



REPRODUCTIVE TECHNOLOGIES AND THE AMERICAN FAMILY, AN ODD COUPLE?

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Introduction

This study will focus on the debate revolving around bioethics and the American family. In particular, it will highlight the impact of assisted reproductive technologies (hereinafter "ART") and gene therapy on the traditional or classical family model and the emergence of non-traditional families¹.

The traditional legal definition of family is focused on the nuclear family at the center of the classical patriarchal system, with the father at the head. The traditional definition of the family is rapidly evolving, however, due to multiple marriages, the divorce rate and the increased number of children born out of wedlock². The increased use of ARTs, in particular *in vitro* fertilization (hereinafter "IVF") and artificial insemination (hereinafter "AI"), has also influenced social changes affecting the evolution of and challenges to the notion of the traditional family model.³

This increased use of ARTs inspired by new developments in medicine and the biological sciences, essentially to treat problems of infertility, has opened the door to an intense debate on bioethics in the United States and abroad. The definition of bioethics or medical ethics for this discussion is the "study of moral issues in the fields of medical treatment and research."⁴

This study will similarly discuss the legal right to create offspring by ARTs. In 1942, the US Supreme Court, in *Skinner v. Oklahoma*, created perhaps the strongest precedent in establishing a fundamental right to procreate.⁵ The question is whether the right to procreate also protects the right to use ARTs in the creation of a child.

¹ This study covers the time period commencing in 1942 and extending to April 1, 2001.

² Tsippi Wray, "Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families," 21 *Hamline Law Review* 127 (fall 1997).

³ *Ibid.*

⁴ Encarta Encyclopedia 1998. *Microsoft Encarta*.

⁵ *Skinner v. Oklahoma*, 316 U.S. 535 (1942) 536-39.

However some commentators claim that human life is devalued due to techniques such as AI and IVF that tend to “cheapen the procreative process.”⁶ They often lament that offspring are increasingly the result of the work of technical devices rather than the result of a natural birth between two people.

Eugenics is also revisited in this study to the extent that the parent desires for some type of gene therapy to be performed on his or her fetus or later on the child after birth. However, the leap between treating a genetic defect and enhancing the characteristics of a person, such as height, intelligence, etc., has provoked a major uproar. The substantial cost of enhancing the genes could widen the cleavage between the rich families, able to enhance their genes, resulting in a marked increase in height, beauty and intelligence, and the poor families who cannot afford such procedures.

This research paper will first discuss the legal framework of new reproductive technologies and gene therapy in Part I. In Part II, the discussion will focus on the impact of ARTs and gene therapy on the American family.

I. Alternative reproductive technologies, gene therapy and the law

A. Basic protection of the right to procreation

As noted in the introduction, the U.S. Supreme Court, in *Skinner v. Oklahoma* (See note 4), has underlined an important fundamental right to procreate, especially since the Court noted procreation is “fundamental to the very existence and survival of the race.”⁷

The right to procreate was also extended by another U.S. Supreme Court decision as a fundamental right to privacy with respect to private marital sexual intimacy.⁸ In that case, *Griswold v. Connecticut*, a state statute prohibiting the use of contraceptives by married persons was rendered invalid by the Supreme Court because the statute interfered with “the intimate relation of husband and wife.”⁹ In another case, *Eisenstadt v. Baird*, the Supreme Court struck down a state statute prohibiting a single person’s access to contraceptives, but not for married persons.¹⁰ That case then underlined the principle of right of privacy to be exercised by

⁶ Gilbert Meilaender, “Products of Will: Robertson’s Children of Choice,” 52 *Washington & Lee L. Review* 173 (1995) 188, cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *Ibid.*, 1489.

⁷ *Skinner v. Oklahoma*, *supra*, 536-39.

⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965) 482.

⁹ *Ibid.*

¹⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

individual, married or single people when it concerns something so fundamental as to bear children.¹¹ Similarly, another U.S. Supreme Court case, *Cleveland Board of Education v. LaFleur*, held that maternity leave restrictions which “impermissibly burdened teachers who decided to bear children” were invalid as overly restrictive.¹²

Those cases protecting procreative capacity concern conception, gestation and childbirth with respect to married and unmarried persons. These protections are the cornerstones for the legal basis of ARTs, techniques for procreation involving a myriad of combinations of biological and non-biological parents.

B. The right to use ARTs

However, the U.S. Supreme Court’s protection does not address the issue of whether such rights extend to non-coital reproduction.

One could start by observing similarities in coital or noncoital reproduction in that the overall objective is the same, that of creating a child and the enlargement of a family.¹³ In that regard, the Supreme Court stated that “no one can seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.”¹⁴ One might also add that this relationship is nurtured without coital reproduction.

Since ARTs and coital reproduction have the same objective, namely the creation of a baby, one can conclude that the right to procreate can equally be applied to the use of ARTs.

1. Artificial insemination and in vitro fertilization

The language of *Eisenstadt*¹⁵, concerning the prohibition of contraceptives for unmarried persons, has been interpreted by lower courts as allowing the right to affirmatively procreate, not only the right to avoid procreation by contraception. A federal court judge held that a “woman has a constitutional privacy right to [...] become pregnant by artificial

¹¹ *Ibid.*, 453, cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1478.

¹² *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) 634-35. The maternity leave regulations required that pregnant schoolteachers resign from their employment five months before the expected birth, without remuneration.

¹³ Clone Kolata, “Clone: The Road to Dolly, and the Path Ahead” (1998), cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1486.

