SOLOMON REVISITED: ASSIGNING PARENTHOOD IN THE CONTEXT OF COLLABORATIVE REPRODUCTION

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Co-parent sought by gay white male, 38. Seeking woman to collaborate equally in making and raising a child. Am healthy, secure, professional, Jewish, excellent Dad material. My intentions for parenting are serious and genuine.[1]

Sperm Donors Wanted. All ethnicities needed. As a donor you have the opportunity to permit us to release your identity to resulting offspring when they reach 18. . . . [S]erve the needs of childless couples and single women.[2]

INTRODUCTION

Alternatives to traditional human reproduction have long been available. Surrogate motherhood is first mentioned in the Bible,[3] "while noncoital conception by donor insemination has been widely practiced since 1950."[4] However, the availability and acceptability of various birth technologies has only recently experienced a dramatic rise, with the advent of in vitro fertilization (IVF) in 1978.[5] Since then, the desire of biologically infertile

1. *Personal Ad*, E. BAY EXPRESS, Feb. 4, 1994, at 55.
2. *Id.* at 54.
3. *See Genesis* 16–17 (telling the story of Sarah, Abraham, and Hagar).
4. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 942 (1986).
5. *Id.* The first baby resulting from IVF, Louise Brown, was born amid worldwide acclaim in England on July 25, 1978. For accounts of the birth from either the parents' or the doctor's perspective, see L. BROWN & J. BROWN, OUR MIRACLE CHILD CALLED LOUISE, A PARENT'S STORY (1979) and ROBERT G. EDWARDS & PATRICK STEPTOE, A MATTER OF LIFE (1980).

couples to procreate has fueled the rapid growth of IVF and other noncoital solutions to infertility. The increasing availability and acceptability of these techniques,[6] in addition to changing cultural norms, have given rise to families of consent[7] involving socially infertile individuals and couples.

The term "families of consent" is used throughout this Article to refer to those families in which at least two members are not related by blood, marriage, or adoption and wherein the unit functions and self-identifies as a family. "Socially infertile" refers to individuals who wish to parent children independent of their decisions about sexual relations and interpersonal intimacy.[8] Like heterosexual couples who choose to utilize reproductive technology due to one partner's biological infertility,[9] such technologies may represent the only viable option for gays, lesbians, and other "social infertiles" to have children. Family law, influenced by both heterosexism and homophobia,[10] often precludes gays and lesbians from forming families of consent through other methods, such as adoption or foster parenting.[11] Moreover, families of consent headed by gays or lesbians do not presently receive legal recognition or protection.[12]

The current legal framework, because it fails to provide such recognition or protection, is incapable of adapting to the unique needs of families of consent. Clearly, a framework that provides these families with a higher degree of protection and applies to all types of family configurations is required. This Article con-

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6. Moral, ethical, and religious concerns about the use of reproductive technologies are beyond the scope of this paper. For fuller discussions thereof, see Hollace S. W. Swanson, *Donor Anonymity in Artificial Insemination: Is It Still Necessary?*, 27 COLUM. J.L. & SOC. PROBS. 151 (1993–1994).

7. *See infra* note 55 and accompanying text.

8. *See* Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 314–15 [hereinafter Shultz, *Reproductive Technology*]. The socially infertile includes single parents of either gender, gay male or lesbian couples, and individuals in relationships where one partner does not wish to procreate.

9. *See infra* notes 19–26 and accompanying text.

10. *See infra* notes 57–59 and accompanying text.

11. Florida and New Hampshire are the only two states that expressly prohibit gays and lesbians from adopting children. FLA. STAT. ANN. § 63.042(3) (West 1985) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); N.H. REV. STAT. ANN. § 170-B.4 (1994) (stating in introductory clause that "any individual not a minor and not a homosexual may adopt . . ."). For a thorough state-by-state discussion of adoption laws regarding gays and lesbians, see Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31 (1993).

12. *See infra* Part I.C.

structs a paradigm that provides this protection and recognizes the choices and the people involved, no matter what the construction of the underlying family. The proposed paradigm clarifies the legal relations of reproductive collaborators[13] to each other and to their offspring. The existing legal uncertainty of the various kinship relations and the meaning of "family" in light of noncoital collaborative reproduction creates a myriad of disputes among members of such reproductive efforts. Existing law establishes a polarity of adult-child relationships — legal parent and legal stranger. While legal parent status confers absolute parental rights and responsibilities,[14] a legal stranger lacks standing even to initiate a cause of action.[15] Although parties who use reproductive technologies may consider themselves "parents,"[16] they are not often viewed as such in the eyes of the law. Reproductive collaboration becomes extremely risky when such parents find their interests unprotected.

Moreover, the current legal framework fails to reflect the reality of families of consent creating children through collaborative reproduction. Many of these families involve gay and lesbian parents who face a legal system which often refuses to

13. *See infra* notes 47–49 and accompanying text.

14. The rights and responsibilities of parenthood are described by Katharine T. Bartlett, in *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884–85 (1984). In her article, Bartlett advocates for legal recognition of certain nonparental adult-child relationships. Her theory rests on the premise that exclusive parenthood can deprive a child of valuable relationships with significant adults in his or her life, particularly in non-nuclear family situations. *See infra* note 299 and accompanying text. For a discussion of the allocation of responsibility among numerous adults, see *infra* notes 292–96 and accompanying text.

15. "The term stranger, still used today, was common in turn-of-the-century decisions removing children from the custody of grandparents and other relatives and returning them to their natural parents." Barbara Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1786 n.150 (1992–1993). Third parties today have few common law or statutory rights, although some states have enacted statutes allowing for third party visitation or custody. *See* Richard S. Victor et al., *Statutory Review of Third Party Rights Regarding Custody, Visitation and Support*, 25 FAM. L. Q. 19 (1991). While some of these statutes utilize a "best interests" approach, many are limited to grandparents, relatives, or stepparents. Woodhouse, *supra*, at 1786 n.150; *see also infra* notes 164–68 and accompanying text. In addition, many are triggered only by death or divorce of parents, and many require a showing of unfitness. Woodhouse, *supra*, at 1786 n.150.

16. This Article constructs the concept of parent as a continuum of adult-child relationships ranging from complete to very limited moral and legal responsibility. This continuum consists of two poles: at one end lies "full parenthood," and at the other lies "legal stranger." In between are varying degrees of more or less limited parental roles. *See infra* Part III.C.

recognize, let alone protect, their families. In addition, these families involve a number of participants with varying interests in the reproductive effort. Such varying levels of interest give rise to a continuum of adult-child relationships. Collaborators and courts need a system that recognizes and accommodates relationships between the children and adult parties to the reproductive effort who do not claim full parenthood.[17]

Both of these goals — proper allocation of legal parental status and legal recognition of a special nonstranger status for members of a collaborative reproductive effort who do not want full parental status — are best met through enforcing written agreements entered into by all members of a family of consent. Recognizing and enforcing such agreements provides a principled and unified approach which alleviates uncertainty, protects the best interests of children born into such families, and affirms the values of individual choice, family autonomy, and private ordering. In this context, written agreements serve two distinct, equally crucial, purposes: they confer legal standing on appropriate individuals should dispute resolution become necessary[18] and facilitate analysis under the current "best interests of the child" standard for resolving disputes concerning a child's relationships with the adult members of his or her family.

This Article proposes that: (1) parental status be assigned, according to written agreement made at or before time of birth, to the intentional parents; (2) legal parenthood be available to all intentional parents regardless of number, gender, or sexual orientation; and (3) legal recognition be conferred on all statuses falling between legal parent and legal stranger. My model divorces parental status from genetic and/or biological contribution. In so doing, it is flexible enough to accommodate future, unknown scenarios emerging from evolving technology and changing cultural norms. Additionally, this model assigns status at birth, thereby giving a child's functional parents all of the authority that they need to rear the child properly.

Part I of this Article provides a brief overview of the medical and social history of reproductive technology, its role in the evolution of collaborative reproduction, and the resultant emergence of families of consent. Part II discusses recent cases in-

17. Under this Article's paradigm, one's position on the continuum is fixed at the time of entry into the written agreement among reproductive collaborators. *See infra* Part III.B.

18. *See infra* Part III.A.

volving the assignment of parental status among reproductive collaborators. Analysis of these cases reveals the need for a new paradigm by which courts can determine parenthood in these new, emerging family structures. The need for a principled approach is evidenced by the haphazard approaches taken and inconsistent results reached in current cases. As it stands, different technologies receive different standards of review. Courts have the discretion to make decisions influenced by cultural biases, and the inadequacy of the current paradigm often results in outcomes antithetical to the goal of protecting the best interests of the child. In short, the absence of an appropriate paradigm undermines the utility of the technologies themselves. Part III proposes a new paradigm. This paradigm, premised on the enforcement of written parenting agreements, both expands the current definition of legal parenthood and confers recognition to statuses that fall between legal parent and legal stranger. This Part discusses how the paradigm corrects the wrongs of current case law and how it applies to future, as yet unlitigated scenarios.

As reproductive technologies develop, gay, lesbian, and other nontraditional families of consent will continue to emerge. We need a flexible framework which can accommodate this convergence of technological advancement and changing social norms. My paradigm provides a principled and predictable approach for allocating parental status, one that is applicable to current and future reproductive arrangements.

I. Reproductive Technology, Collaborative Reproduction, and Families of Consent

An introduction to the medical technologies and social phenomenon of collaborative reproduction is worthwhile prior to analyzing the case law and the Article's proposed paradigm. This Part begins by discussing the emergence of reproductive technologies and then provides an overview of those technologies that are common in collaborative reproduction — Donor Insemination (DI), In Vitro Fertilization (IVF), Ovum Donation, and Surrogate Motherhood. Next, collaborative reproduction is defined and the importance of affirmative intents among collaborators is discussed. Finally, this Part discusses the recent emergence of families of consent.

A. *The Development of Various Reproductive Methods*

The National Center for Health Statistics estimates that more than one in every five heterosexual couples in the United States — over twelve million people — have difficulty conceiving or carrying a child.[19] Infertility has traditionally affected people of color and poor people at disproportionate rates, and continues to do so.[20] Recently, however, infertility has appeared with greater frequency among white and class-privileged people, particularly women,[21] and it has become the focus of much media attention.[22]

The increased numbers of infertile class-privileged women, with the resources necessary to seek treatment, caused an increase in professional interest in the field of fertility services, thus spurring new reproductive options and noncoital solutions to infertility.[23] The general demand for these services has always been high due to cultural norms supporting reproduction[24] and a cultural emphasis on having genetically related children.[25] How-

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19. JUDITH LASKER & SUSAN BORG, IN SEARCH OF PARENTHOOD: COPING WITH INFERTILITY AND HIGH-TECH CONCEPTION 2 (1987).

20. Robertson, *supra* note 4, at 945; *see also* Sevgi O. Aral & Willard Cates, *The Increasing Concern with Infertility — Why Now?*, 250 JAMA 2327 (1983). For a variety of reasons, some known and some unknown, infertility is currently twice as likely to affect African-American women as white women. LASKER & BORG, *supra* note 19, at 204 n.3.

21. Robertson, *supra* note 4, at 945 (citing Centers of Disease Control, *Infertility — United States, 1983*, 34 MORBIDITY & MORTALITY WEEKLY REP. 197 (1985)).

22. *See* MARTHA FIELD, SURROGATE MOTHERHOOD: LEGAL AND HUMAN ISSUES 25–26 (1990); Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 40 n.36 (1993).

23. In 1983 there were over two million visits to private physicians' offices for infertility-related consultations, making it a $200 million industry. Robertson, *supra* note 4, at 946.

24. *See, e.g.*, LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT (1990); JANET S. HYDE, HALF THE HUMAN EXPERIENCE: THE PSYCHOLOGY OF WOMEN (1976); ADRIENNE C. RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1976); Nadine Taub, *Surrogacy: Sorting Through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285 (1990). Media articles on reproductive technology imply that women should reproduce at all costs, for they will be emotionally "desperate" without their own children. Sarah Franklin, *Deconstructing Desperateness: The Social Construction of Infertility in Popular Representations of the New Reproductive Technology, in* THE NEW REPRODUCTIVE TECHNOLOGIES 200 (1990).

25. Dreyfuss and Nelkin have defined this phenomenon as "genetic essentialism." Rochelle C. Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 320 (1992). For the importance of genetic relations, see Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, 21 HASTINGS CTR. REPORT 5, 6 (Jan.–Feb. 1991) and Katherine O'Donovan, *"What Shall We Tell the Children?": Reflections on Children's Perspectives and the Reproductive Revolution in* BIRTHRIGHTS: LAW AND ETHICS AT THE BEGINNING OF LIFE

ever, as demand among people with financial resources became particularly strong,[26] new technologies — among them donor insemination, in vitro fertilization, and ovum transfer — emerged. Through time and increased use, these reproductive methods have steadily gained societal acceptance.

While different from one another, these and other modern reproductive techniques share one important feature — they allow for noncoital procreation, that is, procreation without sex. These three techniques subdivide and sever various stages of the previously unitary procreative process. They permit and often require more than two persons to be biologically involved in a given reproductive effort.[27] Developments and expansions of these techniques have further fragmented the process of procreation, such that there are presently at least sixteen different reproductive combinations, in addition to traditional conception and gestation.[28]

Although created to enable biologically infertile heterosexual couples and those at risk for having children with birth defects to reproduce, these techniques have become increasingly popular among the socially infertile — single men and women, and gay and lesbian couples. As the methods themselves become more complex, and as the socially infertile begin to take advantage of modern reproductive technologies, collaborative reproductive arrangements take on added social and legal significance. This is particularly true given the inadequacy of current statutes and case law addressing modern reproductive technology. Specifically, collaborative reproduction gives rise to the dual issues of how to determine the parents' identity and how to character-

96 (Robert Lee & Derek Morgan eds., 1989) (asserting that blood ties are also considered important in England).

26. The shortage of white babies for adoption fueled demand among those white, class-privileged people who may have considered adoption in spite of cultural norms that emphasize genetic propagation. *See* Robertson, *supra* note 4, at 946 n.20.

27. Shultz, *Reproductive Technology*, *supra* note 8, at 299–300.

28. These distinct collaborative reproductive methods result from "varying the source of the male gametes (whether by husband or third-party sperm donor), the source of the female gametes (whether by wife or third-party egg donor), the location of fertilization (whether in the wife, in the laboratory, or the surrogate host), and the site of gestation (either in the wife or the surrogate)." John L. Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991). Hill includes a chart mapping the 16 currently possible collaborative reproductive methods. *Id.* at 355 n.10.

ize the status of the other collaborators in the reproductive effort.

Most arrangements use a variation or combination of three basic methods — donor insemination, in vitro fertilization, and ovum donation/surrogacy. These techniques are discussed in the sections below.

1. Donor Insemination

While not new, donor insemination (DI) as a popular reproductive choice is a relatively recent phenomenon.[29] It first became employed on a wide scale during the 1930s and 1940s. DI began as a solution for heterosexual couples who had trouble conceiving due to either male (e.g., low sperm count) or female (e.g., poor cervical mucus) infertility. Due to its relative simplicity and low cost, DI has since been used with increasing frequency by single women and lesbian couples.[30] Currently, it is conservatively estimated that over 300,000 babies in the United States have been conceived through donor insemination.[31]

DI involves the deposit of semen inside a woman, usually with a syringe, and occurs in one of three contexts: where the prospective mother is inseminated with the sperm of an unknown donor through the help of professional services such as sperm banks and private physicians;[32] where she conceives without professional assistance, using a third party who serves as an intermediary and never discloses the identity of either party to the other;[33] or where she inseminates without anonymity and negotiates directly with the donor and any other interested parties.

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29. "The earliest [donor] insemination in humans was performed in 1790 by John Hunter, a Scottish surgeon." Patricia A. Kern & Kathleen M. Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent Through Artificial Insemination by a Donor,* 7 WOMEN'S RTS. L. REP. 251, 252 n.4 (1981–1982). The first successful insemination involving humans in the United States was performed in 1866. The procedure became more widely accepted between the 1920s–1930s. *Id.*; *see also* Hill, *supra* note 28, at 353.

30. *See, e.g.*, Kern & Ridolfi, *supra* note 29; Sheila M. O'Rourke; *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 BERKELEY WOMEN'S L.J. 140, 141, 144 n.31 (1985).

31. In 1979 George Annas estimated that 250,000 Americans had been conceived by DI; other experts estimate that an additional 15,000 are born each year by DI. George Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, *in* GENETICS AND THE LAW II, 331 (Aubrey Milunsky & George J. Annas eds., 2d ed. 1979); *see also* Kern & Ridolfi, *supra* note 29, at 252 n.5.

32. Kern & Ridolfi, *supra* note 29, at 253.

33. *Id.* at 253.

The third option, insemination with a known donor, has several benefits. It eliminates potential difficulties in gaining access to medical information, permits the prospective mother to choose her donor, and allows for negotiation of a variety of adult-child relationships, among them the relationship that between the child and his or her genetic father. The logistics of insemination are relatively simple; the procedure can be performed at home without medical assistance.[34]

Legal considerations, however, may prompt a woman to seek medical participation where she, her partner, or the donor seek to relieve the donor of all rearing rights and duties. The Uniform Parentage Act, for example, provides that a sperm donor is not the legal father where he has given his sperm to a licensed physician for an insemination.[35] In California, the involvement of a licensed physician bars the assertion of paternity rights by the donor.[36] Of course, where both the woman and

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34. *Id.* at 256.

35. Section 5 of the Uniform Parentage Act states:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. . . .
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592–93 (1979); *see also* Note, *Contracts to Bear a Child*, 66 CAL. L. REV. 611, 614 (1978).

36. California Family Code § 7613 closely tracks the Uniform Parentage Act, stating:

> (a) If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship. . . .
>
> (b) The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the do-

the donor want the donor to have some sort of legally recognized relationship with the child, ensuring legal strangerhood presents as unappealing an option as does the only other alternative, legal parenthood.

