscript{248} Laws that restrict either component will offend the positive freedom to procreate.\textsuperscript{249} Thus laws that prohibit conception and those that vest parental rights in someone other than the intending parents infringe equally.\textsuperscript{250} The growth of nontra
ditional techniques of reproduction raises the question of whether the availability of other traditional means permits some state restrictions on the broad procreative freedom promised by new technologies.

A flatly negative answer would imply that the state may neither regulate reproduction nor provide unalterable rules determining parental status. If this were the case, a conclusive presumption of legitimacy would unconstitutionally infringe the rights of men wishing to procreate with married women by denying them that opportunity; and laws prohibiting the sale of embryos would violate the rights of any parties wishing to buy them for procreation. But conclusive presumptions are constitutional, and states may surely place restrictions on the sale of embryos. Procreative absolutism is clearly too extreme a position to assimilate into the existing legal framework; it implies the unconstitutionality of some regulations that have been upheld against constitutional challenge, and some that have never been challenged.

Some state regulation is, therefore, compatible with procreative liberty, and to the extent that regulation is part of our cultural heritage, as is the presumption of legitimacy, it may only gradually come to be seen as a restriction. Laws against fornication and adultery play similar roles and, like the presumption of legitimacy, are emerging from their historically uncontroversial status to be contested as illegitimate restrictions.

An exhaustive investigation of procreative liberty is an arduous task well beyond the scope of this article. The only relevant question at this point is to what extent the state can limit the use of nontraditional reproduction, and the answer I suggest is only tentative. A reasonable conception of the scope of procreative liberty is that the state may regulate as it pleases (in a nondiscriminatory fashion) to the extent that it leaves parties ample other means of procreation. It may
prohibit use of any nontraditional reproductive technology by a fertile couple; it may not do the same to an infertile couple without a compelling interest to which the restriction is narrowly tailored.\(^\text{254}\)

On this analysis, a woman who cannot bear children has a constitutionally protected interest in employing a surrogate without interference from the state.\(^\text{255}\) Determining whether making surrogacy market-inalienable, as discussed above, is unconstitutional under this standard requires us to decide whether the state interest in avoiding commodification is compelling, and whether a ban on paid surrogacy is narrowly tailored to promote that interest—an inquiry of uncertain outcome.

b. The Right Not to Procreate

The right not to procreate, the negative component of procreative liberty, is the right not to have parental rights vest against one’s will.\(^\text{256}\) While the positive right is infringed by either restrictions on conception or restrictions on transfer of reproductive material, a violation of the negative right is produced simply by state action that creates unwilling, original, legal parents.\(^\text{257}\)
The negative right, like the positive, cannot be absolute. If it were, parties could simply relinquish their property rights at any time before the beginning of gestation and avoid parental status. Our law clearly does not countenance this; most obviously, it vests parental rights in parties who engage in intercourse regardless of their intentions.\textsuperscript{258}

Some restrictions on the right not to procreate are clearly permissible: a man who has intercourse with a woman, or a husband who consents to the insemination of his wife, cannot deny parenthood by asserting procreative freedom. Others are not; the state cannot constitutionally assign parental status on whatever grounds it sees fit.\textsuperscript{259} A tentative proposal for analyzing claims of negative procreative liberty is the following: the state may not make parents of those who did not (intentionally or unintentionally) play some role in creating the child, and its burden in justifying its rule decreases according to the number of affirmative steps the parties have taken to create the child. The property model provides a default rule for the absence of state intervention.\textsuperscript{260}

The implications of this understanding of the right not to procreate are startling, although they may not be immediately clear. The right, I claim, is the right to avoid the vesting of parental status. It has no necessary connection to a right to control genetic material. If the state demands eggs from fertile women, intending to make them available to the infertile, it would not infringe on negative procreative liberty.\textsuperscript{261} More realistically, if the state requisitions embryos certainly unwise and probably unconstitutional, but not an infringement on the right not to procreate.