¹⁴ *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) 844.

¹⁵ *Eisenstadt v. Baird*, *supra*, 453.

insemination.”¹⁶ In another case, the US Supreme Court manifested its concern that an abortion regulation adopted in Missouri may have the effect of prohibiting *in vitro* fertilization.¹⁷ That clearly manifested the Court’s intent to protect the right to *in vitro* fertilization.

2. Cloning

Following the creation of Dolly the sheep in February 1997, the first cloned mammal, President Clinton requested the National Bioethics Advisory Commission (NBAC) to draft a report on the scientific and legal issues concerned in human cloning.¹⁸ Pursuant to the report, the President signed an executive order banning federal funding of human cloning research and officially requested privately funded institutions to comply with a voluntary moratorium until the NBAC published its report.¹⁹ The NBAC subsequently issued its report, which recommended that legislation be drafted and adopted prohibiting the use of cloning technology to create a child.²⁰

Since then, Congress proposed legislation in that regard but, as of fall 2000, has not adopted it. One bill proposed by Congress was to prohibit the federal funding of human cloning research.²¹ That bill had a limited scope in that it only prohibited federal funds for such research and did not impose a total ban on cloning. California, however, adopted a ban on human cloning in 1998, in the form of a five-year moratorium. Only four other states, Louisiana, Missouri, Michigan and Rhode Island have adopted legislation banning such cloning temporarily or permanently.²² Those bans follow NBAC’s recommendations, but the legislation does not prohibit the cloning of human tissue or cells and other experimentation, provided that the embryo is not used to create a human being.²³ That implies that cloning of stem cells (see below, note 110) for research in view of treating disease and creating organs is allowed.

The Food and Drug Administration (FDA), a federal government agency, announced its authority over biological (in particular somatic cells

¹⁶ *Cameron v. Board of Education*, 795 F. Supp. 228 (S.D. Ohio, 1991) 236-37 cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1485.

¹⁷ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) 522-23.

¹⁸ Christine Willgoos, “FDA Regulation: An Answer to the Questions of Human Cloning and Germline Gene Therapy,” 27 *American Journal of Law & Medicine* 101 (2001) 101.

¹⁹ *Ibid.*, 114. See letter from Bill Clinton addressed to Dr. Harold Shapiro, Chair, NBAC (Feb. 24, 1997), in NBAC, “Cloning Human Beings—Report and Recommendations of the NBAC” (June 1997) 2. The NBAC is an independent panel consisting of 18 scientists, doctors, lawyers and ethicists set up to review human cloning with respect to ethical, legal, scientific and religious issues.

²⁰ *Ibid.*

²¹ S. 368, 105th Congress (1997).

²² “The Politics of Genes—Americas Next Ethical War,” *The Economist* (April 14th-20th, 2001) 20.

²³ California Health & Safety Code 24185 (West 1998) cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1473.

used in cloning procedures) products²⁴ under the Public Health Service Act, 42 USC §201 *et seq.*, and the Federal Food, Drug and Cosmetic Act, 21 USC §201 *et seq.* However, that legislation merely subjects doctors or scientists desiring to clone a human being to meet its licensing requirements²⁵ and does not give authority to the FDA over how doctors practice medicine.²⁶

An American scientist, Brigitte Boisselier, has stated that she has commenced cloning research at a location in the U.S. Her objective is to clone a dead child. However, the FDA recently warned her not to clone a person without obtaining the agency's approval, or be subject to enforcement action. She did not confirm that she would heed the warning. That has regenerated new attempts to adopt legislation destined to ban human cloning.²⁷

However, many legal experts claim that the FDA's alleged authority over cloning has no valid legal basis. In fact, as of May 23, 2001, six pending bills requesting a congressional ban on human cloning are also considered void of a legal basis, especially since they cannot be separated from provisions interpreted as opposing abortion.²⁸ The legal scholars even suggested that if such legislation were adopted, it would be rendered null and void by the courts applying case law (discussed above) setting forth the constitutional right to procreate.²⁹

Finally, contrary to the NBAC report, some commentators argue that, similar to other ARTs, "human cloning implicates the constitutional sphere of family freedom to an extent sufficient to warrant ...protection."³⁰ As such, the cases cited earlier articulating a right to procreate could be extended to the right to engage in all techniques resulting in the birth of a child, including cloning.

3. Gene Therapy

The U.S. Patent and Trademark Office (hereinafter "USPTO") approved the first patent for human gene therapy to the National Institutes of Health (NIH) researchers on March 21, 1995. The patent includes a procedure for performing gene therapy on human beings by inserting new DNA into human cells.³¹ Since then, approximately a thousand gene

²⁴ The definition of a "biological product" is "any virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component ... or analogous product," Rick Weiss, "Legal Barriers to Human Cloning May Not Hold Up," *Washington Post Company* (May 23, 2001) 1. <<http://www.washingtonpost.com>>.

²⁵ William Feiler, "Birth of Dolly Raises Patent Issues on Clones," *New York Law Journal*, (March 9, 1998) 2.

²⁶ Rick Weiss, "Legal Barriers to Human Cloning May Not Hold Up," *supra*, 1.

²⁷ Rick Weiss, "Scientists Testify on Human Cloning Plans," *Washington Post Company* (March 29, 2001) 1.

²⁸ Rick Weiss, "Legal Barriers to Human Cloning May Not Hold Up," *supra*, 1.