2. In Vitro Fertilization

In vitro fertilization (IVF) joins the egg of a woman with the sperm of a man outside of the woman's body.[37] IVF is an expensive procedure[38] with a relatively low success rate.[39] However, it has rapidly caught on both in the United States and abroad.[40] As medical technology has improved,[41] IVF has become a tool for

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nor's wife is treated in law as if he were not the natural father of a child thereby conceived.

CAL. FAM. CODE § 7613 (West 1994); *see also* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986) (granting semen donor visitation rights over mother's objection where semen was not inseminated by a licensed physician).

37. When IVF was first developed, it was intended primarily as a way of bypassing damaged or blocked fallopian tubes. LASKER & BORG, *supra* note 19, at 52. It has since been extended to couples with other problems, including endometriosis and some types of male infertility. *Id.* IVF can also be used for genetic screening, sex selection, menopausal cessation of ovary function, and a variety of other purposes. *See* Robertson, *supra* note 4, at 951.

38. In 1982 the typical cost to the patient for an initial treatment (screening, laparoscopy, and embryo transfer) was estimated at $7500, with each subsequent attempt (omitting screening) costing about $5000. Given levels of efficacy, (about 10% for a laparoscopy), $38,000 is required for a 50% chance of live birth. Robertson, *supra* note 4, at 943 n.6 (citing Clifford Grobstein et al., *External Human Fertilization: An Evaluation of Policy*, 222 SCI. 127, 128–30 (1983)). That cost is probably higher today.

Health insurance does not cover most of these charges, and the Clinton health plan has explicitly excluded coverage for this procedure. White House Domestic Policy Council, *President's Health Security Plan: The Draft Report* (Sept. 7, 1993), at 34–35. Consequently, IVF is generally reserved for the class-privileged infertile. This class makeup comes into play in subsequent court disputes among collaborators in reproductive efforts involving IVF and other expensive reproductive technologies. *See, e.g.*, Horsburgh, *supra* note 22.

39. The most successful IVF programs have a 20–25% rate per treatment of achieving pregnancy with two-thirds of these pregnancies resulting in a live birth. Robertson, *supra* note 4, at 943.

40. Since 1978, the year of the first successful IVF birth, extracorporeal fertilization methods have improved and expanded. By 1986 as many as 150–200 IVF programs existed in the United States alone, with the number increasing annually. Joan H. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 870–71 (1985). The technique had resulted in the birth of over 2000 children worldwide. Robertson, *supra* note 4, at 943.

41. Basic IVF entails surgical removal of a woman's eggs from her ovary and fertilization with a man's sperm in a petri dish. After the cells have divided, the physician inserts the fertilized eggs through the woman's vagina into her uterus. *See* Hollinger, *supra* note 40, at 871; Robertson, *supra* note 4, at 943.

collaborative reproduction in at least three different situations: where the husband has a low or absent sperm count, where the woman's ovaries are missing or inaccessible, and where the woman cannot carry or give birth to a baby. These variations require the cooperation of either a sperm donor, an ovum donor, or a gestational surrogate.[42]

It is in the context of these collaborative efforts that IVF becomes significant for the purposes of this paper. Those statutes that do address reproductive technology and the relationships derived therefrom fail to contemplate, let alone resolve, the issues presented by more complex collaborative efforts. Once a third party is involved, especially one that is either genetically or biologically linked to the child, the legal framework for allocating parental status begins to break down. The question, "Who are the parents of this child?," is no longer readily answerable. A second question, "What is the relationship between the child and this third party?," emerges.

3. Ovum Donation and Surrogate Motherhood

Ovum donation allows women unable to produce their own eggs to gestate children. It entails the acquisition of donated eggs,[43] the in vitro fertilization of those eggs, and the implantation of the embryo into the gestational mother.[44] Ovum donation is often analogized to sperm donation for purposes of legal and social treatment. Sperm donation has raised new and complex legal issues for families of consent where the donor retains a nonparental role in the child's life. Similarly, ovum donation raises complex issues regarding the termination of rearing rights and duties, and the extent to which agreements allowing the egg donor to play some rearing role should be respected.

In contrast with ovum donation, surrogate motherhood is more accurately conceptualized as a social arrangement rather

42. In addition to these contributors, IVF implicates the interests of others who are not biologically or genetically related to the child — the partners of the surrogate, the ovum donor, and the woman using donor insemination.

43. "[These] eggs can be acquired from women undergoing ovarian stimulation as part of an IVF cycle, or from women undergoing other abdominal surgery who agree to superovulation in order to donate eggs." Robertson, *supra* note 4, at 1008. Egg donation may also be sought from women not undergoing intrusive medical procedures, however "the risk of superovulation and retrieval are not trivial." *Id.* at 1008 n.230.

44. Ovum donation was not possible until the development of both IVF and methods for transferring extracorporeal embryos to a uterus other than that of the egg source. *Id.* at 1008.

than as a medical procedure. It differs from the three methods discussed above in that it describes a relationship rather than a technology. Nonetheless, surrogacy does emerge from and involve medical technology, and it plays an important, controversial, and growing role in collaborative reproduction.

"Surrogate mothering" generally refers to a noncoital technique, involving in vivo[45] rather than in vitro conception where the surrogate provides both the egg and gestation. In this type of collaborative reproduction, a woman other than the partner of the sperm donor agrees to conceive a child by donor insemination and carry it to term. She also agrees to relinquish the child to the genetic father and his partner at birth. For purposes of this Article, this arrangement shall be called "traditional surrogacy."

Traditional surrogacy can be distinguished from "gestational surrogacy" which involves IVF using the egg and sperm of a couple where the woman cannot or will not undergo pregnancy. The woman's eggs are retrieved and fertilized by her partner's sperm, and then transferred to the surrogate who gestates and gives birth.

While any woman who gestates and births a genetically unrelated child is, in theory, a gestational surrogate, this term has been applied only to those women who agree to relinquish custody of the child after birth to his or her genetic mother and father. In contrast, a gestator who intends to keep the child is not known by this term; rather, she is usually referred to as the "mother" while the genetic mother in such situations is known as the ovum donor. These distinctions attest to the social construction rather than medical basis of the concept of surrogate motherhood.[46]

B. *Collaborative Reproduction*

Social arrangements stemming from collaborative reproduction vary not only according to the scientific procedures involved, but more importantly, according to the diverse social agreements

45. In vivo fertilization occurs inside rather than outside the woman's body.

46. It is difficult to estimate the number of babies born in this country through surrogacy arrangements. They are certainly expensive, with varying costs depending on whether legal fees as well as payments to the surrogate are included. Hollinger estimates costs to range from $10,000 to $30,000 or higher. Some people may offer as much as $50,000 for the surrogacy fee alone. Hollinger, *supra* note 40, at 873 n.32. These costs are incurred primarily for the social arrangement as the medical procedure involved, at least in traditional surrogacy, is relatively simple — usually basic donor insemination.

reached by the parties. These agreements concern relationships among the parties themselves and their respective relationships with the child. Most of the literature on this subject states that collaborative reproduction can have as many as five adult participants: a sperm donor, an egg donor, a gestator, and two nonbiologically related individuals who intend to raise the child.[47] However, the number of adult participants can change according to the social arrangements made by the collaborators. Thus, in addition to the five participants previously named, a collaborative reproductive effort can involve, for example, the partner of the gestator or the donor.[48] As reproductive technology develops and social arrangements become more complex, other scenarios will doubtless emerge.[49]

Modern technology makes procreation without sex possible.[50] This possibility allows for affirmative intention — for purpose and choice — in procreative behavior. Individuals can now control their sexual and procreative choices, independently of one another. Previously, such a separation was impossible. Consequently, individuals were forced to "undertake[ ] or avoid[ ] complex relationships and diverse obligations in order to effectuate a specific intent regarding procreation. . . ."[51] With collaborative reproduction, choices emerge — choices that challenge old paradigms and raise new legal and social issues.[52]

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47. Hill, *supra* note 28, at 355; *see also* Mary S. Henifin, *Introduction: Women's Health and the New Reproductive Technologies*, *in* EMBRYOS, ETHICS, AND WOMEN'S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES 1 (Elaine Hoffman Baruch et al. eds., 1988) (setting out the five roles), *cited in* Woodhouse, *supra* note 15, at 1758 n.25.

48. The idea of a "gestational father," one who supports and nurtures the birth mother during the course of her pregnancy, can be attributed to Woodhouse, *supra* note 15. While the idea is helpful in developing our notion of the ways in which adults can participate in collaborative reproductive efforts, it is at the same time both gendered and heterosexist. Thus, although I have incorporated and expanded on the concept in this Part, I have also sought to reconstruct the roles to make them nongendered.

49. For example, two men may mix their sperm together before donating it to a woman. While this is a purely symbolic act and genetic fatherhood can be determined by blood or DNA tests, an interesting situation arises where both men refuse to undergo such tests, preferring to "share" fatherhood. Even more complex is the scenario presented by a woman who gestates the fertilized egg of her lesbian lover.

50. Shultz, *Reproductive Technology*, *supra* note 8, at 308. This represents the flip side of the choices created by the emergence of safe, effective, and accessible contraception: sex without procreation. *Cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

51. Shultz, *Reproductive Technology*, *supra* note 8, at 305.

52. *Id.* at 307–08.

Affirmative intent underlies the collaborative reproductive process. According to Professor Marjorie Shultz, intent is characterized by specificity of purpose and availability of options.[53] Medical technology, by subdividing biological procreation into discrete stages, has created options for both the biologically and socially infertile.[54] The separation of sex from procreation ensures that the purpose of procreation can be met, as well as avoided, by a conscious, deliberate, and specific choice. Moreover, collaborative reproductive efforts allow for the separation of procreation from parenting.

For Shultz, one of the most difficult issues resulting from the emergence of collaborative reproduction is how to resolve competing claims to parenthood. The number of people available to fill the traditional role of parent has increased for children born through modern reproductive techniques. As this Article will illustrate, the nature and scope of reproductive efforts and the concomitant growth of families of consent have given rise to a second, equally compelling issue — how to affirm and protect the diversity of adult-child relationships that result from collaborative reproductive efforts, and more specifically how to characterize those relationships that fall between the traditional legal dichotomies of parent and stranger.

C. *The Emergence of Families of Consent*

Collaborative reproductive arrangements give rise to families of consent, also known as "families of choice."[55] Unlike conventional nuclear families, some of the relationships in these families are not based on ties of blood, marriage, or adoption. Rather, they are characterized by a bond of love, of choice. Since private ordering of familial relations does not without more give rise to legal recognition thereof, these relationships do not generally receive legal protection.[56]

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53. *Id.*

54. *Id.*

55. KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 35 (1991) ("Lesbians and gay men [have begun to] lay claim to a distinctive type of family characterized as families we choose or create.").

56. In two cases, the Supreme Court did provide a modicum of protection to families based on their social function and familial bonds rather than the formal structure of conventional nuclear families. However, both these cases, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating a zone restriction that excluded extended families) and Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating a state statute that automatically deprived unwed fathers of custody of children after death of the mother) involved biological families. Although the Court emphasized

This is particularly true for gay- or lesbian-headed families of consent. Gays and lesbians face a society pervaded by heterosexism. Heterosexism[57] is a cultural presumption that all people are and should be heterosexual. It both marginalizes and condemns gay and lesbian relationships. Societal heterosexism is "structured into basic familial, economic and political relationships,"[58] and permeates our legal system.[59] It influences marriage, adoption, custody, and visitation laws, thereby impacting every facet of the lives of gays, lesbians, and their children.

Gays and lesbians are deprived of the right to marry, despite the fact that the Supreme Court has held that marriage is a fundamental right.[60] The deprivation of this right denies gay and lesbian couples significant economic and legal benefits given to married heterosexuals.[61] Denial of state sanction and recognition further marginalizes gay and lesbian relationships. Finally, prohibition of same-sex marriage affects the children of gays and lesbians. Gay and lesbian co-parents cannot, for example, take advantage of the presumptions of parentage that attach to the husband of a woman who has a child.[62] Thus, in one case the court denied custody or visitation rights to a nonbiological mother because she was not a biological or adoptive parent.[63] While legitimizing the family formed by a mother through donor insemination, the court refused to view her lesbian partner in the way that it would have viewed a husband.

Heterosexism also affects adoption and foster parenting. Although there has been some liberalization in foster parenting

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the value of emotional ties among family members, the biological ties were also considered. *Moore*, 431 U.S. at 504–05; *Stanley*, 405 U.S. at 651–52.

57. Professor Sylvia Law explains the distinction between homophobia and heterosexism. Homophobia suggests "fear of homosexuals and an individual pathological hatred of them." Sylvia Law, *Homosexuality and the Meaning of Gender*, 1988 WIS. L. REV. 187, 195. Homophobia is experienced on an individual basis, while heterosexism is a broader social phenomenon. *Id.*

58. *Id.*

59. For a complete discussion of the ways in which heterosexism influences the legal system, see Lisa Pooley, *Heterosexism and Children's Best Interests: Conflicting Concepts in* Nancy S. v. Michelle G., 27 U.S.F. L. REV. 477 (1993).

60. Loving v. Virginia, 388 U.S. 1 (1966); Zablocki v. Redhail, 434 U.S. 374 (1978); *cf.* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that Hawaii's prohibition of same-sex marriage was an unconstitutional form of gender-based classification which must be struck down in the absence of a compelling state purpose).

61. See Pooley, *supra* note 59, at 481 n.21, for a discussion of these rights and benefits.

62. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (denying paternity to an unwed biological father in favor of the mother's husband).

63. Nancy S. v. Michelle G., 279 Cal. Rptr 212 (Cal. Ct. App. 1991).

laws concerning gays and lesbians, adoption laws remain restrictive. Gay and lesbian couples, unlike married heterosexuals, often cannot adopt a child together.[64] When a single gay or lesbian adopts, his or her partner has no legal relationship to the child.[65] Some states and numerous counties have begun to permit second-parent adoptions.[66] Such adoptions allow gays and lesbians to become the legal parents of their partners' children. However, second-parent adoption — even if it were universally available — represents a very limited option, appropriate in only a small set of circumstances.[67]

Finally, heterosexism influences the ability of gays and lesbians to obtain custody and visitation rights. Biological parents are often denied custody solely on the basis of their sexual identity.[68] Until recently, the majority of jurisdictions held that homosexuality constituted per se unfitness with respect to parenting.[69] In these cases, judges ruled that living with a gay or lesbian parent is against the best interests of the child, despite the absence of inappropriate behavior or unfitness.[70] The legal system continues to label gays and lesbians as mentally ill, criminal, and immoral. Such labels justify court declarations of lesbians and gays as unfit parents,[71] even in the absence of impropriety.[72]

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64. *See supra* note 11 and accompanying text.

65. See *In re* Z.J.H., 471 N.W.2d 202 (Wis. 1992), discussed *infra* notes 158–62 and accompanying text.

66. Vermont and Massachusetts are the only states to have considered and approved second-parent adoption. Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *see also In re* Evan, 583 N.Y.S.2d 997 (N.Y. Sur. Ct. 1992); *In re* L.S. & V.L., 17 Fam. L. Rep. (BNA) 1524 (Aug. 30, 1991).

67. *See infra* Part II.B.3.

68. *See, e.g.*, N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. 1980) (affirming trial court's order to remove custody from lesbian mother due to unwholesome environment); *In re* Jane B., 380 N.Y.S.2d 848 (1976) (awarding custody to the father because staying in a home where there is a lesbian relationship was not in the child's best interests); Newsome v. Newsome, 256 S.E.2d 849 (N.C. 1979) (upholding change in custody because, although lesbian mother was loving and capable, the court did not feel that she and her partner could raise the child well).

69. ELLEN LEWIN, LESBIAN MOTHERS 165 (1993).

70. This has occurred even outside of the context of a custody dispute between the two legal parents. In Bottoms v. Bottoms, ___ S.E.2d ___, 1995 WL 234222 (Va., Apr. 21, 1995), for example, the court awarded custody to the grandmother because the lesbian mother was deemed unfit in part due to her homosexuality.

71. Pooley, *supra* note 59, at 480.

72. *See* Nancy Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L.J. 459, 549–61 (1990) (discrediting these myths). In her article, Polikoff argues that the status of legal parenthood should not be limited numerically (to two adults) or by gender (to adults of opposite sex). *See infra* note 303 and accompanying text.

Collaborative reproduction is the only way in which gay and lesbian couples can produce a child together.[73] Yet a collaborator who is not genetically or biologically related to the child has few, if any, means of attaining parental status.[74] Often courts are reluctant to validate gay or lesbian parenting arrangements because to do so entails validation of gay or lesbian relationships. This reluctance, stemming from a combination of heterosexism and "genetic essentialism,"[75] leaves many parent-child relationships unprotected. In the event of dissolution of the adult relationship, nonbiological parents receive no custody or visitation rights.[76]

There are no precise statistics on the total number of children with a lesbian mother or gay father. During the 1980s estimates ranged from six million[77] to ten million.[78] More recent estimates suggest that there are between three and eight million gay and lesbian parents in the United States, raising between six and fourteen million children.[79] Most of these parents had their children not as a result of collaborative reproductive arrangements, but rather within earlier heterosexual marriage. However, gays and lesbians are increasingly seeking parenthood within their same-sex relationships, thereby creating a new generation of families of consent.[80]

Rather, she seeks to extend the availability of parental status to a greater number and variety of individuals. *Id.*

73. Even those gay or lesbian couples whose desire to parent is not limited to genetically or biologically related offspring cannot currently parent except through collaborative reproduction because they are prohibited from adopting or fostering children. *See supra* notes 64–67 and accompanying text.

74. Second-parent adoption provides an option, albeit limited, in situations where no second legal parent exists. For a discussion of the limited use and availability of second-parent adoption see *infra* notes 169–71 and accompanying text.