\textsuperscript{258} See supra text accompanying notes 156-169.

\textsuperscript{259} Requiring a couple to reproduce, by whatever means, would violate other rights—most likely, it would shock the conscience sufficiently to trigger substantive due process protection. See, e.g., County of Sacramento v. Lewis, 118 S. Ct. 1708, 1716-17 (1998). The clearest example of a pure violation of negative procreative liberty would be the state’s determination that certain unwilling individuals would be the parents of a child to be conceived by others.

\textsuperscript{260} A criticism that further parallels the legal realist attack on traditional First Amendment doctrine suggests itself here: the property-derived baseline is not neutral, but rather the product of state regulation. This is true, but given that parenthood is a legal relation, some legal framework must be taken as the background. Since it is control over genetic information that is at issue here, intellectual property provides the most appropriate legal framework. It seems reasonable—though it is not currently the law—that individuals might have something like copyright protection of their genetic information. See generally JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS 97-108 (1996).

\textsuperscript{261} It would certainly infringe on bodily integrity, and probably would not
held by a fertility center, issues of procreative liberty arise only if the materials have been designated for particular parties, and then the question is one of positive procreative liberty. That is, the question would be whether these parties have alternate means of reproducing. Apart from that potential issue, this would be a garden-variety taking; even if the owners of the embryos wanted them destroyed, there would be no negative procreative liberty claim.

This result is undeniably counterintuitive, but the idea that there exists a procreative right to control genetic material is simply untenable. Such a right would be threatened by the decisions of our siblings and trampled by those of our twins. The point is not merely that siblings and twins are allowed to reproduce without our consent; they would be permitted under a balancing test that weighed positive against negative procreative liberty. It is rather that no balancing of rights occurs. Our control over our genetic material is rooted in property rights and unrelated to procreation.\footnote{Severing negative procreational liberty from control over genetic material has immediate consequences. Consider an ordinary coital pregnancy, and suppose that the embryo may be safely removed from the womb. The abortion right is a right to separate, not to destroy. Therefore, the destruction of the fetus is a question of procreative liberty. This liberty interest exists: since parental rights vest at the beginning of gestation leading to birth, an extracted embryo would have no legal parents until that gestation began. The biological progenitors would have rights, grounded in negative procreative liberty and privacy,\footnote{See supra text accompanying notes 199-200.} not to be the legal parents. The state could vindicate those rights, however, simply by vesting survive constitutional scrutiny. Requisitioning sperm from men would be a lesser infringement and might well be upheld, although the ready availability of donor sperm suggests an easy alternative. For a suggestion that a nondiscriminatory bone marrow draft might appropriately be found constitutionally sound, see Guido Calabresi, \textit{The Supreme Court, 1990 Term; — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)} 105 HARV. L. REV. 80, 95 (1991).}

\footnote{262. For another example, a scientist could conceivably, though not currently, create a complete human genetic sequence. If he happened to produce mine, I would gain no rights thereby. If, as is possible, he took cells from me and cloned them, I would have a property-based claim.}

263. \textit{See supra} text accompanying notes 199-200.

264. The negative procreative right is clear; the privacy right flows from the fact that parenthood is a role that "inform[s] the totality of a person's life." \textit{See} Rubenfeld, \textit{supra} note 193, at 784.
parental status in other parties. The ability to destroy the embryo would then be supported only by a property right, which the state could constitutionally revoke as long as it provided compensation.  

2. Embryos and Procreative Liberty

The above analysis applies to a dispute over embryos. From this perspective, the approach of the lower court in *Kass* is flawed because it conflates abortion and procreative rights. It lodges sole decision-making power in the woman simply because she may choose whether or not to abort, but the rights at stake are quite different. Less obviously, the decision in *Davis v. Davis* is also wrong. The parties do have competing claims of positive and negative procreative liberty, but vindicating the right not to procreate does not require destruction of the embryos. Conventional property law respects both parties' procreative rights. The court could divide the embryos equally and parental rights would vest only in the party who owned the embryo. Alternatively, awarding all embryos to the party intending to procreate would equally satisfy the negative right and better protect the positive right.