²⁹ *Ibid.*

³⁰ "Human Cloning and Substantive Due Process," 111 *Harvard Law Review* 2348 (1998) 2356, cited in Lawrence Wu, "Family Planning Through Human Cloning: Is there a Fundamental Right?," *supra*, 1484.

³¹ William Feiler, "Birth of Dolly Raises Patent Issues on Clones," *supra*, 4.

patents have been issued to companies that have successfully proved that the technology is original, non-obvious and useful.³² In addition, a new procedure, “germline therapy,” has been introduced which is predicted to be able to correct recessive gene disorders diagnosed in an early embryo by replacing the defective gene by a healthy one.³³

Except for those criteria set forth by the USPTO, there is virtually no control on the protection and use of technology in the area of gene therapy. The FDA announced its authority over biological products including gene therapy under the Public Health Service Act, 42 USC §201 *et seq.* and the Federal Food, Drug and Cosmetic Act, 21 USC §201 *et seq.* However, that legislation, as noted above under cloning, merely subjects doctors or scientists desiring to use a gene therapy product to meet its licensing requirements.³⁴

Therefore, there is neither case law nor direct legislative control on gene therapy technology. Researchers at the American Association for the Advancement of Science have recently declared the need for federal legislation governing fertility clinics which are increasingly involved in the creation of “designer babies” as well as experiments involved in permanently modifying inherited genes.³⁵

Even if such legislation were to be adopted, Rick Weiss suggests that well-developed case law sets forth that scientists enjoy a first amendment right (U.S. Constitution) to “pursue their intellectual interests [...] to follow one’s muse and gain personal knowledge.”³⁶ That suggests legislation restricting gene therapy (and cloning of human beings) research would be unconstitutional.

For the time being, however, legal controls on gene therapy are minimal and will probably not be imposed without extensive debate.

II. Consequences of ARTs on the American family

³² “The Politics of Genes—Americas Next Ethical War,” *supra*, 21.

³³ Christine Willgoos, “FDA Regulation: An Answer to the Questions of Human Cloning and Germline Gene Therapy,” *supra*, 104-105.

³⁴ *Ibid.*, 2.

³⁵ Paul Recer, « Fed Rules Urged on Gene Clinics,” *AP Science Writer*, The Associated Press (May 17, 2001) 1.

³⁶ Rick Weiss, “Legal Barriers to Human Cloning May Not Hold Up,” *supra*, 3.

A. The evolution of the traditional family

The traditional nuclear family is defined as a “self-contained unit comprised of a married heterosexual couple with children.”³⁷ The normative argument, developed by author Allison Young, is that families work best as exclusive units for both children and parents since “authority and responsibility are localized, readily identified, and efficient.”³⁸ The law usually aligns with that normative standard, as noted above, providing that a child cannot have more than two parents, such that when a stepparent adopts a spouse’s child, the other spouse/biological parent is no longer recognized as a parent.³⁹ The law however does provide for the possibility of single parents, even though they are treated as inferior and deficient.⁴⁰

It is useful to review the state of the law concerning the rights of the unwed father with regard to his biological offspring according to the normative standard. Most of the US Supreme Court cases set forth that the unwed father could not form a family unit with his biological child without showing an appropriate relationship between the latter and his or her mother.⁴¹ For example, in a Supreme Court Case—*Michael H. v. Gerald D.*—Carole D., while married to Gerald D., had an affair with her neighbor Michael, which created an offspring. Even though Carole’s husband’s name was on the birth certificate of the child named Victoria, Michael held her out as his child and spent a lot of time with her. Later Michael, the biological father, attempted to establish paternity rights and visitation as the biological father. In California, there is a marital presumption whereby if a child is born during a marriage, the child is presumed the child of the husband. Michael claimed that the marital presumption law was unconstitutional in that it violated his constitutional rights to equal protection. The Supreme Court upheld the marital presumption and went on to say that the traditional family (as defined in the introduction) must be protected in order to support the exclusive framework of the nuclear family. Judge Scalia noted in the opinion that “California law, like nature itself, makes no provision for dual fatherhood.”⁴²

Therefore, legal parentage comes with rights and duties for some parents, not for others, so the legal framework takes on an “all-or-nothing” approach.⁴³ The traditional role of the nuclear family does not include an important role played by the extended family, or other members of the

³⁷ Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *6 American University Journal Gender & Law* 505 (Summer 1998) 506 [See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) 113-32].

³⁸ *Ibid.*, 511.

³⁹ *Ibid.*, 506, citing *Lehr v. Robertson*, 463 U.S. 248 (1983) 262-63.

⁴⁰ *Ibid.*

⁴¹ See *Michael H. v. Garaldine D.*, 491 U.S. 110 (1989).

⁴² *Ibid.*, 135.

⁴³ Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 507.

community playing a role in the lives of the children.⁴⁴ "These networks can be supportive and constructive, especially for the children involved," but their existence remains unacknowledged by the legal system.⁴⁵

According to Alison Young, neither the interests of the children nor the interests of the community are served by the exclusive family model.⁴⁶ In fact it seems to foster the separation of the children and their parents from the broader community, from biological parents, birth mothers and gestational mothers in a surrogacy relationship. These people could make a valuable contribution to the lives of the children and even could "supplement and complement the parents."⁴⁷ For example, a birth mother could provide loving care of her offspring who, because of bonding with the natural mother, turns out to be better adjusted psychologically than a child whose contacts with the biological mother are avoided.