75. *See supra* note 25 and accompanying text.

76. *See* Georgia P. v. Kerry B., Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); Alison D. v. Virginia M., 77 N.Y.2d 651 (N.Y. 1991). These cases are discussed *infra* Part II.B.

77. J. SCHULENBERG, GAY PARENTING (1985), *cited in* Polikoff, *supra* note 72, at 461 (1990).

78. *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 Fam. L. Rep. (BNA) 1512, 1513 (Aug. 27, 1987), *cited in* Polikoff, *supra* note 72, at 461 n.2.

79. APRIL MARTIN, THE LESBIAN AND GAY PARENTING HANDBOOK 6 (1993).

80. *See* WESTON, *supra* note 55, at 165–68, 175. I do not address herein the concerns and arguments made in favor of or against lesbians and gay men choosing to seek parenthood within their same sex relationships. However, for an excellent discussion of the various issues raised, see Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992).

In the last several years, the national and local media have begun to focus on the steadily increasing numbers of lesbians and gay men[81] who are choosing to have children with their same-sex partners.[82] National television programs have also featured lesbian and gay parents.[83] As lesbian and gay cultures become more visible, and as alternative reproductive therapies become more accessible, these and other families of consent will continue to emerge. The best interests of children — stability within and integrity of their families — will never be realized until society and the law recognize and protect relationships within families of consent. Legitimization of these relationships will provide stability and continuity for children and protect parents' autonomy in structuring their families.

II. CASE LAW AND LEGAL PROBLEMS

Prevailing law reveals that courts are distinguishing between different collaborative reproductive methods and addressing each according to its own separate doctrine. This approach is flawed on two levels: The cases are categorized according to false distinctions, and the existing law applied to the various categories is inappropriate. A better approach would be to acknowledge that surrogacy arrangements, ovum donation, and sperm donation all fall within the context of collaborative reproduction, and

81. Of course, gay fathers, like lesbian mothers, are not new; gay men have always been able to father children within heterosexual marriage. Gay men are just beginning to be able to choose parenting within their same-sex relationships or as single men, with the emergence of medical advancements and social arrangements that enable men to reproduce and parent a child without the ongoing involvement of the child's mother. In addition, cultural norms have begun to break from the belief that a child needs to be parented by a woman. While fewer gay men than lesbians have chosen to become parents, they are growing in numbers. Many are now creating their families through collaborative reproduction with lesbian women or couples, adoption, or foster parenting. *See, e.g.*, Babets v. Secretary of the Executive Office of Human Service, 526 N.E.2d 1261, 1262 (Mass. 1988) (gay couple, approved as foster parents, challenged decision to remove foster children from the couple's home on the basis of their homosexuality); Jean Seligman, *Variations on a Theme*, NEWSWEEK, Special Ed., Winter/Spring 1990, at 39 (describing the family of two gay men and their jointly adopted children).

82. Jane M. Adams, *Gay Couples Begin a Baby Boom*, BOSTON GLOBE, Feb. 6, 1989, at 2; Jean Latz Griffin, *Law Begins to Address Rise in Gay Families*, CHI. TRIB., Sept. 4, 1992, at C1; Jonathon Mandell, *The Lesbian Baby Boom*, NEWSDAY, July 13, 1989, at 8; *Two Moms*, S.F. EXAMINER, June 12, 1989, at A18; *see also* Polikoff, *supra* note 72, at 461 n.2.

83. *See, e.g.*, *Phil Donahue Show: I Have Two Moms* (ABC television broadcast, May 6, 1989); *Oprah Winfrey Show*: *Gay and Lesbian Adoption* (ABC television broadcast, Aug. 9, 1990).

then to construct a paradigm through which disputes arising within this context can be resolved.

Among the current legal disputes arising in the context of collaborative reproduction, two questions emerge: (1) Who are the child's legal parents?; and (2) To what extent shall the relationship between the child and other members of the reproductive effort be recognized and protected? Few articles address the socio-legal implications of collaborative reproduction.[84] Those that do focus primarily on methods of determining who are the parents where multiple parties, not living in a nuclear family structure, are involved. The best of this body of work favors awarding parental status to the child's intentional parents, in a manner that is consistent with the first Part of this Article's proposal.[85] However, current scholarship does not go far enough in that it fails to address two important issues: the need for an expanded notion of legal parenthood and the need to provide legal recognition of privately ordered, nonparental relationships.

Recent cases highlight the importance of both these issues and illustrate the ways in which the two are interlinked. Currently, courts refuse to recognize and protect statuses other than legal parent. This forces parties desiring relationships that are less than full parenthood in scope to nevertheless press claims of full parenthood. A close examination of cases characterized as disputes over parental status shows that some cases, particularly those arising before or soon after the birth of the child, do indeed involve competing claims to parenthood. A larger portion of the current disputes, however, are more accurately described as attempts to modify the scope of the rights and privileges of a parenting adult vis-à-vis a nonparenting adult.

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84. Early articles addressing reproductive technology focused primarily on the legal issues inherent to the methods themselves. For example, authors emphasized regulation of the medical profession to ensure informed and voluntary decisions, safe procedures, procreative liberty of the biologically infertile couple or single woman, and the status of the embryo. *See, e.g.*, Alexander Capron, *Alternative Birth Technologies*, 20 U.C. DAVIS L. REV. 679 (1987); Hollinger, *supra* note 40; Kern & Ridolfi, *supra* note 29; Robertson, *supra* note 4. These articles discuss only briefly, if at all, the child. More recent articles have begun to address the manner in which legal parental status should be ascribed where several parties have competing claims to parenthood. *See, e.g.*, Hill, *supra* note 28; Hollinger, *supra* note 40; Shultz, *Reproductive Technology*, *supra* note 8. None, however, has presented an appropriate framework through which both the identity of the legal rearing parents, as well as the legal status of other participants in the collaborative reproductive effort, can be determined.

85. *See, e.g.*, Shultz, *Reproductive Technology*, *supra* note 8; *see also infra* Part III.A–B.

This Part discusses several recent cases arising in the context of collaborative reproduction. The cases are separated into two categories: (1) competing claims to parental status among intentional parents and sperm donors, ovum donors, and surrogates; and (2) competing claims to parenthood between biologically and nonbiologically related co-parents. The first category contains both "true" and "false" claims to parenthood — cases where the petitioner desires full parental status as well as those in which parenthood is sought in order to protect or expand the rights of a nonparenting adult. The second involves attempts by nonbiological parents to attain parental status, either with the consent of a biological legal parent or where that consent has been revoked.

A. *Who Is "Parent" — Competing Claims to Parental Status*

Competing claims to parenthood can arise in any situation where a third (or fourth or fifth) party collaborates with a biologically or socially infertile couple seeking a child to rear. Thus far, such claims to parental status have arisen in three contexts: sperm donation, surrogacy, and gestational surrogacy. The law has dealt with these claims contextually, so that a variety of cases and statutes ascribe parental status in narrowly defined settings. The law has failed to recognize the need for an overarching framework in which competing claims to parenthood among parties to all types of collaborative reproductive efforts can be resolved. Instead, it has artificially separated out lines of cases according to reproductive method and provided piecemeal, inconsistent responses to the uniform problem of establishing parental status.

1. Sperm Donation

At least half the states have enacted statutory presumptions in favor of parenting goals of married couples resorting to traditional anonymous DI.[86] These statutes conclusively presume that a man consenting to insemination of his wife with a donor's sperm is the legal father of any subsequently born child. Under such statutes, the donor is barred from claiming paternity or asserting any parental rights. Most of these statutes reflect the pro-

86. Hollinger, *supra* note 40, at 897.

visions of Section Five of the Uniform Parentage Act (U.P.A.),[87] which exempts the donor from any legal relationship to the child of a married woman.

These presumptions break down in the context of unmarried women, whether single or co-parenting in a lesbian relationship.[88] While many states leave this issue unanswered, some, such as California, exempt the donor from parental rights or obligations regardless of whether the mother is married.[89] The trend certainly favors exemption where the donor is anonymous, in order to protect the reasonable expectations of all parties involved. An anonymous donor most likely expects not to face claims to paternity and concomitant social or economic obligations. Similarly, an unmarried woman may well choose an anonymous donor to bar assertion of paternity.

If the woman and the donor agree that he shall have no paternal rights or responsibilities and that knowledge of the donor's identity suffices, they can each bar paternity claims through the use of a licensed physician.[90] Both the U.P.A. and the California Code permit parties to relieve the donor of all rights and obligations if a physician has been involved in the DI process.[91] If, however, the parties choose not to use this procedure, they may face a situation wherein either can assert a paternity claim, against the wishes of the other and contrary to their original intent.[92]

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87. UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592 (1979). For the statute's applicable text, see *supra* note 35.

88. They also break down when the social arrangement is characterized as surrogate motherhood rather than donor insemination. Donor insemination, if characterized as surrogacy, not only avoids the provisions of the U.P.A. but often gives rise to the opposite presumption — that the donor's legal relationship to the child is as legitimate as the woman's. Of course, in most surrogacy arrangements the donor is not anonymous.

89. CAL. FAM. CODE § 7613 (West 1994). For the statute's applicable text, see *supra* note 36.

90. Even where it seems clear that the parties agreed to exempt the donor from paternal rights and responsibilities and attempted to follow the U.P.A. procedures, disputes have arisen. In one case, the donor asserted paternity claims anyway, and the court held that his claims were not barred because the U.P.A. procedure was not properly followed. Steven W. v. Martha Andra N. & Mary M.N., No. 3 CIV.CO12456 (Cal. Ct. App., Yolo County, May 6, 1993), discussed *infra* note 112 and accompanying text.

91. UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592–93 (1979); CAL. FAM. CODE § 7613 (West 1994). For the applicable text of these statutes, see *supra* notes 35 and 36.

92. *See, e.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

Despite potential legal problems, unmarried women are increasingly choosing DI with a known donor. Single women as well as lesbian couples may want access to a donor's identity for several reasons, including uninhibited access to the donor's medical and genetic history to assist with the child's health care and the opportunity to provide the child a chance to know both of his or her genetic parents. Consequently, these women seek to create families wherein the child knows the identity of, and may even have some sort of relationship with, his or her genetic father. Thus, both single women and lesbian couples have begun to negotiate arrangements with their donors. Where the parties desire a limited relationship between the donor and the child, the all-or-nothing nature of legal parenthood becomes problematic. If they have not used a licensed physician to bar future claims, then a donor who originally wanted few if any parental rights can later demand visitation or even custody.[93] This is particularly threatening to lesbian co-parents because the donor's paternity, if legally recognized, often comes at the expense of the nonbiological mother's position.[94] Conversely, if they have acted to bar such claims with the understanding that the donor would still be able to pursue a relationship with the child, then the donor has no recourse if the woman subsequently decides to terminate that relationship by asserting her parental authority.[95]

A large number of cases involve the breach of an agreement made as part of a collaborative reproductive arrangement. The petitioner typically asks for either legal recognition or erasure of the relationships created therein.[96] The earlier cases involved situations wherein the agreements between the parties were infor-

93. *See id.* at 531; *see also* Leckie v. Voorhies, No. 60-92-06326 (Lane County Cir. Ct., Or. filed Apr. 5, 1993); *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. 1994).

94. See, e.g., *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. 1994), discussed *infra* notes 100–11 and accompanying text.

95. *But see In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (Colorado Supreme Court held that, in spite of clear statutory language denying sperm donors parental status if insemination is performed by a physician, the intentions of a known sperm donor and the unmarried recipient woman at the time of insemination are relevant to determine the donor's parental status). In McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989), an Oregon Court of Appeals held that proof that the sperm donor and the recipient intended the donor to have rights and responsibilities of fatherhood rendered a statute barring donor assertion of paternity unconstitutional, as applied to the donor.

96. *See, e.g., Jhordan C.*, 224 Cal. Rptr. at 530; *In re Thomas S.*, 618 N.Y.S.2d at 356. However, it is important to note that neither case involved a written parenting agreement.

mal and often not written.[97] More recent cases involve written agreements outlining the parties' intentions and distributing their respective rights and responsibilities vis-à-vis the child.[98] As yet, neither written nor oral agreements made between women and donors have been upheld as legally enforceable or binding.[99]

In re Thomas S. v. Robin Y.[100] involved a dispute between a known sperm donor and the custodial parents, the biological mother and her lesbian partner, of a child born as a result of DI. Prior to the insemination the three had orally agreed that the women would raise the child, that the donor would have no parental rights, and that he would make himself known to the child upon the women's request.[101] When the child was five, the donor responded to the mothers' request and met the child.[102] For the next six years, he visited the family several times a year, always at the discretion of the women.[103] In 1990 the donor, seeking to redefine his relationship with the child, insisted on visitation with her outside of the mothers' presence.[104] He commenced the proceeding when the mothers refused his request.

The donor then filed a paternity claim not because he desired full parenthood but as a means of attaining visitation privileges beyond those initially agreed upon. The lower court realized this and thereby refused his claim, asserting that "from the outset, he had no interest in exercising parental rights. . . ."[105] In reaching its decision, the lower court emphasized the child's interest in maintaining her family's integrity. The court viewed

97. *See, e.g.,* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

98. See, e.g., Leckie v. Voorhies, No. 60-92-06326 (Lane County Cir. Ct., Or. filed Apr. 5, 1993), discussed *infra* notes 114–18 and accompanying text.

99. Courts have generally refused to enforce contracts involving children as contrary to public policy. *See, e.g., In re* Baby M., 537 A.2d 1227 (N.J. 1988). However, as the nature and scope of families of consent continue to grow, these agreements are beginning to receive some recognition. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), discussed *infra* notes 123–29 and accompanying text. This Article argues that such agreements do not represent commodification of children but rather the protection thereof. *See infra* notes 195–205 and accompanying text.

100. 618 N.Y.S.2d 356 (N.Y. 1994).

101. *In re* Thomas S. v. Robin Y., 599 N.Y.S.2d 377, 380 (N.Y. App. Div. 1993), *rev'd*, 618 N.Y.S.2d 356 (N.Y. 1994).

102. *Id.* at 384.

103. *Id.*

104. *Id.* at 385.

105. *Id.* at 390.

the donor as a threat to this integrity: "[He] is an outsider attacking the family, refusing to give it respect."[106]

However, the New York Court of Appeal reversed the decision, holding that a "father" who was known to his child as "her father," and who had "spent considerable time with her at instance of her mother, was entitled to an order of filiation."[107] By granting the donor paternity, the court thereby denied recognition of the nonbiological mother, an individual intending and functioning as a full parent, while giving full parental status to one who intended to and functioned at a much more limited level. In so doing, the appellate court focused exclusively on the parental rights of the child's genetic "father," asserting that "[t]he legal question that confronts us is not, as Family Court framed it, whether an established family unit is to be broken up. . . . Rather the question is whether the rights of a biological parent are to be terminated."[108] Refusing to address the impact its decision would have on the child's best interests, the court stated only that "[t]he asserted sanctity of the family unit is an uncompelling ground for the drastic step of depriving petitioner of procedural due process. . . ."[109] The court dismissed the issue of the child's best interests as follows: "Whatever concerns and misgivings Family Court and the dissenters may entertain about visitation, custody and the child's best interest, it is clear that they are appropriately reserved for a later stage of the proceedings."[110]

The appellate court claimed that the lower court's ruling "hardly serve[d] to promote tolerance and restraint among persons who may confront similar circumstances. It discourage[d] resolution of disputes involving novel and complex familial relationships without resort to litigation which, ideally, should only be pursued as a last resort."[111] However, the appellate court's decision similarly fails to avoid these pitfalls, given that it operates under the same framework. Moreover, this restrictive framework resulted in a decision far less preferable than that of the lower court's, which originally denied the paternity petition

106. *In re* Thomas S. v. Robin Y., 599 N.Y.S.2d 377, 390 (N.Y. App. Div. 1993), *rev'd*, 618 N.Y.S.2d 356 (N.Y. 1994).

107. *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 362 (N.Y. 1994).

108. *Id.* at 358–59.

109. *Id.* at 359. *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (denying paternity of an unwed biological father in favor of the mother's husband).

110. *In re Thomas S.*, 618 N.Y.S.2d at 359.

111. *Id.* at 360.

of the donor. At the very least, the lower court's decision acknowledged the inapplicability of certain legal principles to the context of collaborative reproduction and sought guidance from the agreement reached among the parties involved.

However, even the lower court reasoned from a traditional nuclear family paradigm, one which clearly could not accommodate the social arrangement of the parties involved in the case. This traditional framework forces families of consent to emulate narrow and inappropriate models. In so doing, it denies the emergence of collaborative reproduction and fails to recognize the spectrum of adult-child relationships thereby created. Moreover, the appellate court did not consider either the agreement among the parties or their original intentions. It did not approach the issue from a contract perspective, but rather based its refusal to grant paternity on the concept of estoppel.

In a somewhat similar case, *Steven W. v. Martha Andra N. & Mary M.N.S*,[112] a donor sought and received paternity. From the perspective of the best interests of the child, this outcome is less troubling here than it was in *Thomas S.* Here, the donor changed his mind during the course of the pregnancy and immediately initiated the paternity action. Thus, the lawsuit did not threaten to destroy an established family structure or the child's familial stability. Nonetheless, even here the court did not base its decision on an analysis of the child's best interests. Moreover, it did not employ a contract-based approach; the court did not discuss the parties' intentions or agreements.

The *Steven W.* decision, in fact, runs counter to the initial intentions of the co-parties. The court did not look to the arrangements made and instead focused on the issue of whether the women had followed the statutory procedure for terminating the donor's paternity rights. The statute[113] involved bars paternity claims where a woman has been inseminated by a physician. The court found that the donor's rights had not been terminated because the statute's requirements had not been followed.