The suggested resolution may seem heartless; after all, Junior Davis testified that he would definitely consider any resulting children his own. Legally, however, they would not be. Junior Davis' plight testifies to the dangers of losing control over one's reproductive material and a state wishing to protect the psychological interest in not having unwanted genetic children might adopt a rule that jointly owned extracorporeal biological property must be destroyed at either

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267. Analytically, the difference is clear: the abortion right is grounded in privacy and relates to a woman's control over her own body. It is, as discussed above, a right to separate, not to destroy. There is a further privacy concern at stake—the negative procreative right to avoid unwanted parenthood—but this right belongs equally to men and women and is in no way dependent on the abortion right. Despite this clear conceptual distinction, commentators have tried to leverage the asymmetry of the abortion right into a variety of other contexts. See, e.g., O'Brien, supra note 185 at 145 (1986) (suggesting that a woman's right to an abortion implies a right to custody of the child at birth).
268. See supra notes 36-41, 237-241 and accompanying text.
269. See 842 S.W.2d 588, 604 (Tenn. 1992).
party's request. What it does not do is uncover a constitutional right based on mere genetic contribution.

D. Posthumous Reproduction

The final question, from a certain perspective, posed by novel reproductive technologies is how to treat posthumous reproduction. This may occur whenever reproductive material is used after the donor's death. Donors may be male or female and the material may be gametes (sperm or eggs) or embryos obtained either by testamentary disposition or by postmortem harvesting. The various possibilities raise issues that overlap significantly, and a useful path into the analysis is a famous dispute over a bequest of sperm.

In 1991, William Kane committed suicide at the Mirage Hotel in Las Vegas. His will bequeathed "all right, title, and interest" in 15 vials of sperm he had deposited at Cryobank, Inc., a Los Angeles sperm bank, to his girlfriend, Deborah Hecht. Kane's children, perhaps fearing the creation of other claims against Kane's estate, made policy arguments against posthumous reproduction to contest her claims of ownership and asked that the sperm be destroyed.

Since this policy argument has no constitutional grounding, states could also turn in the opposite direction and prohibit the destruction of embryos, even if both parties so desire. Several states have enacted such laws. See ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 9:129 (West Supp. 1990); MINN. STAT. ANN. §§ 609.2661-5 (West 1987 & Supp. 1990).

Still less does it suggest that one private party's failure to respect another's preferences—which is all Mary Sue's actions amount to—can amount to a constitutional violation. If the state does not attempt to force parental status on Junior Davis, it takes no action at all with respect to his procreative liberty. Even in the slightly more difficult situation in which the state does bestow parental status on an unintentional parent, the argument that this trenches on constitutional liberty has been rejected. See Pamela P. v. Frank S., 449 N.E.2d 713, 715-16 (N.Y. 1983) (holding that mother's misrepresentation about use of contraception did not violate father's procreative liberty). While I have suggested that there may be limits to the state's power to draft citizens into parenthood, no case has yet come close to them.

The maintenance of brain-dead pregnant women in order to deliver babies is also often considered under the rubric of posthumous reproduction. See, e.g., John A. Robertson, Emerging Paradigms in Bioethics—Posthumous Reproduction, 69 IND. L.J. 1027, 1027 (1994). On my model, parental rights are determined at the beginning of gestation, and death occurring after that time does not raise the issue of posthumous reproduction.

See David Margolick, Battle Royal at the Sperm Bank, S.F. CHRON., May 15, 1994 (This World), at 6.