In addition, the absence of a father creates a void in the life of a child, in the case of single mothers, which can be filled by the intervention of state civil servants that assist and monitor the single mother during the rearing of the child. The maintenance of a private relationship between the father and the child is presumed inadequate and gives way to the principles of public intervention and supervision, which then become the norm.⁴⁸

B. The rise of the nontraditional family

The traditional notions of the family are being stretched by the advent of ARTs, especially with regard to childbearing, child rearing and those connected with those processes.⁴⁹ In fact the ARTs change our perception of those processes and inspire a reconceived, perhaps more inclusive notion of family,⁵⁰ as opposed to the exclusive approach studied above. Nancy Polikoff suggests that "it is misdirected to blame social ills on the father's absence from raising children and to fail to focus on the needs of the child instead of whether there is a [traditional] nuclear family."⁵¹ More blatantly, the exclusion of non-traditional family units would mean the ignoring of a reality currently experienced by many people in the U.S. In addition, commentators suggest that in the face of the failures of

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 508.

⁴⁷ *Ibid.*

⁴⁸ Martha Fineman, "The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies," (1995) 178, cited in Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 511.

⁴⁹ Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 514-15.

⁵⁰ *Ibid.*

⁵¹ Nancy Polikoff, "The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?," 36 *Santa Clara Law Review* 375 (1996), cited in Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 508.

traditional families in the United States, plagued by child abuse and domestic violence, other forms of family should be recognized as functional and therefore valuable to the children concerned.⁵² Some go as far as to say that “the nuclear family is based largely on myth and has not borne much relationship to real life.”⁵³

One could realistically conclude that since more people are contributing to the creation of a human being, such as surrogate mothers and gamete donors, the law should be flexible in satisfying their need for involvement in the lives of the children they helped to create.

In *Stanley v. Illinois*, the presumption under Illinois law was that unwed fathers were unfit. When an unmarried mother died leaving her children and their biological father, Stanley, the state of Illinois wanted to make the children wards of the state. The state proceeded to do this without providing Stanley with a hearing to determine his fitness as a parent. Stanley sued on the grounds that his Constitutional rights of Due Process and Equal Protection were violated. The Court agreed with Stanley and emphasized the role of Stanley as the “biological and social father to his children.”⁵⁴ However, the Court did not address the legal meaning with respect to biological father and his paternity rights.

Even though courts hesitate to give a legal meaning to rights of biological fathers to children born out of wedlock, the reality is that many children grow up in non-traditional families, and the families of those children are often overlapping. Many legal frameworks “are at odds with the new non-traditional family and continue to ‘channel’ in favor of an obsolete [patriarchal] model of the family.”⁵⁵ It is however true that children in such families can benefit from stepparents as well as natural parents, from biological parents as well as the intended parents in an in-vitro fertilization system where the sperm and/or the ovum is donated. In fact “research repeatedly shows that the children who are most adjusted following divorce are those who maintain relationships with their natural parents.”⁵⁶

Cases cited above, including *Stanley* and *Michael H.*, typically concern a married couple and a third party who is the surrogate, or sperm or ovum donor.⁵⁷ The ARTs, creating a multitude of relationships, are

⁵² Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 510.

⁵³ Stephanie Coontz, “The Way We Never Were: American Families and the Nostalgia Trap” (1992), cited in Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 510.

⁵⁴ Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 521.

⁵⁵ *Ibid.*, 533.

⁵⁶ Eleanor Maccoby & Robert Mnookin, “The Divided Child: Social and Legal Dilemmas of Custody,” (1992), cited in Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 533.

⁵⁷ Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 534.

stretching the inclusive and nuclear definition of the family and thus extending the notions of the traditional family structure. An example is the stretching the constitutional notions of family to include the surrogate mother.

1. Surrogacy

The surrogate relationship is the catalyst for this evolution in the notion of “family.” Nowadays babies available for adoption are few, due to abortion and the pill.⁵⁸ In addition, it appears that more and more pregnant women are keeping their children born out of wedlock.⁵⁹

Surrogacy is defined as an “agreement wherein a woman agrees to be artificially inseminated with the semen of another woman’s husband; she is to conceive a child, carry the child to term and after the birth, assign her parental rights to the birth father and his wife.”⁶⁰ Another type of surrogacy, called gestational surrogacy, “involves in vitro fertilization, whereby the embryo, formed with either the sperm and egg of the intended parents or with donated gametes (donated sperm and/or egg) is then transplanted into the surrogate.”⁶¹

Gestational surrogacy is probably becoming the most common.⁶² In a typical surrogacy relationship, the gestational mother develops a close relationship with the intended parents, who often attend ultrasound scans and doctor appointments.⁶³ Normally, the surrogate parents are involved in the creation of the child and are clearly acceptable that the fetus is the child of the intended parents.⁶⁴ It is rare that the gestational mother refuses to hand over the child according to the surrogacy agreement.⁶⁵

It has been documented that the termination of all relationships between the surrogate mother and the intended parents is extremely difficult for the surrogate mother.⁶⁶ Evidence has indicated that “many families maintain a two-way contact, though it is not analogous to shared

⁵⁸ Noel Keane & Dennis Breo, “The Surrogate Mother” (1981), cited in Laura Brill, “When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy,” Summer/Fall, 39 *Catholic Lawyer* 241 (1999) 245.

⁵⁹ John Yeh & Molly Yeh, “Legal Aspects of Infertility, 1991, cited in Laura Brill, When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy,” *supra*, 245.

⁶⁰ Black’s Law Dictionary, 6th ed. (1990).

⁶¹ Laura Brill, “When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy,” *supra*, 245.