In contrast to *Thomas S.* and *Steven W.*, a recent decision out of Oregon, *Leckie v. Voorhies*,[114] involved a written parenting agreement. In *Leckie*, a sperm donor sued to establish paternity and for court-ordered visitation in contravention of an

112. No. 3 CIV.CO12456 (Cal. Ct. App., Yolo County, May 6, 1993).

113. CAL. FAM. CODE § 7613 (West 1994). For the statute's applicable text, see *supra* note 36.

114. No. 60-92-06326 (Lane County Cir. Ct., Or. filed Apr. 5, 1993).

express term of a written parenting agreement entered into by the donor, the biological mother, and her partner/co-parent.[115] While the court did not explicitly recognize or enforce the agreement, it did dismiss the claim and make a number of findings. These included finding that the donor was legally unrelated to the child,[116] and that it was not necessarily in the best interest of children to maintain contact with biological parents through court-ordered visitation.[117] In making its findings, the *Leckie* court honored the agreement and the allocation of rights it contained. *Leckie*, however, remains an aberration, an exception to the prohibition of private ordering within adult-child relationships.[118]

2. Surrogacy

A number of cases address various aspects of surrogacy. In general, these cases involve the legality of the surrogacy contract, especially one calling for relinquishment of parental rights by the surrogate mother.[119] The cases often question the enforceability

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115. The three page agreement provided, among other things:

> 5. Each party acknowledges and agrees that DONOR provided his semen for the purposes of AI, and did so with the clear understanding that he would not demand, request, or compel guardianship or custody . . . that he would have no parental rights.
>
> a. Recipients agree to allow DONOR limited visitation rights . . . .
>
> 6. Recipients relinquish any and all rights to hold DONOR legally, financially, or emotionally responsible for any child. . . .
>
> 9. Each party relinquishes and releases any and all rights he or she may have to bring suit to establish paternity . . . .
>
> 12. DONOR is free to identify himself as such to anyone . . . but should not identify himself as "father," only as sperm donor with limited visitation rights . . . .

Leckie v. Voorhies, No. 60-92-06326 app. at 1 (Lane County Cir. Ct. Or. filed Apr. 5, 1993) (parties agreement).

116. *Id.* at 1.

117. *Id.* at 4.

118. Oregon's DI statute is much more explicit than the U.P.A. and provides:

> If the donor of semen used in artificial insemination is not the mother's husband:
>
> (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and
>
> (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.

OR. REV. STAT. § 109.239 (1977).

This statute may have played a role in the court's refusal to grant the donor parental rights, although the opinion does not expressly cite to it.

119. *See In re* Baby M., 537 A.2d 1227 (N.J. 1988) (banning commercial surrogacy contracts and granting custody to the father using a best interest standard ap-

of contracts when the surrogate mother changes her mind and demands custody or any type of parental right. Courts which refuse to uphold surrogacy contracts do so because terminating parental rights via contract violates public policy.[120] Yet collaborative reproduction entails private ordering of relations among the parties, and this private ordering necessarily includes the option of terminating, in addition to ascribing, parental rights.

The most famous case involving surrogacy is *In re Baby M.*[121] In *Baby M.*, a married couple contracted with a woman to donate her egg, have it fertilized in vitro with the husband's sperm, carry the child to term, and relinquish her parental rights upon birth. The surrogate changed her mind during the course of the pregnancy and sued for maternity. The court refused to recognize the contract, holding that it violated public policy, and it treated the dispute as a custody battle between a mother and father, employing the best interests of the child standard. Thus, the original intentions of the collaborators were ignored, and the intentional, nonbiological mother received no recognition or standing.

Rather than characterize surrogacy arrangements as a subsection of collaborative reproduction methods and apply a legal framework tailored thereto, the *Baby M.* court treated surrogacy arrangements as analogous to private adoptions, or even baby selling. This and other attempts to regulate surrogacy arrangements under prevailing law reflect the false distinctions that current case law draws among various methods of collaborative reproduction. Courts have assessed these cases without a uniform and principled paradigm. Consequently, they have, as Professor Shultz observes, "failed to create a legal framework responsive to the growing role of personal intention in reproductive and parenting decisions."[122] This failure has resulted in uncertain and inconsistent decisions across jurisdictions and it perpetuates family law paradigms that are obsolete in the face of collaborative reproduction and emerging families of consent.

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plied to custody disputes); Miroff v. Surrogate Mother, 13 Fam. L. Rep. (BNA) 1260 (1987) (permitting a mutually agreed upon adoption through a surrogacy agreement to be voided); Yates v. Keane, 14 Fam. L. Rep. (BNA) 1160 (1987) (where a surrogacy contract was found to be illegal). For other cases involving the validity of surrogate contracts, see Shultz, *Reproductive Technology*, *supra* note 8, at 372 n.232.

120. *See, e.g.*, In re *Baby M.*, 537 A.2d at 1240.

121. *Id.*

122. Shultz, *Reproductive Technology*, *supra* note 8, at 373.

a. Gestational Surrogacy

In the influential case *Johnson v. Calvert*,[123] the California Supreme Court faced competing claims to legal motherhood by a gestational surrogate and an ovum donor. In *Johnson*, a married couple, wherein the woman was unable to carry a child to term, contracted with a gestational surrogate to carry their genetic child and relinquish the child to them after birth. Because both women fit the U.P.A.'s definition of biological mother, the original intentions of the parties determined legal maternity. Based on this intent-oriented approach, the court assigned legal parentage to the genetic and intentional mother, Crispina Calvert, rather than to the gestational surrogate, Anna Johnson.[124]

The potential limits of *Johnson* — offering protection only to a party who both has the intention to parent and makes a genetic or biological contribution to the reproductive collaboration — are clear. The court looked to intent only after a biological and a genetic connection were established. *Johnson*'s applicability to an intending parent without a biological connection to the child remains questionable.[125] The court also held that gestational surrogacy contracts are not invalid on the basis of public policy.[126] It reasoned that the analogy to adoption applied in *Baby M.* does not work in the context of gestational surrogacy, primarily because the surrogate is neither the child's genetic mother nor his or her legal mother. Thus, the contract did not implicate the policies underlying either adoption statutes or statutes governing termination of parental rights.[127]

While the *Johnson* court's intent-based approach is consistent with that proposed in this Article, its model is weak because of its inherent limitations. The *Johnson* logic works only if the roles of genetic/biological and intentional parent correspond. When the two roles are divorced, the *Johnson* model breaks down because the contract will violate public policy by terminating parental rights. Nor does it accommodate the scenario where both co-parents are biologically related to their child. For instance, a lesbian may donate her egg to her partner for gestation.

123. 851 P.2d 776 (Cal. 1993).

124. *Id.* at 782.

125. *See* Georgia P. v. Kerry B., Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion), discussed *infra* notes 150–57 and accompanying text.

126. *See infra* Part II.A.2.

127. *Johnson*, 851 P.2d at 783–84.

Like the two women in *Johnson*, both women will have biological ties to the child, but, unlike in *Johnson*, both are also intentional parents from the outset. The *Johnson* paradigm is neither flexible enough to divorce parental status from genetic contribution nor expansive enough to contemplate situations involving more than one intending mother[128] or father.

Johnson falls short in terms of outcome as well as process by failing to offer a framework in which true intentions may be expressed. The existing legal framework constrains private ordering by limiting options to one of two statuses: legal parent or legal stranger. Only a reconstructed framework that recognizes a continuum of adult-child relationships from which adults may choose can ensure that collaborative reproduction agreements accurately express "intentions that are voluntarily chosen, deliberate, express and bargained-for . . . ."[129] Under such a framework, the parties involved in gestational surrogacy arrangements, as in any collaborative reproduction effort, would be able to negotiate the exact parameters of the various adult-child relationships arising from the effort.

B. *Establishment and Protection of Parental Status for Nonbiologically Related Co-Parents*

Under current law, intending parents who are neither genetically nor biologically related to the child often face legal bars to their attempts at establishing parental status. Even in the absence of competing claims to parenthood, courts are reluctant to allow private ordering of parenting rights. Traditional adoption and foster parenting provide options for some, but are often not available to gay or lesbian couples or to single people.[130] Moreover, neither fits the needs of those intending parents who desire a child related to at least one of them or to someone they have personally selected. Collaborative reproduction offers gays, lesbians, and other intending parents their best, and sometimes only, option.

Like lesbian and gay nonbiological parents, stepparents and unmarried heterosexual partners of biological parents are generally unable to attain parental status. In the absence of systemic legal recognition of their parenthood, nonbiological parents must

128. The court declined to accept the ACLU's contention that both women should receive legal maternal status. *Id.* at 781.

129. *Id.* at 783 (quoting Shultz, *Reproductive Technology*, *supra* note 8, at 323).

130. *See supra* note 11 and accompanying text.

resort to ad hoc means of gaining legal recognition of their functional parental status. For example, they can execute powers of attorney and medical consent forms to secure some decision-making authority over their children. The biological legal parent can execute a will nominating the nonbiological parent as guardian. Neither of these approaches, however, provides parental status equal to that of the biological parent. Nor is the nonbiological parent's continuing relationship with her child legally protected.

Intending parents may theoretically seek legal parenthood of their genetically or biologically unrelated children in two ways: private ordering through contractual agreements or second-parent adoption. The lack of recognition and enforcement given to contracts distributing parental rights and obligations and the inconsistent availability of second-parent adoption[131] leave a child's relationship with one of his or her functional and intentional parents unprotected. The family of consent thus lives in a state of uncertainty and insecurity. A change in the internal family structure or an external challenge to the family's integrity can destroy an unprotected adult-child relationship.[132]

Several recent cases, all involving gay and lesbian parents, address these issues. This section will discuss the outcomes and repercussions of these cases within three contexts: (1) claims by a nonbiologically related co-parent in the absence of a formal contract (*Alison D. v. Virginia M.*[133] and *Nancy S. v. Michele G.*[134]); (2) claims by nonbiologically related co-parents pursuant to formal contracts (*A.C. v. C.B.*[135] and *Georgia P. v. Kerry B.*[136]); and (3) second-parent adoptions (*In re Evan*[137]).

131. *See infra* Part II.B.3.

132. Examples include the dissolution of the parents' relationship, the death of one parent, or a claim by either a donor or a surrogate seeking inclusion in the family unit.

133. 77 N.Y.2d 651 (N.Y. 1991).

134. 279 Cal. Rptr. 212 (Cal. Ct. App. 1991). For a fuller description of the facts of the case, see Maria Gil de Lamadrid, *Expanding the Definition of Family: A Universal Issue*, 8 BERKELEY WOMEN'S L.J. 170, 175–76 (1993).

135. 113 N.M. 581, 829 P.2d 660 (N.M. 1992).

136. Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion).

137. 583 N.Y.S.2d 997 (N.Y. Sur. Ct. 1992).

1. Parenting Arrangements Not Protected By Formal Contract

In *Alison D. v. Virginia M.*,[138] New York's highest court held that the state's domestic relations law did not grant standing to a lesbian nonbiological co-parent to petition for visitation with the biological child of her former partner. Therefore, regardless of their intention and agreement to co-parent this child, and despite the fact that the co-parent's relationship with the child was strong and functionally that of a parent, the court deemed her to be a legal stranger to the child.[139] Consequently, the legal parent of the child, the biological mother, had the absolute right to grant or prohibit visitation.

This holding accords with that in *Nancy S. v. Michele G.*,[140] wherein the court determined that the biological mother of two children, conceived by DI during her relationship with another woman, was the only legal parent of the children. As such, the court held that the biological mother was entitled to sole legal and physical custody, and further contact between the children and their nonbiological co-parent required her consent.[141] The *Nancy S.* court noted that "the absence of any legal formalization of her relationship to the children has resulted in a tragic situation."[142] Nonetheless, it refused to expand the definition of parent in order to avoid such a result. The court's stated intention was to "illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue,"[143] an intention it succeeded in fulfilling.

In both cases, the absence of legal recognition of the relationships between the children and their nonbiological parents proved fatal to the petitioners' claims. However, the families in these cases had no viable method of seeking such recognition.[144]

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138. 77 N.Y.2d 651 (N.Y. 1991).

139. *Id.* at 655.

140. 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

141. *Id.* at 213–14, 219; *see also* Curiale v. Reagan, 270 Cal. Rptr. 224 (Cal. Ct. App. 1990) (denying standing to sue for custody or visitation to partner of a biological mother who had planned the child with the mother and played an equal role, emotionally and financially, in the child's life).

142. *Nancy S.*, 279 Cal. Rptr. at 219.

143. *Id.*

144. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), implies that if both intending parents actively participate in the collaboration — for example, one woman donates the egg and the other gestates — then each may be legally recognized. However, this scenario has not yet appeared before the courts and it is not clear that the courts are willing to find that a child has two mothers. Moreover, this method of reproduc-

Even if the women had entered into a written agreement setting out their intent that both would share full parental rights and obligations, such a contract would be invalid under current legal paradigms. And, as the dissent in *Alison D.* noted, New York's Court of Appeals had not yet dealt with, nor did the case raise, the issue of adoption as a method of legal recognition of the relationship between a co-parent and his or her child.[145]

2. Contractual Parenting Arrangements

Written agreements among members of families of consent and parties to collaborative reproductive efforts are currently not recognized or enforced in case of breach. There has been some movement, albeit slight, toward validating such agreements and distributing parental rights and obligations that they seek to create.[146] Most of this movement, however, has occurred in the context of competing claims over parental status, where the clashing parties are not related to each other. This was the situation in *Johnson*, where in deciding between the claims, the court was choosing between two families.

A few cases involve agreements entered into only after the dissolution of a family of consent. In these cases, some courts have looked to the agreements for guidance, although none have held that such contracts are valid and enforceable. In the best case scenario, the courts could use these agreements to establish parentage of the intending parents, both biological and nonbiological, and then treat the situation as they would any custody dispute between divorcing parents. In so doing, unmarried couples, mostly gay and lesbian, would receive the same treatment that married couples do. Evaluation would occur on the basis of the best interests of the child, the standard used in resolving custody disputes between legal parents upon divorce.

Such an approach to custody disputes between lesbian or gay co-parents, unlike that used in *Nancy S.* and *Alison D.*, acknowledges the reality of families of consent and best protects

tion is extremely expensive, complicated, and unnecessary for couples who do not strongly desire a child that is genetically or biologically related to both parties. The *Johnson* model's chief flaw is that it does not break from the genetic/biological concept of parenthood. See *supra* Part II.A.2.a. for a discussion of the *Johnson* case.

145. Alison D. v. Virginia M., 77 N.Y.2d 651, 658 n.1 (N.Y. 1991) (Kaye, J., dissenting).

146. See, e.g., A.C. v. C.B., 829 P.2d 660 (N.M. 1992), discussed *infra* notes 147–48 and accompanying text. For further discussion of this case, see Gil de Lamadrid, *supra* note 134, at 177.

the children in those families. A recent New Mexico case, *A.C. v. C.B.*,[147] illustrates the appropriateness of recognizing parenting agreements where neither adoption nor marriage is available as an avenue for establishing parentage. In *A.C.*, lesbian co-parents separated and agreed informally to share custody of their children. They received a consent decree from the court pertaining to this agreement. When custodial disputes subsequently arose, the women returned to court to enforce the decree. The court agreed to review the decree on the basis of the best interests of the child. New Mexico's history of enforcing consent decrees, even those involving nonparents, was the key to the court's actions.[148]

While *A.C.* did not involve a written parenting agreement per se, it represents a step toward validating and enforcing private ordering of parental relationships. However, its applicability to collaborative reproduction and agreements made pursuant thereto is limited, in that the agreement was entered into only upon dissolution of the family. Ironically, where parties seek preliminary establishment of parental status — that is, prebirth of the child — in a nonadversarial setting, courts refuse to recognize their agreements. Consequently, if the family structure changes due to dissolution or any other circumstance, courts can ignore the family's history and erase the child's relationship with one of his or her parents.

While courts refuse to recognize preliminary allocation of parental status via co-parenting agreements, they do recognize that this "may result in occasional unfortunate consequences for minor children."[149] Nonetheless, it seems that these children's interests are outweighed by a public policy against expanding the definition of family to include gays, lesbians, and others who serve as intentional and functional parents to genetically unrelated children. This public policy serves two functions: perpetuating heterosexism and restricting parental status to biological parents.

In *Georgia P. v. Kerry B.*,[150] a lesbian couple entered into a written agreement establishing their intentions to make joint decisions about their child, share custody, include a specified third

147. 829 P.2d 660 (N.M. 1992).

148. Gil de Lamadrid, *supra* note 134, at 177.

149. *In re* Z.J.H., 471 N.W.2d 202, 209 (Wis. 1991).

150. Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion).

person in the child's life, and resolve disputes by mediation.[151] For several years, both women functioned as the child's parents. Upon dissolution of the women's relationship, the biological mother of their child refused to share custody and asserted that the parenting agreement was not a binding, enforceable contract.[152]

The nonbiological mother filed two separate actions. One sought to establish parentage as well as custody and visitation rights,[153] and the other was a contract action to compel arbitration and recover for breach.[154] Her claims raised three key issues: (1) determination of parentage; (2) the nature and scope of rights an adult found not to be the legal parent may have in terms of custody and visitation; and (3) enforceability of a written agreement between a parent and nonparent about how the child will be raised. Given these issues, *Georgia P.* provided the court with an opportunity to validate contracts ordering the relationships among members of families of consent. Such validation could have expanded on prior case law which recognized contracts in the context of competing claims to preliminary establishment of parentage.[155]

However, the court refused to do so and the contract action was simply dismissed. In addition, the court found that the appellant was not a parent and that the biological mother was the child's only legal parent. Consequently, contact between the appellant and the child could only occur with the consent of the legal parent.[156] The co-parent appealed from the judgment of dismissal, and once again the court heard arguments in favor of recognizing parenting agreements. In a 3–0 decision, the appellate court affirmed the superior court's dismissal of the action, asserting that such contracts were neither binding nor enforceable.[157]

151. Brief for Respondent at 3, Georgia P. v. Kerry B., Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion).

152. *Id.*

153. Georgia P v. Kerry B., No. 197577 (Cal. Sup. Ct., Sonoma County, Jan. 31, 1994).

154. Georgia P. v. Kerry B., No. 197581 (Cal. Sup. Ct., Sonoma County, Jan. 31, 1994).

155. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

156. *Georgia P.*, No. 197577 (Cal. Sup. Ct., Sonoma County).