See id. at 844.
The California Court of Appeals, in its first decision, held that the decedent had a property interest in his sperm and that his intentions for its disposition were controlling. It thus granted a writ prohibiting destruction pending the distribution of the estate. Pursuant to a "global settlement agreement" that divided the estate 80%-20% between the children and Hecht, the executor allotted three of the fifteen vials to Hecht, but delayed distribution while appeal was pending. A second trip to the Court of Appeals resulted in immediate dispensation of these three vials, on the grounds that Hecht, then forty, faced a rapidly closing window of fertility. Failing to conceive with the first two vials, Hecht returned to court seeking the last twelve. The Court of Appeals' final opinion held that because the disposition of Kane's sperm implicated his fundamental right to procreate, Hecht was legally incapable of conveying it to his children under the settlement agreement: "[T]he decedent's right to procreate with whom he chooses cannot be defeated by some contract third persons—including his chosen donee—construct and sign." The California Supreme Court, denying review, ordered that the opinion not be officially published, eliminating its precedent value.

As a result of the de-certification, the series of Hecht decisions may stand for little more than the proposition that hard cases make bad law. Kane intended indisputably that Hecht have his sperm, and her long struggle could hardly fail to arouse sympathy. The Court of Appeals reached a tempting result, but its ringing endorsement of a fundamental right to posthumous procreation and the conclusion that Kane's desires should prevail over the contractually expressed intent of his chosen recipient goes too far.

The property model makes clear that posthumous procreation is not a fundamental right but an impossibility. Procreative liberty has as an essential constituent—the creation or avoidance of parental status. Property rights deter-

276. Id. at 850.
277. Id. at 858-61.
279. See id. at 1581-82.
281. See id. at 226
282. Id. at 222.
mine the allocation of parental rights and dead people cannot own property. Therefore, they cannot become parents and no disposition of preserved reproductive material can infringe on their procreative liberty.

This fact does not prescribe any particular treatment of frozen sperm that a decedent wills to another, but it does make the difficulties somewhat more tractable. If the bequest is honored, only the legatee holds property rights in the sperm. On the facts of the case, if Hecht conceived and bore a child with the frozen sperm, she would be the mother and the child would have no father. Therefore, the concern that posthumous reproduction complicates the administration of the decedent’s estate rests on an illusion.\footnote{283}

The same principles operate with regard to preserved eggs or embryos.\footnote{284} Resulting children are not the decedent’s. Since decedents have no procreative rights to be violated, the state can regulate quite broadly the testamentary disposition of reproductive material.\footnote{285} What constitutional concerns there are arise from property rights.\footnote{286} A slightly more interesting question centers on the decedent’s ability to restrict the legatee’s use of the material. This is properly a question of trusts and estates, and state law will govern the questions of what happens if the legatee fails to comply with the restrictions of the bequest. I venture only the observation that


284. They also control sperm or egg harvesting. The next of kin, or whoever authorizes the harvesting, will be the parents, and the state may regulate broadly without infringing on procreative liberties.

285. The policy reasons that might support prohibition of such bequests are not readily apparent. The Kane children advanced three concerns: ease of administering estates, the undesirability of single parents, and generalized distaste for posthumous reproduction. See Hecht v. Super. Ct., 20 Cal. Rptr. 2d 275, 284-91 (Ct. App. 1993). The court rejected all three. Id. Rightly so, because posthumous reproduction does not implicate them differently from other techniques of nontraditional reproduction. Administration of estates is unaffected, and single women can under existing law become the sole parents of children conceived with donor sperm. Moreover, the donor of such sperm may well be dead at the time of insemination.