⁶² Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 541.

⁶³ *Ibid.*

⁶⁴ Helena Ragone, “Surrogate Motherhood—Conception in the Heart” (1994) 38, cited in Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 541.

⁶⁵ See *In re Baby M*, 525 A. 2d 1128, N.J. Superior Court Ch. Div. (1987).

⁶⁶ See Helena Ragone, “Surrogate Motherhood—Conception in the Heart” (1994) 44, cited in Alison Young, “Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,” *supra*, 542.

custody or even visitation *per se*. Rather, there is occasional contact, primarily between the adults, and the exchange of cards or photos.⁶⁷ As such, the surrogate mother does not have a legal right to visitation of the child she nurtured nor is she allowed to benefit from partial custody of the child.

In fact, the traditional model of the nuclear family has a tendency of totally excluding the surrogate mother.⁶⁸ In reality "like the stepfather or the 'ex-father' who is legally eliminated by subsequent adoption, the connections and relationships between a surrogate and her child will nevertheless subsist at some level."⁶⁹ On the other hand, the legal system could recognize the important contributions made by the surrogate mother. Many cases have confirmed the nature of those essential contributions and justify the continued benefit that relationship brings to the child.⁷⁰ In addition, if there is an ongoing relationship between the surrogate mother and the child, the child will already have a head start on understanding, and can more easily adapt to, the relationship with the surrogate mother when the child is finally informed that he or she was nurtured by her.

2. Sperm donation

- Lesbian families and the known sperm donor

The notion of the traditional family does not include lesbian families.⁷¹ Even though there is a concern that the involvement of a known donor can threaten the family unit and can lead to intervention by the donor including a claim for parental rights, some lesbians obtain sperm from known donors. Certain cases have revealed that this concern is justified and that the lesbian family, not being considered a traditional nuclear unit, is vulnerable to intrusion from third parties. In New York in 1994, a case arose between a lesbian gestation mother and a known sperm donor.⁷² An oral agreement set forth that Thomas agreed to provide Robin with sperm through donor insemination and Thomas agreed to be available in the event the child asked to meet her biological father. When the child was three years old, Thomas met with the child and established a relationship with her. When Thomas wanted the child to spend part of her summer with him and his family Robin refused and Thomas sued for visitation rights. Under the law, he had to seek parental rights from the court by obtaining a declaration of paternity in order to receive visitation

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, 43.

⁶⁹ Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 542.

⁷⁰ Scott Rai, "The Ethics of Commercial Surrogate Motherhood" (1994), cited in Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 542.

⁷¹ *Ibid.*, 545.

⁷² *Thomas S. v. Robin Y.*, 599 N.Y.S. 2d 377 (N.Y. Fam. Ct., 1993), cited in Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 546.

privileges. In other words, that could allow Thomas to obtain custody of the child. The lower court ruled that Thomas was not entitled to a declaration of paternity and therefore could not benefit from visitation rights.⁷³ The Court of appeals reversed the decision and explained that the parental rights of Thomas were unlawfully terminated.⁷⁴

That decision sent out a warning to all receivers of sperm from known donors that the latter could later claim parental rights. It revealed a weakness in the legal system, which preserves the traditional approach of winner-takes-all without providing for a more flexible approach. In that case, Thomas did not appear to desire full legal custody of the child but was obliged to seek full custody/parental rights in order to have a legal right to maintain contacts with his child.⁷⁵ Perhaps a more flexible framework, less rigorous than the nuclear family model, would be more realistic and therefore better adapted to this type of situation.

In any case, allowing the father to maintain at least visitation rights with the child would benefit the child by maintaining contacts with the father. However, the possibility that known sperm donors may claim rights to the child might chill the desire of the mothers to seek their "donations."

- Anonymous sperm donors

Artificial insemination and *in vitro* fertilization by anonymous sperm donors appear at first blush to be simple matters. Certainly the situation is based on the premise that the donor would not be identified and therefore could not assert parental rights. However, the situation becomes more complicated when the child wants to know who the biological father is. This scenario is similar to adopted children seeking the identity of their biological parents. In some jurisdictions, there are systems whereby the donor and the child can mutually decide to meet each other.⁷⁶ This type of scenario may warrant a less rigorous approach in the event that the donor and the child create lasting bonds and mutually desire to protect visitation rights of the donor.

3. Cloning

The cloning of humans, just like other ARTs, can lead to the creation of more non-traditional families⁷⁷ consisting of one biological parent and one non-biological parent to the child.

Some suggest that cloning of humans could create a world with fewer men in proportion to women who desire to clone themselves, since an egg is

⁷³ 618 N.Y.S. 2d 356 (N.Y. App. Div., 1994).

⁷⁴ *Ibid.*

⁷⁵ Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 547.

⁷⁶ *Ibid.*, 549-50.

⁷⁷ Lori Andrews, "Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning," 11 *Harvard Journal of Law & Technology* 643 (Summer 1998) 648.

needed; a sperm cell is however not needed to create a human clone. Others say that it would lead to “the ultimate feminist utopia.”⁷⁸ Even though cloning by single women would of course decrease the risk of intrusion by third party donors claiming rights over the children that will probably not deter her from choosing to procreate the traditional way.