157. *Georgia P.*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994).

Similarly, the Wisconsin Supreme Court, in *In re Z.J.H.*,[158] concluded that a co-parenting agreement was unenforceable. In this case, a lesbian couple decided to adopt a child together. However, only one of the women (H.) became the legal adoptive parent because under Wisconsin law two unmarried individuals cannot both adopt a child. To protect the rights of the other woman (S.), the couple agreed in writing that if they separated they would determine custody of their child through mediation, and that the noncustodial parent would have "reasonable, liberal" visitation rights to the child.[159]

Upon dissolution of their relationship, H. refused to enter mediation and instead asserted her right to custody. In the subsequent custody dispute, the court held that S. had no standing to acquire custody since she was not the child's legal parent. She was characterized as a third party, a legal stranger. Moreover, the court concluded that the co-parenting agreement, to the extent that it purported to award custody or grant visitation rights to S., was void. The agreement was unenforceable because, as other cases had held, "the rights to custody and visitation are controlled by statutory and case law, and cannot be determined by contract."[160]

The Wisconsin court justified its decision as a means of avoiding the slippery slope of "opening the doors to multiple parties claiming custody of children."[161] Along this slope, the court envisioned housekeepers, prior companions, day-care providers, and others who could conceivably qualify as parents. Yet this concern can be addressed by restrictions other than the one chosen by the court. Written contracts provide protection against just such a slope. S. herself argued for a framework wherein the group of parents would be limited to those whom the biological or adoptive parent intended to fulfill such a role. The court, however, dismissed this framework as "virtually impossible."[162]

Heterosexual stepparents who have not adopted their spouse's children face similar obstacles to legal recognition of their adult-child relationships.[163] Under the common law, the

158. 471 N.W.2d 202 (Wis. 1992).
159. *Id.* at 204.
160. *Id.* at 211.
161. *Id.* at 208.
162. *Id.* at 209.
163. Stepparent adoption, like second-parent adoption, has limited applicability. Such adoptions require either the noncustodial parent's consent or the involuntary termination of that parent's rights. A few states have liberal adoption statutes that

stepparent-stepchild relationship does not itself give rise to any legal rights or obligations.[164] Although some statutes now impose a duty to support, it is generally held by statute as well as by common law that the relationship and duty end upon the marriage's termination or the natural parent's death.[165] A few states have enacted stepparent visitation statutes.[166] However, only a few courts have awarded stepparent visitation or stepparent custody in the absence of such statutes, and they have had to stretch both common and statutory law to do so.[167]

Georgia P. and *In re Z.J.H.* reflect courts' resistance to permitting private ordering of parental rights and obligations. They also epitomize courts' denial of social reality. The number and type of families of consent continue to increase, and collaborative reproductive efforts continue to create adult-child relationships ranging from parental to stranger, with many variations in-between. Written parenting agreements define the nature and scope of those relationships and restrict the pool of parties who can successfully claim parental rights. Gays and lesbians in particular need to have their parenting agreements recognized. Without this validation, their families remain completely unprotected. However, the usefulness of contract law extends beyond recognizing gay and lesbian-headed families, which could also be protected by an expansion of current statutory and case law. Contract law also allows for flexibility in the number, nature, and makeup of families of consent and in the relationships among reproductive collaborators and the children they produce.

3. Second-Parent Adoptions

Second-parent adoption enables the nonbiological parent of a co-parenting couple to adopt his or her partner's biological child without requiring the partner to terminate his or her own parental rights. This form of adoption is limited to children with only one legally recognized biological parent, and only where that parent agrees to the adoption. Second-parent adoption rep-

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apply only to stepparents. However, while these liberal adoption statutes regularize a child's family relationships, they also increase the likelihood that the child will be deprived of a relationship with the absent parent. *See* Bartlett, *supra* note 14, at 913–914.

164. *Id.* at 914.

165. *Id.*

166. *See supra* note 15.

167. *See, e.g.*, Carter v. Brodrick, 644 P.2d 850 (Alaska 1982); Lloyd v. Lloyd, 415 N.E.2d 1105 (Ill. 1980).

resents an alternative, and currently more promising, mechanism for gaining legal recognition and protection of adult-child relationships. It is separate and different from contractual parenting and is appropriate only for a limited type of family of consent: where only two, nonadversarial parties are involved;[168] where each party desires full, legal parental status; and where the preferred method for attaining this status is through adoption rather than via private ordering. For such families, second-parent adoption affords a relatively successful means of receiving legal parental status.

Traditional adoption permits one individual to gain legal parental status only upon the termination thereof by the child's biological parent. Where an individual — often the same-sex partner of the child's biological parent — seeks legal co-parent status through second-parent adoption, without such termination, courts can and often do refuse to grant the request. This is true even when the request is made with the legal parent's approval, is consistent with both adults' parenting intentions, and the refusal leaves the child with only one legal parent.

While still a very limited option, second-parent adoption is gaining some viability. One of the first opinions granting such an adoption is *In re Evan*.[169] *Evan* (decided six months after and most likely in response to *Alison D.*[170]) emphasizes the need to solidify co-parent/child relationships and to protect children in families of consent. In response to *Evan*, a few states — namely, Massachusetts and Vermont — have recognized second-parent adoptions.[171]

Second-parent adoption, where available, allows co-parents to establish and protect their parental status against either claims by their partner in the event of dissolution of the relationship or outside claims. If the plaintiff in *Alison D.*, for example, had

168. Third-parent adoptions are also beginning to receive legal recognition. They give legal parent status to all three parties involved in creating a family of choice consisting of a child and his or her biological mother, lesbian co-parent, and gay sperm donor. Such adoptions have occurred in Alaska, Oregon, and California. *See* Gil de Lamadrid, *supra* note 134, at 178.

169. 583 N.Y.S.2d 997 (N.Y. Sur. Ct. 1992).

170. Alison D. v. Virginia M., 77 N.Y.2d 651 (N.Y. 1991), discussed *supra* notes 138–39 and accompanying text.

171. *In re* Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993). Many jurisdictions recognized second-parent adoption even before *Evan*. *In re* A.O.L., No. 1JU-85-25 P/A (Alaska Sup. Ct. July 23, 1985); *In re* N.L.D., No. 18086 (Cal. Sup. Ct. San Francisco County, Sept. 28, 1987); *In re* M. by S. & A., No. D8503-61930 (Multonmah, Or. Cir. Ct. Sept. 4, 1985).

adopted the child, she would have been granted standing to petition for parental privileges such as visitation and custody. Nonetheless, second-parent adoption cannot substitute for or be preferred to private ordering of adult-child relationships emerging from collaborative reproductive efforts.

While they are useful and desirable, second-parent adoptions should represent an alternative, rather than the sole option for families of consent. For a variety of reasons, some parties would not choose second-parent adoption, even if universally permitted. Second-parent adoption creates only full-parent status, which may not be attractive to people who want a more limited adult-child relationship. Moreover, it matches only the needs of two-parent nuclear families, albeit gay or lesbian, where the child's other genetic contributors are not part of the picture. Thus, regardless of the availability or appropriateness of second-parent adoption, contractual arrangements entered into by parties to collaborative reproduction should be recognized and enforced.

III. CONSTRUCTING A NEW PARADIGM

As the cases discussed above illustrate, the current paradigm contains two major flaws that render it inappropriate for allocating parenthood in the context of collaborative reproduction. These flaws are: (1) a failure to validate co-parenting agreements that allocate parental status and (2) a refusal to recognize statuses greater than stranger but less than full parent. This Part constructs a new paradigm that corrects both flaws and protects families of consent and the best interests of the children within them. My paradigm fulfills the following four goals: (1) recognizing and enforcing written parenting agreements; (2) defining and protecting intentional parents; (3) lifting gender and numerical restrictions on parenthood as a means of ensuring fulfillment of true intent; and (4) creating and conferring statuses between legal parent and legal stranger.

A. *Recognition and Enforcement of Written Parenting Agreements*

Reconstructing the current flawed paradigm begins with a simple yet powerful step — recognizing written parenting agreements. As one commentator notes, "[t]he allocation of parental rights and responsibilities cannot be accomplished exclusively

through private contracts."[172] Such rights and responsibilities — indeed, the assignment of parenthood in general — remain within the aegis of state powers. However, co-parenting agreements can and should be recognized by the state in exercising its power to allocate parental status to those who cannot otherwise attain it due to legal barriers.[173] Collaborative reproducers could then allocate legal parental status among themselves.

Privately ordered ascription of parental status enables courts to split parentage from genetic and biological contributions, and it offers a better, more flexible model than the one employed in *Johnson*.[174] It would allow reproductive collaborators to determine which of them will parent the child. Although such agreements may not be enforceable to the extent that they distribute particular future rights, such as custody or visitation upon dissolution of the family unit, these contracts should be valid as a means of conferring parental status. At a minimum, this model gives standing to nonbiological parents in custody disputes, such as *Alison D.*[175] and *Georgia P.*,[176] as well as protects them in the face of challenges from parties outside the family, such as *Thomas S.*[177]

The *Georgia P.* court justified its refusal to recognize the terms of the parenting agreement by noting that the contract failed to confer parental status on the nonbiological mother.[178] The agreement expressly stated that it did not aim to establish parentage (because the women assumed they could not do so).[179] This became the basis for the court's conclusion that Georgia was not a legal parent. She then became a legal stranger, a third party with no standing to petition for any rights regarding her child.[180] Similarly, in *In re Z.J.H.*,[181] the co-parenting agreement

172. Hollinger, *supra* note 40, at 896.

173. Thus, for example, gays and lesbians who cannot adopt their partners' legal children (and cannot even marry their partners) would have another means of achieving legal parenthood.

174. See *supra* notes 123–29 and accompanying text, for a discussion of the model employed in Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

175. Alison D. v. Virginia M., 77 N.Y.2d 651 (N.Y. 1991), discussed *supra* notes 138–39 and accompanying text.

176. Georgia P. v. Kerry B., Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. A059817, A060829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion), discussed *supra* notes 150–57 and accompanying text.

177. *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. 1994), discussed *supra* notes 100–11 and accompanying text.

178. *Georgia P.*, Nos. A059817, A060829 at 11.

179. *Id.* at 2 n.1.

180. *Id.* at 11.

sought to distribute parental rights rather than ascribe parental status. Consequently, the agreement was void because S. was simply a third party with no legal standing.[182]

Under the paradigm proposed herein, written agreements allocate legal parenthood among the multiple parties involved in a reproductive collaboration. Parental status attaches to intentional parents, regardless of their gender, their sexual orientation, or the nature of their contribution to the collaboration. Ascribing parentage through contract presents a flexible and appropriate framework for ordering and protecting adult-child relationships in the context of reproductive collaboration. It serves several important functions: protecting gay and lesbian parents; encouraging negotiation among collaborators; fulfilling individual intentions and expectations; and protecting the best interests of the child.[183] Several issues raised by a paradigm embracing and enforcing written parenting agreements are discussed below. These include: (1) benefits of contracts over other methods of allocating parental status in the context of collaborative reproduction; (2) policy concerns about parenting agreements; (3) the best interests of the child; and (4) morality and the concept of the nuclear family.

1. Benefits of Contracts Over Other Methods

Parenthood can be assigned on one of three bases: status, action, or intent.[184] Status considers the adult's relationship either to the child or to the child's legal parent. Examples include adoptive parents, stepparents, and husbands of women using DI. Action looks to the conduct of an adult in his or her relationship to a child. A number of parenthood theories fall into this category: de facto parenthood, in loco parentis, equita-

181. *In re* Z.J.H., 471 N.W.2d 202 (Wis. 1992), discussed *supra* notes 158–62 and accompanying text.

182. *Id.* at 206.

183. *See infra* Part III.A.3.

184. Carmel B. Sella, *When a Mother is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 146–48 (1991). Under the theory of inclusive parenthood, parental rights are conferred according to status — as lover of the biological parent or as spouse — and by acts of caring for the child. Under a nonexclusive theory, parental status attaches to acts, regardless of status. Both require showing proof that an individual has acted as a parent before being recognized as one. Intent, on the other hand, confers status based on future intention to assume a role. Only this theory places nonbiological parents on par with both biological parents and their heterosexual spouses. *Id.*

ble estoppel, and functional parenthood.[185] Each represents an effort to establish parental status some time after the child's birth, often upon dissolution of the parents' relationship. They are invoked primarily in the context of custody disputes as attempts to gain standing to petition for either custody or visitation in the absence of legal parental status.

These theories seek to replace, rather than attain, legal parenthood. They provide limited protection to nonbiological parents, rather than full parental rights. While they may occasionally justify continuing an adult-child relationship, they do not grant parental decision-making authority from the time of the birth through the course of the child's life. Moreover, they are subjective standards used in case-by-case analyses. Consequently, these theories leave parties vulnerable to judicial discretion and bias. The danger is that only the most perfect, most committed, and most appealing petitioners will succeed in receiving parental status under these conduct-based theories.

The final basis for allocation of parenthood is intent, or private ordering. The benefits of private ordering in general, and in the context of collaborative reproduction in particular, are many. Privatization of familial relationships advantages all members of the family; it protects the best interests of the child and furthers the adults' autonomy. Allocation of parental status by prebirth agreement clarifies adult-child relationships from the beginning of the child's life. It enables intending parents to exercise parental authority and receive legal recognition of their functional status throughout the course of the child's life. It provides certainty to the child and structure to the family. Moreover, it ensures that the relationships within families of consent have been thought out and planned, through negotiation and compromise.

Professor Marjorie Shultz argues that contractual ordering of various familial relationships furthers the values of choice

185. The de facto parenthood doctrine focuses on the psychological bond between an adult and a child. In loco parentis is a common law doctrine which creates parental rights and responsibilities in one who voluntarily assumes custody or support obligations to a child. The equitable estoppel doctrine prevents persons from denying the existence of a parent-child relationship upon which others have detrimentally relied. Functional parenthood, as defined by Polikoff, entails a "functional parental relationship that a legally recognized parent created with the intent that an additional parent-child relationship exist." Polikoff, *supra* note 72, at 573. For a more complete discussion of these theories, see Polikoff, *supra* note 72, at 491–506; Pooley, *supra* note 59, at 489–90.

"(with its implication of available alternatives),"[186] voluntariness (given the freedom to choose no relationship at all),[187] and autonomy (freedom to engage in personal decision-making).[188] Privatization also acknowledges and accommodates the diversity of families of consent. Basing family rights in contract lessens the danger that parties will be vulnerable to judicial bias because the right to be in court is conferred by contract and is not determined by judicial discretion. It allows reproductive collaborators to attain parental status regardless of gender, sexual identity, or biological relation to the child. It offers intending parents a means to clarify and protect their families in the absence of other legal methods. As such it provides distinct advantages over other currently available options, such as guardianship, foster parenting, and adoption. Guardianship provides few rights and only comes into play upon the death of the legal parent. Foster-parenting and adoption are not universally available to gay and lesbian couples. Moreover, neither is flexible enough to fit the diverse needs of collaborative reproducers.

Courts have repeatedly expressed concern that any expansion of the legal definition of parent would unduly expose biological parents to litigation by a variety of third parties, such as "child-care providers of longstanding, relatives, successive sets of stepparents or other close friends of the family."[189] Courts fear that they will be unable to distinguish between adults who are psychological or functional parents to children and other third parties. Private allocation of parental status to intending parents alleviates this problem. Recognizing the distribution of parenthood found within co-parenting agreements does not require courts to engage in the task of determining status or standing. Rather, they would resolve disputes arising within families of consent as they would any other, by inquiring as to the best interests of the child. Standing would attach to those parties who have received parental or some other special status via con-

186. Marjorie Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 218 (1982) [hereinafter Shultz, *Contractual Ordering*]; Shultz, *Reproductive Technology*, *supra* note 8, at 307.

187. Shultz, *Contractual Ordering*, *supra* note 186, at 218.

188. *Id.* Our society generally values individual liberty, particularly in the area of reproductive life. *See, e.g.*, Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1534.

189. Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991).

tract.[190] Collaborators who have not received standing through the agreement, and other third parties, would remain legal strangers.

As the makeup of the American family changes, private decision-making supplants state imposed structures governing family behavior. This privatization represents the convergence of several legal phenomena, primarily the migration from constitutional to family law of liberal notions of privacy and autonomy,[191] and the rejection of traditional gender roles and other notions of family.[192] Consequently, "legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future."[193] In so doing, the state may have to legitimize adult-child relationships previously unrecognized by the law. When determining which relationships to legitimize, the state should look to allocation of parental status found in co-parenting agreements.

2. Policy Concerns About Parenting Agreements

While privatization seems to represent the best method for allocating parental status among reproductive collaborators, some object to it on principle. These objections generally have two recurring themes: commodification of children and exploitation of parties to the contract. The commodification concern views the nature of private ordering — a contractual transaction — as analogous to "baby-selling."[194] Under this view, privatization fosters the market-like aspects of human behavior, both stunting the growth of other values and commodifying children in the process.[195]

190. *See supra* notes 14–18 and accompanying text. *Contra* Alison D. v. Virginia M., 77 N.Y.2d 651 (N.Y. 1991), discussed *infra* notes 138–39 and accompanying text.

191. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (decriminalizing abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating regulation which made contraceptives less available to unmarried than to married couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (decriminalizing use of contraceptives by married couples). *But see* Bowers v. Hardwick, 478 U.S. 186 (1986) (limiting this liberalization by upholding a statute criminalizing sodomy between two consenting adults).