286. Some restrictions on testamentary dispositions are unconstitutional. See, e.g., Hodel v. Irving, 481 U.S. 704, 716 (1987) (noting that right to transfer property while alive is not adequate substitute for right to bequeath).
it is important to distinguish between use restrictions that simply require the recipient to procreate with the material and those that require her to do so with her own biological material. The former type would allow a woman to hire a surrogate and would allow a man to use donor sperm.\footnote{287}

VI. CONCLUSION

New reproductive technologies have brought new complications to family law. Resolution of the novel questions posed requires us not so much to turn to new concepts as to recognize those that have been with us all along. Realizing that parental rights are best understood as derived from property rights gives us first principles from which we can reason. The property model provides an analytic framework that readily assimilates new technologies and reveals with clarity and certainty the limits and effects of state regulation and individual agreements.

Not only should we begin to recognize parental rights as derived from property rights, we must. If not, we must reshape our legal landscape to rebury this emerging fact. Whatever alternative paradigm may be proposed,\footnote{288} the developing law determines parental rights in many cases by looking to antecedent property rights.\footnote{289} We ignore this only at substantial intellectual cost. I have not attempted to resolve all of the policy issues raised by nontraditional reproduction, and the answers I have given are far from final. I have tried instead to reveal the means by which the law reaches its results, and in so doing to provide a language the

\footnote{287. The potential for some very odd results does exist: suppose $A$ bequeaths sperm to $B$ on the condition that she use it herself; otherwise it passes to $C$. If $B$ receives the sperm but then hires a surrogate to gestate it, her failure to comply with the restrictions might make $C$ the owner. Whether $C$ would then have parental rights is a difficult question.}

\footnote{288. The leading contender is of course the intentional model, as discussed \textit{supra} text accompanying notes 63-79. I think that the intentional model is simply a weaker and less coherent version of the property model. \textit{See supra} text accompanying notes 63-79.}

\footnote{289. Courts have not explicitly recognized this. But I think that the property model offers the most convincing explanation of how, for example, a semen donor avoids parental rights, see UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION Act § 4(a), 9B U.L.A. 189 (Supp 1988), why gestational surrogates are not parents, \textit{see, e.g.,} Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) and why posthumous children cannot inherit, \textit{see} UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION Act § 4(b), 9B U.L.A. 189 (Supp 1988).}
future may speak.

The chief benefit I claim for the property model is that it clearly reveals the legal mechanism by which parental rights are determined. This allows private parties to make contracts with predictable legal effect; similarly, it allows states to regulate the allocation of parental rights without having to contend with nebulous and untrammeled intent-based parenthood. I do not, however, intend to suggest that property law is or should be the entire story.

State regulation must be sensitive to the unique features of reproductive property. It cannot be determined simply by the policies that conventional property law seeks to promote. In much the same way that the pieces of property known as "securities" have given rise to a distinct field of law, motivated by its own concerns, reproductive property demands a regulatory framework that responds to the place the parental relationship holds in our society.

In cases of dispute over ownership of embryos, for example, conventional principles of marital property law would dictate an equal division between divorcing spouses. If one spouse opposes the creation of children from the embryos, as Junior Davis did, his interests will not be well protected by an equal division. Junior Davis' claims of psychological distress do not, I have argued, raise a constitutional issue of negative procreative liberty. If he is not legally a parent, his procreative freedom is not infringed. Yet it would be an unfeeling court indeed that saw no harm to him in the creation of his biological children against his will. Genetic connection is socially important, and legal rules offering enhanced control over the disposition of reproductive property could be used to recognize this social fact.

Rules that refuse such enhanced control might come to be accepted. The value-shaping effect of law is considerable, but it may well be that the values implicit in the property model are not those we want for our society. Parental rights, I have argued, are best understood as flowing simply from property rights, but parental relation, historically, has required much more. A world in which parents contribute

291. See Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
292. See supra text accompanying notes 268-269.
293. See supra text accompanying note 48.
equally to their child's genetic makeup, in which they watch it grow within its mother's womb, may attach greater social meaning to the parent-child relationship than one in which a single person may buy sperm and eggs on the market, hire a surrogate to gestate an embryo, and receive a newborn baby at the end of a contract. Timidity may be appropriate as we approach a brave new world.