The argument was earlier made that constitutional protections to procreate using ARTs should extend to people who desire a clone of themselves. One person stated that “I realize my clone would be my identical twin, and my identical twin has a right to be born.”⁷⁹ The right to be born may not be specifically articulated by the law but there clearly exists a right to procreate.⁸⁰

In any case, it is deemed typical that the societal outrage against cloning will eventually be tempered with more research and more information, following the same evolution of public opinion as *in vitro* fertilization and DNA research to cure disease. Some experts have pointed out that new ARTs and the public reaction to them “follow predictable patterns—from ‘horrified negation’ to ‘negation without horror’ to ‘slow and gradual curiosity, study and evaluation’ and finally arriving at ‘a very slow but steady acceptance’.”⁸¹ In any case, it has been predicted that as soon as a healthy cloned child is born, the reaction will probably be that every fertility clinic in the U.S. will offer the cloning ART.⁸²

Therefore, one could say that the material difference between human cloning and other ARTs is neither the initial public reaction to them, nor the Constitutional right to procreate, but rather an ethical one.⁸³ According to Laurence Wu, the ethical issues can be divided into two categories: the first category concerns intangible harm, such as the effect on the procreative process including the affect on the parent-child relationship and the dignity of the child, the second analyzes the tangible harms, such as the potential physical harms, the psychological impact to the child and the possibility of abuse of the technology.⁸⁴

- Intangible harms

With regard to the parent-child relationship, it seems that the factor which contributes most to a stable happy child is to provide love, care and other necessities of life. Is there evidence that demonstrates that a cloned

⁷⁸ *Ibid.*, 649.

⁷⁹ Anita Manning, “Pressing a ‘Right’ to Clone Humans, Some Gays Foresee Reproduction Option,” *USA Today* (March 6, 1997) 1D, cited in Lori Andrews, “Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning,” *supra*, 649.

⁸⁰ See above, namely Skinner and Eisenstadt Supreme Court cases.

⁸¹ Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1492, citing Gina Kolata, “On Cloning Humans, ‘Never’ Turns Swiftly into ‘Why Not,’” *N.Y. Times* (Dec. 2, 1997) at A1.

⁸² “The Politics of Genes—Americas Next Ethical War,” *supra*, 20.

⁸³ Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1492.

⁸⁴ *Ibid.*

child will not be loved or properly cared for? Such concerns are probably irrelevant since it has been shown that ART parents often care more for the children than the children conceived the traditional way by a married woman.⁸⁵ This has been explained by the enhanced appreciation by the parents using ARTs of the value of their child. Usually following a difficult period, the parents were finally able to achieve their procreative goals. This great appreciation by the ART parents similarly manifested itself in the rearing of the children.⁸⁶ Therefore, the psychological harm to the ART children as a result of a strained parent-child relationship is exaggerated. Some commentators say that the psychological harm to the child is overstressed and often exaggerated.

In addition, there is a great deal of concern that the clone will lose the spontaneity of creation and the right to find his or her own identity.⁸⁷ However, studies have proved that genetic traits, such as height and even hair color “can be significantly affected by environmental factors.”⁸⁸ Even further, an author states that determining the genome, the genetic makeup of an individual, will not determine the type of person he or she will become.⁸⁹ For example, if a physics department is made up of Albert Einstein clones, there exists no guarantee that those individuals will become the same person or same type of person as the original Einstein.⁹⁰

One way to assess the individuality of a clone is to compare him or her with the identical twin. A serious study has concluded that “even identical twins who grow up together and thus share the same genes and a similar home environment have different likes and dislikes, and can have very different talents.”⁹¹ Therefore, the decisive factor in determining the stability and character of the child is probably how that person is raised.

The main distinction between cloning and other ART forms is that the former does not require two biological parents. Some commentators have concluded that cloning will undermine the fundamental concept of human interdependence since the child will not be conceived with two distinct sets of genetic frameworks. Human interdependence is defined as reciprocal dependence.⁹² However, that fact alone does not undermine the

⁸⁵ *Ibid.*, 1493.

⁸⁶ *Ibid.*, 1499.

⁸⁷ *Ibid.*, 1493.

⁸⁸ Robert Wachbroit, “Should We Cut This Out? Human Cloning Isn’t as Scary as It Sounds,” *Washington Post* (March 2, 1997) P. C1, cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1494.

⁸⁹ Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1494.

⁹⁰ *Ibid.*

⁹¹ NBAC, “Cloning Human Beings” 68, *supra*, 33, and Nancy Segal, “Behavioral Aspects of Intergenerational Human Clones: What Twins Tell Us,” 38 *Jurimetrics J.* 57, 63, cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1494.

⁹² *Le Nouveau Petit Robert*, Dicorobert Inc. (1993). The translation from French to English was accomplished by the author of this study. In the context of this study, human

idea of human interdependence or of the concept of human diversity caused by the commingling of different sets of genetic structures, especially when one considers the impact of environment on the child, not to mention the identical twin experience discussed earlier.

Of course, coital reproduction is the most pristine if not the most enjoyable example of interdependence; non-coital reproduction is however not void of a kind of interdependence. The latter can be attributed to more than a simple mixture of genetic structures or to the act of coital or non-coital reproduction. For example, the parents who decide to engage in some type of ART illustrate a type of interdependence manifested by a convergence of wills,⁹³ as well as the sharing of emotional support during and after the birth of the child.

In fact, such distinctions could be considered distractions from the main purpose of ARTs as well as traditional procreation, which is to create a new human being. Once the baby is conceived and finds himself or herself in somebody's loving arms, are the methods of conception going to have such a decisive influence on that new person?