192. Singer, *supra* note 188, at 1446.

193. Shultz, *Reproductive Technology*, *supra* note 8, at 302.

194. This characterization occurs most frequently in breach of contract claims wherein a surrogate refuses to relinquish the child. *See, e.g.*, Doe v. Kelley, 307 N.W.2d 438 (Mich. 1981), *cert. denied*, 459 U.S. 1183 (1983); *In re* Baby M., 537 A.2d 1227 (N.J. 1988). For a discussion of *Baby M.*, see *supra* note 121 and accompanying text.

195. *See, e.g.*, Singer, *supra* note 188, at 1562.

Commodification threatens to perpetuate what one scholar calls the "legal tradition of possessive individualism that treats the child as 'an isolated human possession, a property largely beyond the domain of social control.' "[196] Such treatment of children is "hypocritical," given our society's declared "commitment to children's interests."[197] Moreover, it "perpetuate[s] notions of property rights in children."[198] Under the current legal system, parenthood is defined as a "right of possession and control," thereby reifying children.[199] Numerous scholars have criticized the legal system's articulation of family relationships in the language of property rights.[200] Their concern is heightened by the privatization of adult-child relations, which some view as the explicit application of market theory to "transactions" involving children.[201]

Reproductive techniques threaten to "treat persons as means rather than ends," especially when used in the social context of private ordering.[202] Children become a means to the end of adult happiness, a process of commodification that results in the devaluation of human life. While some theorists conclude that market transactions involving sales of goods or services are antithetical to respecting the sanctity of life,[203] others balance the impact of reproductive technology and devaluation of life differently. Shultz writes, for example, that "the critical issue is not whether something involves monetary exchange as one of its as-

196. Woodhouse, *supra* note 15, at 1809 (quoting STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 106 (1968)).

197. *Id.*; *see* M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN 124 (1983) ("The whole ethos of our society, though often described as child-centered, is geared to seeing children as objects, rather than human beings in their own right . . . .").

198. Woodhouse, *supra* note 15, at 1810.

199. *Id.* at 1811.

200. Woodhouse, for example, rejects the "enduring legacy of genetic ownership grounded in patriarchal tradition . . . ." *Id.* Bartlett and Polikoff both reject self-centered individualism and propose models for determining parenthood based on relations of responsibility. Bartlett, *supra* note 14, at 944–961; Polikoff, *supra* note 72, at 573; *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 283–89 (1990) (arguing that rights for children express rather than resolve adults' ambivalence about children).

201. *See, e.g.*, Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 327–34 (1978); *see also* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1925–28 (1987) (critiquing the notion of a market in babies).

202. Shultz, *Reproductive Technology*, *supra* note 8, at 334.

203. *See, e.g.*, Radin, *supra* note 201, at 1928–36.

pects, but whether it is treated as reducible solely to its monetary features."[204] Under Shultz's theory, reproductive techniques do not in and of themselves commodify children, even if they do involve costs and monetary exchange. As long as children are treated with respect and as individuals, collaborative reproduction does not commodify them.[205]

A related concern is that privatization devalues certain types of babies viewed as less-than-perfect, due to illness, race, gender, or disability. Judith Areen argues that surrogacy arrangements increase the risk that biological parents will abandon such infants after birth.[206] The surrogate mother may do so in part because the contract encourages such abandonment; the father because, as purchaser, he feels the right to reject damaged goods.[207] Thus, the eugenicist potential of collaborative reproduction may become more of a reality when combined with private ordering of parental status; contracts imply commodification and allow for breach and reneging.[208] If collaborators are permitted to assign parenthood by contract, public policy will have to address the extent to which such parents can abandon their intended children, and create a structure for protecting such children in the event of abandonment.[209]

A second strand of the policy concerns focuses on the exploitation of one or more of the parties to the contract. In particular, this objection arises over the exploitation of women in the surrogacy context. Margaret Radin emerges as a powerful voice in this discourse, arguing that "treating women like anonymous fungible breeders objectifies them and recreates subordination."[210] The sexual subordination issues she raises seem inherent to the very system of privatization of parenting. Similarly,

204. Shultz, *Reproductive Technology*, *supra* note 8, at 336.

205. *Id.* at 336–37.

206. Singer, *supra* note 188, at 1551.

207. *Id.*

208. Many questions raised herein are beyond the scope of this Article. I acknowledge that in constructing this paradigm, some of these questions demand response, while others cannot be answered in the absence of extensive public discourse. For example, must a surrogate mother assume responsibility of the baby if the intentional parents decide not to accept the child? What are the responsibilities of a known donor in the same situation? What recourse, if any, does the state, the other reproductive collaborators, or the child have against a breaching party?

209. This type of structure can be built through a support statutory scheme and developed through case law.

210. Margaret J. Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 351 (1991).

race and class issues seem at first glance to be inherent in the system: power differentials are replicated and perpetuated through some collaborative arrangements. For example, the majority of people engaging the services of surrogates are white and class-privileged, while many of the surrogates themselves are less well-to-do women.[211] Genetic surrogates tend to be working-class white women, while gestational surrogates have been poor women of color.[212]

These power differentials can be addressed in a variety of ways, including state subsidized access to reproductive technology for those of lower socio-economic statuses and better regulation of the terms of co-parenting agreements to ensure fairness. Legalizing and then regulating the agreements to ensure proper payment for services rendered,[213] as well as expansion of the rights of nonintending parents, are two responses to the problem of race and class exploitation.[214] While perpetuation of such exploitation is a significant policy concern, it need prevent neither the process of reproductive collaboration in general, nor the private ordering of parenting relations within its context.[215]

In fact, public regulation of private ordering may present the best opportunity to acknowledge and address the potential for exploitation of parties. Contract law already provides mechanisms for preventing unfair contracts. Contracts are invalid if entered into through duress, fraud, or from widely disparate bargaining power.[216] In contrast, current family law paradigms often perpetuate unfairness or inequity among parties. Thus while the *Johnson* court ignored the race and class dynamics be-

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211. *See, e.g.*, Horsburgh, *supra* note 22, at 39.

212. For example, Mary Beth Whitehead is a lower-middle class, working-class white woman, while Anna Johnson is a poor African-American woman. Martin Kasindorf, *And Baby Makes Four*; Johnson v. Calvert *Illustrates Just About Everything that Can Go Wrong in Surrogate Births*, L.A. TIMES, Jan. 20, 1991, (Magazine), at 10.

213. Regulation can be achieved through a combination of case law based on contract law and the promulgation of statutory guidelines.

214. For a discussion of special statuses and allocation of less-than-parental privileges to reproductive collaborators, see *infra* Part III.D.

215. On the other hand, "the sale of sperm or ova is not unlike the sale of blood or body parts, things the state is free to elevate above the status of commodities." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1361 (1988).

216. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981); RESTATEMENT (SECOND) OF AGENCY § 7 (1981).

tween the parties, a policy which critically examines such dynamics could guard against, if not prevent, such exploitation.[217]

Parenting arrangements need not be unfair; certain procedural flaws are both remediable and preventable. To facilitate informed and voluntary decision-making, some combination of public and private action is needed. Public regulation of private ordering must have three aims: (1) to aid persons in making informed and voluntary choices rather than imposed ones; (2) to ensure that once made, a decision can be acted upon; and (3) to fulfill the reasonable expectations of parties and protect the best interests of the child.[218] Of course, as one commentator notes, "there is no guarantee that a system of publicly imposed constraints on private transactions involving [adult-child relations] will protect [either the adults or the child] any better than unrestricted private ordering."[219] Nonetheless, mandating some public component allows us as a society to focus collectively on both children's interests and concerns about party exploitation.

Each of these concerns, commodification and exploitation, raise profound ethical questions requiring careful analysis. Nevertheless, they are not arguments which favor any other method of determining or allocating parenthood in the context of collaborative reproduction. As John Hill points out, these concerns, while suggesting that collaborative reproductive arrangements be regulated and even banned, do not establish a paradigm for allocating parental status among parties to such arrangements.[220] Concerns about the social and ethical principles of collaborative reproduction, while important and perhaps ultimately decisive in prohibiting such collaboration, are in essence irrelevant to a paradigm that orders relations within such arrangements.

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217. In certain situations, both parties are vulnerable to exploitation. In Johnson v. Calvert, 851 P.2d 776 (1993), for example, some viewed both the Calverts and Anna Johnson as having been exploited. The Calverts felt exploited by Johnson who repeatedly requested money and assistance beyond that which was contracted — requests which they perhaps felt unable to refuse because of the baby she carried. Despite any feelings of exploitation that the Calverts might have felt, Johnson's racial and class status — she was a low-income African-American woman — placed her in an unequal bargaining position from the contract's inception. But for her status, she probably would not have entered into such an agreement. The racial and class bias against Johnson is evident in some media depictions on the controversy. Kasindorf, *supra* note 212.

218. See Hollinger, *supra* note 40, at 882–928, for a thorough discussion of public regulation of private reproductive choices.

219. Singer, *supra* note 188, at 1556.

220. Hill, *supra* note 28, at 413.

3. Best Interests of the Child

Legal recognition of the adult-child relationships created pursuant to written parenting agreements protects both the integrity of families of consent and the intentions and expectations of its members. Most importantly, it protects the best interests of children born of reproductive collaboration by legitimating the relationships these children develop with their functional parents. Private assignment of parental status provides a child with stability and continuity, access to additional financial and emotional support, societal affirmation of his or her family structure, and arguably more deeply committed parents.

A child's need for stable and continuous relationships with the adults in his or her life has been almost universally recognized by psychoanalysts, social workers, and judges alike.[221] Stability and continuity play significant roles in a child's character and identity development, and these benefits inhere in all parent-child relationships, regardless of blood ties.[222] For children who have formed emotional ties to parenting adults, breaks in the parent-child relationship result in anxiety or trauma.[223] Given the child's needs and the risks of damage from disruption of parent-child relationships, the law should protect these relationships whether the adult is a biological or nonbiological parent.[224]

Allocating parental status through private agreement allows the law to assess certain otherwise unrecognized adult-child relationships. Adults who receive parenthood through agreement would have standing so that courts could include their relationship in an evaluation of the best interests of the child. They would thus receive through contract the footing that biological parents receive by operation of the law. As a result, a court's analysis of the best interests of the child would be more thorough and more reflective of the child's reality. In the event of disrup-

221. One of the preeminent works in this subject is JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979) (presenting the concept of psychological parenthood and describing the importance of the psychological parent-child relationship to a child's healthy development).

222. *See id.* at 31–39; *see also* Carolyn Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents,* 16 COL. J. OF L. & SOC. PROBS. 149, 151–52 (1980).

223. Curtis, *supra* note 222, at 152.

224. An argument may be made that maintenance of genetic ties is per se in the best interests of the child. Although this argument has long been in disrepute, it has resurfaced as a dispositive factor in several recent cases in the adoption context. *See, e.g., In re* Petition of Doe, 639 N.E.2d 181 (Ill. 1994); *In re* Clausen, 502 N.W.2d 649 (Mich. 1993). *But see* Uniform Adoption Act (U.A.A.) (1994).

tion to the family structure, the trauma to the child would thus be minimized.

An issue closely tied to stability is economic and emotional security in the absence of disruption. Significant emotional benefit to the child arises from formal societal recognition of his or her family. The child's relationships with his or her parents will be sustained by the ongoing legal recognition of the law. Moreover, permitting the allocation of parental status to nonbiological intending parents would afford the child important legal rights.[225] It would provide economic security by legally recognizing parents who would then be obligated to support the child. The child would also be entitled to inherit under the law of intestate succession and be eligible for social security benefits. Further, the child would be able to receive medical or educational benefits provided by his or her parents' employment.

Finally, legitimizing private ordering — choice — may well provide children with the best and most committed parents. It seems intuitive that individuals will perform major and responsible tasks better if they have exercised a choice.[226] As one writer points out, "it is a fundamental tenet of our system that when people participate and have a stake in decisions, they have a greater sense of commitment to and collaboration with the resulting arrangements."[227] Moreover, as private ordering entails negotiation and compromise, the boundaries of indeterminacy are narrowed. For the sake of children who are bound to be harmed by not having clarity in their family structures, private ordering ought to be encouraged and recognized.

Values of choice and autonomy must be connected to the best interests of the child. As Singer writes, "choice should not be viewed as a moral trump . . . . [T]he asserted link between privatization, choice and individual autonomy should serve to initiate, rather than preempt, the inquiry into the desirability of private ordering in family law."[228] Because children are not divisible, their interests suffer when they are forced into a model that denies the reality of their adult-child relationships. Their familial relationships receive no legal recognition and no protection thereof in the event of family disruption. Whether in

225. See *In re* Evan, 583 N.Y.S.2d 997 (N.Y. Sur. Ct. 1992), for a discussion of this issue in the context of second-parent adoption.

226. Shultz, *Reproductive Technology*, *supra* note 8, at 323.

227. *Id.* at 398 n.75.

228. Singer, *supra* note 188, at 1540.

divided or intact families, children "need parents who take responsibility for each other's well-being as well as for their children."[229] They also need a legal system that recognizes such parents and the choices they make regarding allocation of status.

4. Morality and the Nuclear Family

Related to the notion of the best interests of the child is an emphasis on maintaining and strengthening the so-called "nuclear family." Yet it is important to note that the "traditional" family — husband and wife, living together with their children — is a minority family structure today.[230] Only twenty-seven percent of American households in 1988 consisted of conventional nuclear families.[231] An increasing number of divorces, heterosexual nonmarital cohabitation, openness in same-sex couples, and the growing number of women raising children alone[232] all contribute to the emergence of alternative families. These demographic shifts notwithstanding, the legal system continues to function under the flawed premise that most Americans live within a conventional nuclear family.

The paradigm proposed in this Article will not cause the breakdown of the nuclear family model; this has already occurred. Rather, it recognizes the current reality of complex family structures. Judicial protection of the family has already expanded to include nonconventional family structures. In *Moore v. City of East Cleveland*,[233] the Supreme Court wrote, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."[234] In *Stanley v. Illinois*,[235] the Court reasoned that nontraditional "familial bonds are often as warm, enduring and important as those arising within a more formally organized family unit."[236] While both

229. Woodhouse, *supra* note 15, at 1812.

230. Victoria Mather, *Evolution and Revolution in Family Law*, 25 ST. MARY'S L. J. 405, 426 (1993).

231. Pooley, *supra* note 59, at 479.

232. For example, recent statistics show that approximately 25% of all first births in the United States today are to unwed mothers, and the number approaches 50% for African-American women. *Id.*

233. 431 U.S. 494 (1977) (invalidating a zone restriction that excluded extended families). For a discussion of *Moore*, see *supra* note 56.

234. *Moore*, 431 U.S. at 504.

235. 405 U.S. 645 (1972) (invalidating a state statute that automatically deprived unwed fathers of custody of their children after the mother's death). For a discussion of *Stanley*, see *supra* note 56.

236. *Stanley*, 405 U.S. at 651.

cases involved biological families, the biological relationship was not the Court's only consideration in protecting the familial interaction.[237] Instead, the Court emphasized the social and emotional bonds among the members of each type of nonconventional family.[238]

Children living in nonconventional families form attachments to adults outside the legal system's defined sphere of "family." The law does not recognize or protect their familial bonds. It is this failure that threatens the family, albeit non-nuclear, and consequently the best interests of the children within them. As one court suggested:

> "Lack of love and guidance in the lives of children is a major problem in our society. Does it make any sense for the law to worsen this sad fact by denying a child contact with one they have come to accept as their parent, especially when it clearly appears to be in the best interests of the child? This court urges the appellate courts and the legislature to reexamine the law in light of the realities of modern society and the interests of its children."[239]

Legal recognition of allocated parental statuses pursuant to co-parenting agreements furthers social policies of protecting children and intact families. Moreover, encouraging intentionality in parenthood protects families as well because intentionality ensures greater commitment on the part of adults. Some may argue that non-nuclear families, especially gay or lesbian families, may be immoral. However, even those who believe that these families should not exist must also recognize that families of consent do exist and are growing.[240] Consequently, the legal system must recognize them and protect the childrens' relationships to adults within them. Failure to do so represents societal shirking of its duty to protect the best interests of children and the integrity of families.

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237. Curtis, *supra* note 222, at 161.

238. *Id.*

239. *In re* the Custody of H.H.K., No. 93 FA 1668 (Dane County Cir. Ct. Wis. 1993).

240. *See supra* notes 77–83 and accompanying text; *see also* Patterson, *supra* note 80.

B. *Defining and Recognizing Intentional Parents*

Parenthood should be assigned to the intentional parents of a child produced through collaborative reproduction.[241] Intentional parents are those individuals who plan to raise a child and then orchestrate a collaborative reproductive effort that results in the birth of this planned-for child.[242] The concept requires first distinguishing the previously linked ideas of biology and procreation.[243] This distinction suggests that intended parents have a recognized claim to procreate. Consequently, their claims to parental rights can "trump" those of biological parents, where these two claims conflict.[244] Three arguments can be made in favor of prioritizing the claims of intentional parents over those of other parties, including various biological progenitors, involved in collaborative reproductive efforts. These are: (1) the but-for causation argument; (2) the contract argument; and (3) the avoidance-of-uncertainty argument.[245] I will focus in this Article only on the first of these arguments.[246]

The but-for causation argument, simply put, maintains that while all of the parties to a collaborative reproduction arrangement bring a child into the world, "the child would not have been born but for the efforts of the intended parents."[247] Likewise, but-for the efforts of the donor or surrogate, the child would not have been born. However, the position of the intentional parents differs from that of the other progenitors in two significant ways. First, the intended parents initiate the collaborative effort, while the others participate only after the intentional parents plan a child and take action to fulfill that plan.[248] Second, while gestational and genetic progenitors are necessary to achieve the intentions of the intended parents, no particular biological progenitors are required.[249] In contrast, the intended parents of a child are unique and particular. Intentions should determine the legal assignment of parental rights and responsibilities in the context of

241. In his analysis of what it means to be a parent, John Hill critiques current biology-centered procreative rights and defends an "intentionalist" right of procreation. Hill, *supra* note 28, at 383–86.