- Tangible harms

Cloning research could be limited to disease prevention and control and to allow reproduction by cloning only after it can be properly evaluated by experts over a period of time. One such utilization is the cloning of stem cells and stem cell research,⁹⁴ which usually involve the destroying of embryos by extracting or cloning their cells to be used to create organs or to cure diseases. This would temper the risk of negative results due to a lack of careful research and testing. For example, a drug to prevent miscarriages introduced into the market without sufficient testing several years ago in the U.S. caused very severe deformities in the fetuses. Without adequate tests, the mother and child assume an unnecessary risk of unexpected negative consequences of the ARTs.

Another issue is the confusion pertaining to lineage or the uncertainty as to identity of the child, since he or she received a set of genes from only one parent. This confusion can be compared to the same confusion experienced by a child who discovers he or she is adopted or that

interdependence refers to the interdependence between the children and their two different genetic parents.

⁹³ Lawrence Wu, "Family Planning Through Human Cloning: Is there a Fundamental Right?," *supra*, 1501.

⁹⁴ President Clinton, on August 23, 2000, endorsed guidelines (set forth by the NIH) that would allow the first federal funding of human embryo cell research. This research will use stem cells extracted from frozen embryos scheduled for destruction at fertility clinics [Rick Weiss, "Clinton Hails Embryo Cell Test Rules," *Washington Post* (August 24, 2000) A11].

However, a scheduled meeting of the NIH to review the first applications from scientists for federal funding of stem cells was canceled in April, 2001, as requested by the Department of Health and Human Services « HHS », a federal agency [Rick Weiss, "Bush Administration Order Halts Stem Cell Meeting," *Washington Post* (April 21, 2001) A02].

one of the parents is not biologically related to the child.⁹⁵ Studies of adoptive and ART children have concluded that the child-parent bond is not loosened by the lack of ordinary genetic ties.⁹⁶

In fact, the tangible harms have been portrayed mostly by science fiction literature and films, especially with regard to mutants and mutations. The films and TV series, such as "X Files," appear realistic to the extent that some people's conception of cloning would be tainted, especially with respect to alien clones often depicted in that TV series. This negative opinion of cloning fostered by the emotional reaction to science fiction should not lead to public opposition to methods of procreation discovered and enhanced by scientific research.⁹⁷

4. *Gene therapy*

There is renewed interest in benign eugenics where a person or couple seeks a healthier child and is not generated by a state seeking racial purification.⁹⁸ This touches upon the sensitive issue of eugenics, but under the auspices of caring parents as opposed to a more coercive version practiced by a racist state. It is certainly preferable to treat a genetic disorder at the embryo stage than to allow a disease, such as leukemia, to develop or to perform an abortion.

As stated earlier, however, intense debate is provoked by the jump from treating defective genes to enhancing genes in order to improve the appearance or intelligence of a human being. Commentators claim that "fertility clinics now routinely offer couples preferences of such things as height, weight, hair color, intelligence, gender and even tanning ability during the selection of donated sperm and eggs."⁹⁹ In fact, it is contended that the re-engineering of the genes of an individual can result in the restructuring of the family, placing those who underwent genetic therapy above the mere 'normals.'

Some commentators argue that such practices could then divide society into two types of families, thereby creating a two-class system "with rich, genetically-enhanced 'GenRich' lordling over poorer, inferior 'naturals'."¹⁰⁰ Does this technology pave the way to a new battlefield where individuals and families strive to compete to obtain at least equal status with their genetically modified neighbors who can just as easily recite the "theory of relativity" as dunk a basketball from five feet away?

⁹⁵ James Q. Wilson, "Sex and Family," in Leon R. Kass & James Q. Wilson, "The Ethics of Human Cloning" (1998).

⁹⁶ *Ibid.* See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) 844. The latter decision declared that "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."

⁹⁷ NBAC Hearings, *supra*, S : 131.

⁹⁸ "The Politics of Genes—Americas Next Ethical War," *supra*, 20.

⁹⁹ Paul Recer, "Fed Rules Urged on Gene Clinics," *supra*, 1.

¹⁰⁰ Lee Silver, "Remaking Eden," (Hearst, 1997), cited in "The Politics of Genes—America's Next Ethical War," *The Economist* (April 14th–20th, 2001) 20.

One could hardly criticize this technology if it is used by human beings seeking to improve their life by using all possible means at their disposal. However, if distortions are even more pronounced in the societal hierarchy to the extent that the poor become even more entrenched in their underprivileged lives and stigmatized living in poor neighborhoods, the social fallout may not be worth the genetically enhanced "raison d'être".

Conclusion - Traditional vs. non Traditional Families

Some commentators feel that the traditional family based on the exclusive nuclear family is no longer adapted to the evolution in society in the United States. This discussion suggests the necessity that society accepts an extended network of persons, beyond the traditional family framework, that could contribute to the well being and the stability of the child.

[A]RTs take their place among other emerging social practices with respect to which people are forging novel and creative relationships that stretch the boundaries of the traditional family beyond the absolute 'one mother and one father' model.¹⁰¹

According to a recent report, at least 20,659 babies were conceived by IVF in the U.S. during the year 1996.¹⁰²

But before the system can evolve, we need to enhance our understanding of the evolution of American family and family structures unbridled by preconceived and often unjustified stereotypes.¹⁰³ For instance,

¹⁰¹ In Alison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family," *supra*, 555.

¹⁰² U.S. Centers for Disease Control, 1996 National ART Fertility Report (July 14, 1999) <www.cdc/nccdphp/drh/art96>.

¹⁰³ The approval of a particular ART by a person probably depends on his or her philosophy of life, notably that person's conception of the beginning of life and moral standards laid down by personal principles and/or by religious beliefs. However, within each person's philosophy of life exists a certain moral or intellectual "comfort zone,"¹⁰³ within which each individual has pre-conceived notions concerning physical and metaphysical phenomena. Imbedded in everyone's "comfort zone" probably lies a certain number of stereotypes, such as people coming from untraditional families tend to be less psychologically adjusted than those coming from traditional/nuclear families. Another example of a preconceived notion is that IV and other ARTs are unnatural and therefore will cause "celestial thundering and lightning" manifested by potential serious distortions of nature.

Most people consciously or subconsciously follow some type of moral standard. It is reflected in how people view the intrinsic value of genes and embryos with regard to their conception of life, as opposed to others who focus on more their utilitarian value in relationship to life.¹⁰³ However, a moral code or set of principles imposed by a particular religion or ideology sometimes overlaps with the "comfort zone" and binds certain followers to ready-made principles.

Perhaps the most formidable obstacle to objective, informed opinions about anything, especially new medical procedures, is the imposed moral code. It often provides individuals with "boxed" dogmas and false securities guided more by ignorance than by intelligent reasoning processes, and which can unfortunately obscure the search for truth.

In any case, the more the dialogue concerning ARTs and gene therapy is inspired by knee-jerk reactions and emotional intuitive flurries, the farther it is led away from the truth.

with respect to the surrogate and adoptive situation, according to studies performed, women do not uniformly associate motherhood with being pregnant. In fact, some pregnant women “experience the fetus as alien and invasive while adoptive mothers typically feel strongly attached to ‘their’ children, even though they did not nurture them prenatally.”¹⁰⁴ In fact, some studies demonstrate that with regards to all areas of parenting, the children conceived by artificial fertilization by a donor did better than those conceived in the natural way.¹⁰⁵ This was probably due to the fact the children were conceived with great difficulty and consequently were cherished more than children relatively easily conceived.

Furthermore, should something deemed “unnatural” be considered “bad” or unacceptable? Open-heart surgery is certainly unnatural but it saves and prolongs many lives every day. Much criticism in the United States is levied against cloning and other ARTs as unnatural especially by certain religions that link human conduct with a divine mandate.¹⁰⁶

However, those who do not accept the religious premises, and who consider that ARTs, in particular cloning, are unnatural, base their argument on individual intuition, which is defined as personal distaste or repugnance.¹⁰⁷ In fact, ARTs can provoke revulsion or repugnance, which is “the emotional expression [...] beyond reason’s power fully to articulate it.”¹⁰⁸

Arguments based on intuition are easily opposed by other intuitive arguments, a dialogue serving as an insufficient basis for rigorous study of the impact of ARTs on society.¹⁰⁹ The use of “intuition has never been a reliable epistemological method, especially since people notoriously disagree on their moral intuitions.”¹¹⁰

In addition to intuitive reactions to ARTs, speculation as to the possible impact of gene therapy on the family and social structure may be exaggerated. Further polarization of our society between the haves and

Isn’t the bottom line that, no matter what the technology is used to help create a human being, and no matter what combination of people are involved in the raising of that child, with enough love, care and commitment, the new child will flourish in society? If that is true, one should rather adapt one’s thinking to align it with the reality of the evolution of the family, including the adapting of the legal and social frameworks set up to facilitate that process.

¹⁰⁴ Femmie Juffer & Lewette Rosenboom, “Infant-Mother Attachment of Internationally Adopted Children in the Netherlands,” 20 *International Journal of Behavioral Development* 93 (1997), cited in Marsha Garrison, “Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage,” 113 *Harvard Law Review* 835 (2000) 914.

¹⁰⁵ Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1498.

¹⁰⁶ *Ibid.*, 1503.

¹⁰⁷ *Ibid.*

¹⁰⁸ Leon Kass, “The Wisdom of Repugnance,” in Leon Kass & James Wilson “The Ethics of Human Cloning” (1998), cited in Lawrence Wu, “Family Planning Through Human Cloning : Is there a Fundamental Right?,” *supra*, note 251, 1503.

¹⁰⁹ *Ibid.*

¹¹⁰ See Macklin, NBAC hearings, *supra*, note 8, S : 133, cited in Lawrence Wu, “Family Planning Through Human Cloning: Is there a Fundamental Right?,” *supra*, 1503.

the have-nots maybe accentuated by the substantial cost of access to gene therapy techniques can be tempered.¹¹¹ In addition, some claim that the competition between companies to own reproductive and gene therapy technologies, in the form of patents, may lead to a certain control by big business over their bodies.

However, the government or private associations may subsidize a person's endeavor to receive gene therapy. In any case, certain liberties characteristic of a free society require that people be allowed to exercise their cultural and economic freedom, even if that means allowing some members of society to materially benefit from new technology or goods at the expense of others. The other alternative is to allow the state determine who and who does not benefit from the new technologies, thereby regressing into an antiquated patriarchy anathema to a free society. Perhaps the policies reflected by the laws could be more influenced by the 3.5 million "infertile" couples in the US¹¹² than by politicians submitting to the pressure exerted by conservative groups often dedicated to the prohibition of ARTs.

¹¹¹ For example, a simple procedure called Microsort allows for the separating of the male from female sperm and is particularly successful at producing girls. It costs 3,000 for each procedure engaged to determine the sex of the offspring ["The Politics of Genes—Americas Next Ethical War," *supra*, 21].

¹¹² *Ibid.*