242. *Id.* at 413–14.

243. *Id.* at 357–58.

244. *Id.* at 414.

245. *Id.* at 414–17.

246. For a more thorough discussion of all three premises, see *id.* at 414–18.

247. *Id.* at 415.

248. *Id.*

249. *Id.*

collaborative reproduction "unless and until policy restrictions on particular types of private arrangements are articulated, justified, and adopted."[250] Intended parents represent the but-for cause of the child's birth resulting from collaborative reproduction. Written agreements identify the intended parents, and consequently such co-parenting agreements ought to be recognized.

Where the intentions of the parties are deliberate, explicit, bargained-for, and a catalyst for reliance and expectation, they should be honored.[251] Courts have begun to consider and protect intentions in allocating parental status,[252] constructing a more appropriate and realistic paradigm for resolving the types of disputes discussed above. However, legal responses to reproductive technology in general, and disputes emerging in the context of collaborative reproduction in particular, have been "fragmentary and tentative."[253] Although courts have applied the concept of "intentional parent" in select situations, they have failed to do so in a consistent and principled manner.

Three cases — *In re Baby M.*,[254] *Johnson v. Calvert*,[255] and *Georgia P. v. Kerry B.*[256] — illustrate this inconsistency. The *Baby M.* court applied an obsolete paradigm and trivialized the role of intention in procreative decision-making. In contrast, the *Johnson* court both recognized the need for a new legal framework and prioritized the role of intention. In deciding between the two women, both of whom presented acceptable proof of a mother-child relationship under the U.P.A.,[257] the court stated: "she who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law."[258] The court found that the genetic father and mother had

250. Shultz, *Reproductive Technology*, *supra* note 8, at 323; *see infra* Part III.C.

251. Shultz, *Reproductive Technology*, *supra* note 8, at 302.

252. See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), discussed *supra* notes 123–29 and accompanying text.

253. Shultz, *Reproductive Technology*, *supra* note 8, at 373. These responses reflect the courts' failure to perceive an "important pattern in technological procreation" in the cases. *Id.* at 376.

254. 537 A.2d 1227 (1988), discussed *supra* note 121 and accompanying text.

255. 851 P.2d 776 (Cal. 1993), discussed *supra* notes 123–29 and accompanying text.

256. Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. A059817, A060829 (Cal. Ct. App. filed Jan. 31, 1994) (unpublished opinion), discussed *supra* notes 150–57 and accompanying text.

257. *Johnson*, 851 P.2d at 781.

258. *Id.* at 782.

affirmatively intended the child's birth and had not intended to donate the embryo to the gestational surrogate.[259] Moreover, it noted that but-for the genetic father and mother acting upon their intentions, the child would not have been born.[260] Finally, the court found that the genetic mother had intended to be the child's mother from the outset.[261] Given these findings, the court concluded that the maternal status should be granted to the genetic mother, according to the intentions of the parties.[262]

Uncomfortable with universal application of this intent-based approach, the California Court of Appeals refused to extend the reasoning of the *Johnson* case to *Georgia P.* Although the intentions met the prerequisites outlined by the court in *Johnson* — "voluntarily chosen, deliberate, express, and bargained-for"[263] — the court refused the nonbiological mother's claim of parenthood. Instead, it narrowed the applicability of an intent-based approach to those situations in which more than one party meets the biological definition of mother or father. Where, as in *Georgia P.*, the party claiming parenthood is not biologically related to the child, the court refused to engage in a discussion of intent.

Although the court viewed the two cases differently, the issues raised by *Georgia P.* are analogous to those of *Johnson.* Because the parties were socially infertile, they chose to use reproductive technology in order to parent a child together. But-for their intent and their decision to use DI, the child would not have been born. The parties intended to raise the child jointly. They bargained-for and agreed to terms which they incorporated into a written agreement. Moreover, they both functioned as parents for the first six years of the child's life.[264]

These similarities notwithstanding, the *Georgia P.* court stated that while "[a]t first blush the decision in *Johnson* appears applicable to the instant action,"[265] it is not.[266] The court then distinguished the cases in two short sentences: "[O]ur Supreme Court appears to have resorted to contract law in *Johnson* be-

259. *Id.*
260. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
261. *Id.*
262. *Id.*
263. *Id.* at 783 (quoting Shultz, *Reproductive Technology*, *supra* note 8, at 323).
264. Georgia P. v. Kerry B., Nos. A059817, A06082 slip op. at 1–4 (Cal. Ct. App. filed Jan. 31, 1994).
265. *Id.* at 10.
266. *Id.*

cause two women, rather than one, fit within the statutory definition of a natural mother. That is not the situation in this case."[267] Without any further explanation, the court limited the use of the intent-based approach and the validity of contracts as expressions of the parties' intentions to situations which present competing claims to parentage.

As a result, cases involving the uncontested preliminary establishment and subsequent protection of the parental status — *Georgia P. v. Virginia M.*,[268] *Nancy S. v. Michele G.*,[269] *Alison D. v. Virginia M.*[270] — have not been deemed appropriate for analysis under the intent-based approach. Courts have restricted application of this approach, as discussed above, to competing claims between biological parents. Yet, the *Johnson* reasoning applies to such situations. An intending parent who has not contributed biologically or genetically to the child most needs a paradigm that acknowledges her parenting role. In the context of collaborative reproduction, parenthood should be allocated to the intentional parents, who are designated at the time the reproductive collaborators enter into their written agreement. Parties who agree to statuses less than that of full parent should be given a period of time, dictated perhaps by statute, during which they may change their intentions. Once that period is over, the agreement should fix the roles and responsibilities delineated within it.

1. Changed Circumstances

One concern raised regarding co-parenting agreements is what to do in the event of changed circumstances, where either a party's intentions regarding the nature and extent of his or her relationship to the child change, or one of the adult-adult relationships within the family dissolves. These changes should be dealt with in much the same fashion that similar changes might be handled in the context of conventional families. The co-parenting agreement simply allocates parental and other statuses. It thus functions in the absence of other legal mechanisms for assigning parenthood. Once the statuses have been conferred,

267. *Id.*

268. Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. A059817, A060829 (Cal. Ct. App. filed Jan. 31, 1994 (unpublished opinion), discussed *supra* notes 150–57 and accompanying text.

269. 279 Cal. Rptr. 212 (Cal. Ct. App. 1991), discussed *supra* notes 140–43 and accompanying text.

270. 77 N.Y.2d 651 (N.Y. 1991), discussed *supra* notes 138–39 and accompanying text.

parties should be treated by law according to the status they have received.[271] The co-parenting agreement serves to bestow standing on otherwise unrecognized individuals.

Once parental status has been allocated to intending parents, they should be treated as legal parents. Thus, if a party decides, before or after birth, against parenting, the same legal options exist as would for any such parent. Support obligations follow legal parenthood. Adoption, as the termination of parenthood, is a way of "opting out" once the agreement has been entered into. A party who has opted out of parenthood — that is, not received it through the agreement — and later wants to parent should have fewer options. Like the gestator in *Johnson*, such a nonintending parent should not receive full parental status against the wishes of the other parties to the agreement. If she did, the entire premise behind intent-based parenthood, and its emphasis on bargaining and agreement, would be defeated.

However, she could try to bargain with the others to modify the contract or to adopt the child. If she has received some sort of status (as opposed to waiving all rights, privileges, and duties) then she will at least have standing in a court to petition for modification.[272] If her functional role has been greater than that allocated to her, she will perhaps be able to make a claim for de facto parenthood. These possibilities notwithstanding, parenthood allocated by agreement would carry the force of law and therefore be treated as any other legal assignment of parental status.

In case of dissolution of adult relationships or other disruptions to the family, the agreement should operate to confer standing on parents and others. This would ensure that families of consent shall be treated as traditional families; a court would, where necessary, determine the best interests of the child as to custody and visitation with the various adult members of his or her family. Thus, the agreement cannot preset custody or visitation terms upon family dissolution. It can, however, define the parties who may have standing to petition for such privileges.

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271. For purposes of this Part, I assume that the contract was fairly bargained and voluntarily entered into.

272. In creating this paradigm, I have sought to minimize this type of "changed intention" dispute by allowing for statuses less than legal parent but greater than that of stranger. In so doing, the model allows a gestator or sperm donor to pursue a legally recognized relationship with the child, without the complete set of rights or duties attached to full parenthood. This option ought to decrease the number of claims filed by parties wishing some privileges, such as visitation, but not parenthood. *See infra* Part III.D.

Dissolution of the original adult-adult relationships raises the possibility of further changed circumstances — the formation of new adult-child relationships subsequent to preliminary allocation of statuses. Throughout the course of the child's life, new adults may enter and perform parenting functions. These adults are not members of the original reproductive collaboration. As such, they cannot affect the original allocation of parenthood. The co-parenting agreement establishes parenthood at the time of birth. Once established, those statuses should retain the force of law until and unless they are terminated as any other legal parental status is terminated. Conversely, new parties should not receive any legal status after the original co-parenting agreement is signed. Rather, their role is analogous to that of stepparents. Their options for legal recognition, like those of stepparents, are limited.

C. *Lifting Gender and Numerical Restrictions on Parenthood to Ensure Expression of True Intent*

Under the current legal framework, the makeup of a child's legal parents faces both gender and numerical restrictions. These restrictions keep reproductive collaborators from defining and creating families of consent reflecting their true intentions. Agreements allocating parental status are meaningless in the absence of a legal framework flexible enough to accommodate diverse interests. This framework must protect all possible variations of privately ordered adult-child relationships. Parties creating families of consent may wish to designate one, two, or more legal parents[273] — a pure intent-based system would honor these wishes. The current system, which offers the polarized choices of legal parent or legal stranger, does not allow participants to express their true intentions or desires. This in and of itself is a flaw. In addition, such a framework operates to the detriment of the child, either by causing disruption to the family, or because a legal parent who did not desire full parenthood may not give the child the full commitment and attention that the child deserves.

Existing law recognizes a maximum of two parents per child, usually of opposite genders. These constraints prompted the

273. See *supra* notes 230–32 and accompanying text, regarding the demise of the nuclear family. Gender and numeric restrictions on parenthood reflect, to a large extent, outmoded ideas about "proper families."

Johnson court to dismiss the amicus curiae's suggestion that the child has two mothers.[274] Similarly, Marjorie Shultz dismisses this possibility as "unconventional and therefore unlikely to be imposed" by the state.[275] Yet, Shultz sees the contradiction in supporting an intent-based approach without validating all types of private choices and arrangements. She notes, "[I]f we truly deferred to private ordering, the adults who decided to create this child would decide who among them — one or more — should mother this child."[276]

In order to realize the full benefits of the intent-based approach, courts must lift the current numeric and gender-based restrictions on parenthood. Courts, however, remain unwilling to redefine legal parenthood to reflect the reality of nontraditional families.[277] Consequently, legal parenthood is allocated according to two myths: every child has one mother and one father, no more and no less, and two persons identified as mother and father share all the rights and responsibilities of parenthood, while nonparents — legal strangers — have none.[278]

Several cases illustrate the law's insistence that every child have one, and only one, parent of each gender.[279] In *Michael H. v. Gerald D.*,[280] the Supreme Court maintained the one-mother/one-father model by upholding the statutory presumption that the husband of a married woman is the father of her child. In *Michael H.*, a biological father unsuccessfully sought paternity, which remained with the mother's husband. Denying his claim, the plurality wrote that "the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[281]

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274. Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993).

275. Shultz, *Reproductive Technology*, *supra* note 8, at 332.

276. *Id.* at 332 n.101.

277. Polikoff, *supra* note 72, at 468.

278. *Id.*

279. Of course, some courts depart from this one-mother/one-father model in the context of second-parent adoption where both parents are the same gender. However, such adoptions are premised on a two-parent model and are almost always granted in a nonadversarial setting where no parent of the other gender presents him or herself. Some state courts have also broken from the model in other contexts. For example, in Finnerty v. Boyett, 469 So.2d 287 (La. Ct. App. 1985), the court acknowledged the reality of dual fatherhood, holding that a biological father could establish paternity while the child remained the legitimate child of the mother's husband. This case was decided before Michael H. v. Gerald D., 491 U.S. 110 (1989), discussed *infra* notes 280–83 and accompanying text.

280. 491 U.S. 110 (1989).

281. *Id.* at 131.

As Professor Nancy Polikoff notes, the *Michael H.* court explicitly limited its holding to cases where a married couple wants to raise the child, thereby guaranteeing the child a father.[282] Thus, while holding that "law, like nature itself, makes no provisions for dual fatherhood,"[283] the Court also refused to leave a child without a father. This need to ensure that children have "fathers" runs through other court decisions and statutory provisions. An unmarried woman cannot automatically protect the integrity of her single-parent family or lesbian co-parent family from paternity claims by biological fathers. Rather, she must follow statutory guidelines — such as enlisting the aid of a physician for donor insemination[284] — if she is lucky enough to live in a state with such statutory protections.

Unlike the nuclear family model, families of consent can include one, two, or more parents. Decisions within families of consent allocating parental status to any and all individuals who intend to take on the rights and responsibilities of parenthood should be honored. Similarly, the gender and sexual orientation of such individuals are irrelevant to allocating parental status. Intentional parents, as identified within written agreements, merit legal recognition.

1. The Best Interests of the Child — Setting a Maximum Number of Legal Parents

This Article advocates a contractual approach to ordering relationships that emerge from collaborative reproduction because this approach presents the best means to the ends of respecting individuals and protecting families. The values embodied in the paradigm proposed herein include, but are not limited to, encouraging party autonomy and prioritizing party intentions. The paradigm also seeks to protect the integrity of families of consent and provide the children born into those families with societal recognition and legal protection of their relationships with various members of the reproductive effort. Finally, the paradigm accommodates the variations among familial arrangements while ensuring that the arrangements it accommodates are, at the least, workable. By ensuring that this paradigm affords societal support and legal protection to functional fami-

282. Polikoff, *supra* note 72, at 480.

283. *Michael H.*, 491 U.S. at 118.

284. *See, e.g.*, UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592 (1979). For the statute's applicable text, see *supra* note 35.

lies of choice, wherein the child's interests are best met, policy concerns relating to numeric restrictions on legal parenthood arise.

While the law should change to protect families with dual mothers, dual fathers, or both, whether lifting numeric restrictions ought to be absolute or qualified is arguable. A purist might advocate complete lifting of all numeric restrictions on allocating legal parental status as the only way to meet true intentions and guarantee party autonomy. While this assertion might be well-founded from a strictly contract-based perspective, values other than those of autonomy and honoring intentions come into play in constructing a new paradigm for ordering adult-child relations within families of consent. The most important of these values is protecting the best interests of the child.

Acknowledging multiple parents is often in the best interests of the child. Children in nontraditional families are able to grasp the concept of multiple parents[285] and can benefit from multiple parental relationships. Other cultures have divided parenting responsibilities among several adults rather than allocate parental status to a child's two biological parents.[286] Some commentators have criticized the nuclear family for being too restrictive, intense, and isolating.[287] One argues that just as parents should have more than one child to decentralize their possessiveness and dependency on any one of them, children should have more than one parent of each sex to provide them with more role models.[288] Moreover, studies on joint custody have found that arrangements wherein parents share authority over their children, while requiring some effort and commitment on the part of the parents, offer significant benefits to both parents and children.[289] These studies support the theory that non-nuclear families and multiple parenting can be in a child's best interests. Finally, while stability is important to a child's development, the concept

285. MARTIN, *supra* note 79, at 181.

286. *See* BEYOND THE NUCLEAR FAMILY MODEL: CROSS-CULTURAL PERSPECTIVES (Luis Lenero-Otero ed., 1977).

287. *See id.*; Fernando Colon, *Family Ties and Child Placement*, 17 FAM. PROCESS 289 (1978).

288. ROBERT THAMM, BEYOND MARRIAGE AND THE NUCLEAR FAMILY (1975).

289. Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 740–44 (1983). However, joint custody has been increasingly criticized. *See, e.g.*, Dale R. Mrkich, *The Unfulfilled Promise of Joint Custody in Montana*, 48 MONT. L. REV. 135 (1987).

of psychological stability should be expanded to include and integrate complex relationships.[290]

We must be careful not to create higher standards for families of consent than those we have for traditional, nuclear families. While concern for a child's ability to cope with differences in personalities, styles, and attitudes of multiple parents in the context of families of consent may exist, we do not, in general, question the child's ability to cope with these same differences within nuclear families.[291]

Nonetheless, even advocates of multiple parenting recognize that there is some numeric limit on parents, beyond which the family becomes unworkable, both from an administrative standpoint as well as from the child's perspective.[292]

In any group of individuals, decision-making becomes more time-consuming and difficult as the number of individuals in the group increases. Thus, the more parents a child has, the harder it may be for such parties to cooperate in making decisions affecting the child. Because parental rights are all encompassing and parental authority is absolute, this administrative difficulty may well endanger the child's well-being, both emotionally and physically. As Bartlett describes:

> Parental rights are comprehensive, and they operate against the state, against third parties, and against the child. Parents have the right to custody of their child, to discipline the child, and to make decisions about education, medical treatment, and religious upbringing. Parents assign a child a name. They have a right to the child's earnings and services. They decide where the child will live. Parents have a right to information gathered by others about the child and may exclude others from that information. They may speak for the child and may assert or waive the child's rights. Parents have the right to

290. Joan Kelly, *Further Observations on Joint Custody*, 16 U.C. DAVIS L. REV. 762, 767–70 (1983).

291. *Id.*

292. April Martin provides an illustrative story of a child's perspective:

> Lynne overheard her three-year-old daughter, Rosa, discussing their family with another child, Katie. Rosa was explaining that she had two moms. She said, "I just have two moms, you know, and some people have two dads, and some people have just one mom. . . ." Katie said, "Boy, wouldn't it be funny if you had two moms *and* two dads?" and both girls giggled. Then Rosa said, "What if I had three moms and three dads?" and they giggled some more. Then Katie tried, "What if you had four moms and four dads?" Lynne, listening from the other room, heard dead silence. Then she heard her daughter answer, in a solemn tone, "*That* would be too many."

MARTIN, *supra* note 79, at 181.

> determine who may visit the child and to place the child in another's care.
>
> Parents' duties correspond to their rights. Parents must care for their child, support him financially, see to his education, and provide him proper medical care. They have the duty to control the child, and if they fail in this duty, they may be required to answer for the child's wrongdoings.[293]

Clearly, the more time and energy spent negotiating each of these decisions, especially where decision-making does not end in a consensual agreement among parents, the more instability, discontinuity, and uncertainty the child may experience. The allocation of shared authority and responsibility among several parents may disrupt the child's life. In addition, a child with multiple parents may experience conflicting loyalties.[294] While this situation occurs in two-parent families,[295] the problem increases with the number of parents involved. Children need to know who their primary caretakers are and to bond with those persons.[296] This becomes impossible when too many people fill that role.

Thus, two concerns underlie the public policy of setting a maximum numeric restriction on legal parenthood. First, encouraging workable families facilitates parental decision-making. Second, the child needs identifiable primary caretakers with whom he or she can bond. Each problem potentially emerges when too many people share full parental authority. Each concern reflects a societal commitment to protecting the best interests of the child. It is clear, regardless of what approach ultimately becomes part of our policy, that some form of public regulation of private ordering is required.

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293. Bartlett, *supra* note 14, at 884–85 (citations omitted).

294. GOLDSTEIN ET AL., *supra* note 221, at 38.

295. *See, e.g.*, Zummo v. Zummo, 574 A.2d 1130 (Pa. 1990) (father who took his children to non-Jewish religious services during his visitation period was required to also present children to a Hebrew School during his periods of weekend visitation).

296. *See, e.g.*, GOLDSTEIN ET AL., *supra* note 221, at 32–34, 117. An infant's need for attachment, "which can be fulfilled only in a close and selective relationship [to a primary] caregiver," is particularly important. *See* Bartlett, *supra* note 14, at 903; *see also* Ernest Kinnie & Jacqueline Kelley-Kinnie, *Psychological Evaluation as an Aid in Permanency Planning, in* PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 543, 545 (NAT'L LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION 1981); *cf.* MICHAEL RUTTER, MATERNAL DEPRIVATION REASSESSED 27 (1981) (suggesting that if high-quality mothering is provided by persons who remain constant during the child's life, the child's exposure to four or five mother figures need cause no adverse effects).

One partial solution to the first problem, that of unworkable families, would require that parental authority be divided rather than shared. Under this approach, the written parenting agreement would not only assign parental status but would also allocate parental authority.[297] However, such a requirement is problematic for several reasons. First, the very definition of "parent" implies full authority over every sphere of decision-making. Individuals who desire a more limited role in the child's life have the option, under the proposed paradigm, of receiving a status which reflects the limitation that parental rights and privileges cannot be separated and shared. Second, even if they could be legally and functionally divided, not every decision can be foreseen; no agreement can allocate every parental responsibility and duty. Third, compliance would be difficult to enforce.

Another approach which does not entail imposing a numeric restriction on parents assumes that such limitations occur naturally, as parties arrange their families. Logically, individuals creating a family of consent are wary of allocating parental authority to too many people. They seek to avoid problems of administrative unworkability. However, if public policy dictates avoiding such problems, then that policy must be implemented in a less haphazard and uncertain method. Because the state cannot be confident that individual parties will desire to, or be able to, limit the allocation of parental status to a functional number, it may well have to take official steps to ensure that parties do so. Given the law's emphasis on the best interests of the child, it must avoid making children pay for the mistakes, however well-intentioned, of their reproductive creators.

Thus, the question becomes not whether the number of legal parents should be limited as a matter of public policy, but rather how we as a society determine the maximum number of parents one child may legally have. For example, the limit could be derived from some variant on the maximum number of people who can be involved in a given collaborative reproductive effort. However, this method is flawed because the number changes according to the reproductive technologies employed and the social relationships of the members involved. Moreover, this number will likely increase as more reproductive technologies become

297. The parenting agreement in *Leckie*, for example, allocated authority to name the child, appoint a guardian, and to self-identify as "parent." Leckie v. Voorhies, No. 60-92-06326, app. at 1 (Lane County Cir. Ct., Or. filed Apr. 5, 1993).

available and as social arrangements among members of these efforts continue to evolve.

A better method considers not just the number of intentional parents but also their role in the family of consent. This method looks beyond the relationships between a child and each adult in his or her life to the relationships among those adults. Both facilitating decision-making and providing the child with clearly identifiable parent figures entail ensuring that the child be raised in some intact family structure in which the adults are related to the child and also, in some way, to each other.

For example, assigning dual motherhood in a *Johnson*-type social arrangement does not further the best interests of the child. The two women do not intend to parent the child together or in cooperation with each other. They are not going to live together, or in the same community, or even in the same city. They are not going to share primary caretaking responsibility or custody. They are not committed to mutual decision-making. Thus, the child would not receive the benefit of co-mothers. Rather, the child would have two mothers between whom he or she would, in all likelihood, feel split.

In contrast, where two women decide to co-parent a child, either because they are lovers or simply because they wish to rear a child together, dual motherhood is desirable. In a situation where two women wish to co-parent with a third member of the reproductive collaboration, such as the sperm donor, three parents might be best. This would depend on whether each of them was committed to cooperating with the others to provide the child with an intact family structure wherein his or her custodial parents, functional parents, and intentional parents were all the same three people. This is not to say that all parents must live together, but they must at least be involved in creating a structure in which the child feels safe and unconfused.

Similarly, four persons could conceivably co-parent a child. Public regulation of assigning parental status should consider not only the number — although the number, as it increases, may become unworkable per se — but also the relations between the parties. For example, where two gay men mix their sperm together and fertilize the egg of a woman whose lover then gestates the child, allocation of parental status in this collaboration should go, according to the proposed paradigm, to the intentional parents. If all four have agreed to parent, then the question should be whether they intend to parent cooperatively or not. If they

can create an environment in which the child is enriched by his or her multiple parents rather than drained by them, then the number becomes less troublesome. Four people involved in each other's lives, sharing a home or at least a community, could co-parent in a way that four people who are not at all involved in each other's lives could not.

Parental status should be assigned through private ordering to intentional parents. Public regulation of such assignment entails a critical analysis of the ways in which the best interests of children produced through collaborative reproduction may be protected. Absolute numeric restrictions on parenthood must be lifted. In certain situations, dual motherhood, dual fatherhood, or both might be in the child's best interests. Those situations arise where the collaborative reproduction arrangement underlies a collaborative parenting commitment.

D. *Conferring Statuses Between Legal Parent and Legal Stranger*

Parties who do not intend to parent but who do bargain for and receive certain privileges and/or duties regarding the child must also receive recognition under the law. Thus, legal protection should be extended to adult-child relationships falling between the all-or-nothing extremes of "parent" and "stranger." Legitimizing such adult-child relationships enables exercise of true choice, since parties could negotiate for the exact extent of involvement with the child resulting from a given reproductive collaboration. The availability of a range of options ensures that participation in collaborative reproduction is voluntary. It also alleviates potential competition over parental status, the only way in which parties can currently gain any legal protection.[298]

Legal recognition of privately ordered adult-child relationships would accommodate the intentions of each member of a collaborative reproductive effort.[299] Intentional parents would receive legal protection.[300] Sperm donors and egg donors could

298. See, e.g., Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. 1994), discussed *supra* notes 100–07 and accompanying text.

299. Any attempt at adopting an intent-based approach under a paradigm that fails to recognize such relationships fails to reflect the true intentions of individuals collaborating in reproduction and creating families of consent.

300. This would give standing to and guarantee the parental rights of lesbian co-parents such as the petitioners in cases like Alison D. v. Virginia M., 77 N.Y. 2d 651 (1991), Nancy S. v. Michele G., Cal. Rptr. 212 (Cal. Ct. App. 1991), and Georgia P.

bargain for nonparental status.[301] Surrogate mothers, gestational as well as genetic, would have more options available when negotiating for the status that they wish.[302] A limited, nonparental status, bargained-for and assigned by agreement, would become the sum of a party's legally protectable relationship to a child. Hence, while any member of a reproductive effort would have standing to protect his or her relationship with the child, the agreement would also limit the scope of privileges an individual can claim — for example, naming, visitation, and custody. Finally, a party might "opt out," waiving any legally recognizable status, and be free from any duties. Such parties would have no standing to petition for any parental privileges, and would be in no greater or worse position than any other third party to raise claims against the members of the family. Conversely, members of the family would be barred from pressing claims for paternity or maternity against these individuals.

While the first prong of the paradigm seeks a redefinition of parenthood itself, this second prong criticizes the rigidity of the legal significance of parenthood.[303] It seeks to limit parental control, absolute under current law, over those adult-child relation-

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v. Kerry B., Nos. 197577, 197581 (Cal. Sup. Ct., Sonoma County), *aff'd*, Nos. AO59817, AO60829 (Cal. Ct. App. filed Jan. 31, 1994).

301. Parties such as the petitioner in *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (1994), gain standing to petition for certain privileges, such as visitation, without being able to demand additional rights. This is the type of outcome achieved in Leckie v. Voorhies, No. 60-92-06326 (Lane County Cir. Ct., Or. filed Apr. 5, 1993), although that outcome was not reached as a result of validating or enforcing the written parenting agreement entered into by the parties.

302. The surrogate, as well as the intentional mother, in cases such as Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), and *In re* Baby M., 537 A.2d 1227 (N.J. 1988), could bargain for allocation of various rights and privileges without having to compete for the status of mother. Moreover, the status of mother could in fact be allocated to both women by agreement.

303. My proposal thereby incorporates aspects of both Polikoff's assessment that restrictions on parenthood, numeric as well as gendered, must be lifted, as well as Bartlett's advocacy of legal recognition of nonparental relationships. Polikoff, *supra* note 72; Bartlett, *supra* note 14. I do not agree with Polikoff that these two theories are mutually exclusive. Polikoff, *supra* note 72, at 473 n.51. Rather, I see them as two equally necessary sides to the same coin: creation of a paradigm which is appropriate to an intent-based approach to resolving disputes within the context of collaborative reproduction among members of families of consent. Parenthood would thus become available to "more or less than two individuals" regardless of gender. Polikoff, *supra* note 72, at 473 n.51. It also would become, to a certain extent, "nonexclusive" within the meaning of Bartlett's proposal. Bartlett, *supra* note 14, at 944–61. However, this nonexclusivity extends only as far as limiting parental authority and discretion over agreed-upon distributions of privileges and duties to nonparental adults in the family.

ships which have been bargained-for and consented-to in written agreements among members of families of consent. An intent-based approach allows legal parents to consent to allocating various statuses to other adult members of their families. Thus, my paradigm does not dilute parental autonomy[304] or the legal significance of parenthood, but rather reinforces it by allowing legal parents to engage in private ordering with other parties to their reproductive collaborations.

The current legal framework, Katharine Bartlett points out, does not accommodate "extra-parental attachments, because the presumption of exclusive parenthood requires that these relationships compete with others for legal recognition."[305] Accordingly, the state presently does not recognize adult-child relationships involving nonparenting adults unless the child's legal parents consent, are unfit, or abandon the child.[306] Yet certain extra-parental relationships — those involving adult participants to a collaborative reproduction effort, which are bargained-for and consented-to by the intentional (and therefore legal) parents and included in the terms of the written parenting agreement — merit recognition.[307] Such relationships complement rather than replace legal parenthood.

Under this paradigm, many of the disastrous and destructive outcomes of recent disputes can be avoided. First, enforceable contractual ordering encourages negotiation and bargaining among parties, which in turn results in agreements that better represent each party's intentions. Second, the availability of a

304. For an interesting discussion of the meaning and scope of parental autonomy, see Bartlett, *supra* note 14, at 880 n.3.

305. *Id.* at 881.

306. *Id.*

307. These members of the family of consent could be deemed "significant adults." I much prefer this title to that of "partial parent." The Baltimore City Circuit Court used the term "significant adult" to recognize and grant visitation privileges to a nonparent who was nevertheless found to have a close relationship to the child. M.C.C. v. C.I.D., No. 8919039/CE99949 (Balt. City Cir. Ct. July 10, 1989). See Gil de Lamadrid, *supra* note 134, at 176, for a detailed discussion of the case's facts. Similarly, in Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986), the "close friend" of a biological mother was awarded visitation rights, notwithstanding the court's declaration that she was not a parent.

Under my proposal, the parties in both *M.C.C.* and *Jhordan C.* would most likely fit the meaning of intentional parent. Therefore, in the future such parties, armed with written parenting agreements, would have full and legally recognized parental status. Nonetheless, these cases are important because they support the proposition that there is room in our system for legal recognition of adults who are neither full parents nor complete strangers.

range of options ensures more voluntary and deliberate decision-making. Parties to contractual arrangements will continue to breach or seek modification of terms; intentions and desires, even those perfectly met in an initial agreement, may change through time. Nonetheless, some types of disputes will decrease as agreements more closely match each party's deliberate and voluntary choices.

Consequently, the nature of future cases involving reproductive collaborators would change. Parties would no longer have to present claims for parental status in order to receive a modicum of privileges.[308] Instead, individuals could protect their adult-child relationships in the form in which they were initially intended. Any adult with some status other than stranger — whether "parent" or not — should have standing to maintain his or her relationship with the child in the event of disruption to the family. Children, as well as adults, would be ensured of continuity and security within their familial relations.

Private contracting is a workable model because it provides flexibility for dealing with variations of family structures made possible by collaborative reproduction.[309] The proper role of a court in resolving disputes that emerge in the context of collaborative reproduction should be to inquire into the nature of the parties' agreement and the reality of the family's adult/child relationships. Courts will save considerable time and energy trying to resolve disputes in the absence of a workable paradigm for determining parenthood. Under the paradigm proposed in this Article, standing and statuses are allocated by agreement. Courts need only engage in an analysis of the best interests of the child.

CONCLUSION

Assigning parenthood has become increasingly complicated due to the convergence of reproductive technology and changing social norms. Existing paradigms for assigning parental status, based solely on biological and genetic contributions, have become obsolete. They cannot accommodate scenarios wherein the intending parents are not biologically or genetically related to their child. Nor is the existing system flexible enough to accommodate situations of dual fatherhood or dual motherhood, where

308. *See supra* note 298 and accompanying text.
309. O'Rourke, *supra* note 30, at 161.

it is either unclear just who is the child's "father" or more than one person fits the definition of "mother."[310]

Recent cases highlight the problems that collaborative reproduction raises in terms of determining parental status. They also reveal the need for recognizing statuses between full parenthood and legal stranger. Most articles addressing this topic focus primarily on methods of determining who are the "parents" where reproduction is collaborative among two or more parties not living in a nuclear family structure. Although the best of this scholarship favors awarding parental status to the child's intentional parents,[311] it has not gone far enough either in expanding the notion of "legal parenthood" or in acknowledging the role of nonparenting members of the collaboration.

Resistance to private ordering of parental adult-child relationships stems from societal confusion about the nature of familial and parental institutions.[312] Allowing private ordering in family matters acknowledges that the structure of the family is changing. It permits individuals to create families that reflect their own intentions and needs. It also ensures that the adult-child relationships recognized by law match those known to the child. Consequently, the children of families of consent receive the security and continuity in their familial relations that children of conventional families do.

The structure of the family has changed, and it will continue to change. Adult-child relationships have become more complex with the advent of reproductive technology and the emergence of families of consent. The legal system must acknowledge these changes and be flexible enough to accommodate future changes. Parenthood is no longer easily determined or presumed. Yet, it must still be assigned and protected for the sake of children. A publicly regulated system of private ordering serves this function and fulfills the needs of children, adults, and families of consent.

Faced with the competing claims of two women, each demanding maternity of the same child, Solomon discerned the true mother from the impostor and assigned parenthood accordingly.[313] Today, the medical technologies and social arrangements inherent in collaborative reproduction would complicate

310. These situations arise, for example, when two men mix their sperm together before insemination, or where one women carries another woman's egg.

311. *See, e.g.*, Shultz, *Reproductive Technology*, *supra* note 8.

312. O'Rourke, *supra* note 30, at 160.

313. *See* 1 KINGS 3:16–28 (story of King Solomon).

Solomon's task. No longer can "true" parents be easily distinguished from "impostors;" such labels are meaningless in the context of reproductive collaboration, as is the dichotomy of "legal parent" and "legal stranger." Confronted with a lesbian couple, one of whom has gestated the fertilized egg of the other, and a sperm donor and his partner, all of whom seek legal recognition as adults in their child's life, Solomon's once functional method of allocating parental status would be useless.

This Article represents an initial attempt to construct a flexible and principled paradigm to guide contemporary courts — modern day Solomons — in assigning parenthood in the context of collaborative reproduction. Under the proposed paradigm, with a written agreement providing guidance and the best interests of the child at heart, parental and other legally recognized statuses can be justly conferred according to the intentions of all parties involved. This paradigm indisputably leaves a myriad of questions unanswered and issues unresolved. Nonetheless, it presents an alternative framework for resolving disputes among reproductive collaborators and within families of consent. As such, it seeks to illustrate the ways in which the current framework is obsolete and to create a universally applicable method of recognizing and protecting adult-child relationships arising in all possible and potential reproductive arrangements.