THE RIGHT NOT TO BE A GENETIC PARENT?

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ABSTRACT

Should the law recognize an individual's right not *to be a genetic parent when genetic parenthood does not carry with it legal or gestational parenthood? If so, should we allow individuals to waive that right in advance, either by contract or a less formal means? How should the law's treatment of gestational and legal parenthood inform these questions? Developments in reproductive technology have brought these questions to the fore, most prominently in the preembryo disposition cases a number of courts have confronted—disputes over the use of stored frozen preembryos that couples have fertilized in the course of In Vitro Fertilization (IVF)—but other examples abound.*

In this Article, I argue that, in analyzing these cases, it is essential to unbundle the possible rights not to be a genetic, gestational, and legal parent, and to recognize that the three rights do not stand and fall together. I show that we cannot move from the discourse surrounding the rights not to be a gestational and legal parent to a justification for a right not to be a genetic parent. Instead, I argue that the normative mooring of the right not to be a genetic parent is best understood as a way of protecting individuals from what I call "attributional parenthood," a harm that stems from the

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social assignment of the status of parent to the provider of genetic material that persists notwithstanding the fact that the legal system has declared him or her a nonparent.

Using this framework, I argue for the recognition of the right not to be a genetic parent. I reject, however, the claim, common among courts and commentators, that this right should not be capable of advance waiver. I instead conclude that we should permit advance waiver of the right through contract, with several interventions aimed at improving contractual consent. In preembryo disposition disputes where the parties have not contracted, I argue for a general default rule of non-use, perhaps with a subrule permitting use when non-use would mean the impossibility of one party ever having any genetic children.

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I. INTRODUCTION

Should the law recognize an individual's right *not* to be a genetic parent when genetic parenthood does not bring with it legal or gestational parenthood? Should we allow individuals to waive that right in advance by contract, or by a less formal means? How should the law's treatment of gestational and legal parenthood inform these questions?

Consider, for example, the following two fact patterns, both drawn from real cases.

A man tells a woman with whom he is having an affair that he does not want to have children. Throughout the course of their relationship they engage only in oral sex, and during one occasion when she is performing oral sex on him, she, unbeknownst to him, retains his sperm with the intention of using it to conceive a child.[1]

Should the woman be permitted to use his sperm if the man objects? Does the answer depend on whether the man will be made a legal parent of the resulting child, or is the mere fact that he will be made a genetic parent against his contemporaneous objection sufficient?

In the second case, a husband and wife undergo in vitro fertilization ("IVF"), mixing his sperm with her eggs in culture dishes and allowing those that have been fertilized to develop into two- to eight-cell organisms called "preembryos." They manage to fertilize six preembryos, two of which are used for implantation in the woman, while the other four are cryopreserved and stored in canisters frozen with liquid nitrogen for future use. Neither implanted preembryo leads to a successful pregnancy. The parties divorce and reach an impasse as to the disposition of the remaining preembryos.[2] A number of state supreme courts have confronted cases like

1. These were the facts alleged by the plaintiff in *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 22, 2005). In the actual case, the court's involvement began only after the woman had allegedly used the sperm to inseminate herself. *Id.*

2. *E.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003). For more information on the IVF and cryopreservation process, see, for example, Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 58–63 (1999).

these, called "preembryo disposition disputes."[3]

Can the wife obtain the cryopreserved preembryos and use them for implantation, producing a child against her husband's contemporaneous objection? Does the answer depend on whether the husband will be made a legal parent of the resulting child, or is the mere fact that he will be made a genetic parent sufficient? Does the answer turn on whether the husband and wife executed a prior agreement on the issue?

In this Article, I examine these and other questions relating to a possible right not to be a genetic parent. Given that as of 2003 there were slightly less than 400,000 cryopreserved preembryos in storage in the United States,[4] these questions are of obvious importance.

I begin, in Part II, by explaining my conceptual thesis that, while a number of courts and commentators have invoked a monolithic "right not to procreate," it makes more sense to think of a bundle of rights not to procreate (plural) containing multiple possible sticks, including the right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent. Because (at present) only women can gestate a fetus, this last right is limited to women. Unbundling the right not to

3. None of these courts allowed the preembryos to be used for implantation even when there was an agreement so providing. Two courts found the particular agreements at issue flawed but indicated, in dicta, that even if faced with a valid agreement they would refuse to enforce it. A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001). A third court assumed arguendo that participation in IVF constituted an implied agreement to become a parent, but nonetheless held that despite such an agreement neither party could be made a parent against his or her contemporaneous objection. *In re Marriage of Witten*, 672 N.W.2d at 780. One court found that in the absence of an agreement neither party could be made a parent against his or her contemporaneous objection, but suggested in dicta that a disposition agreement mandating implantation would be enforceable. Davis v. Davis, 842 S.W.2d 588, 597–98 (Tenn. 1992). Finally, one court found such agreements enforceable, but the agreement in question mandated preembryo destruction, and thus its performance would not impose unwanted parenthood. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

Florida has, by legislation, made these contracts enforceable, and provides that in the absence of "a written agreement, decisionmaking authority regarding the disposition of preembryos shall reside jointly with the commissioning couple." FLA. STAT. ANN. § 742.17 (West 2007).

The European Court of Human Rights has also weighed in on this type of case, Evans v. United Kingdom, 2007 Eur. Ct. H.R. 264 (2007) (holding, in a case without a contract on the matter, that a husband could demand the destruction of preembryos he had fertilized, even though they represented his wife's only chance of having a genetic child due to the removal of her ovaries), as has the Israeli Supreme Court, CFH 2401/95 Nahmani v. Nahmani [1996] IsrSC 50(4) 661 (reaching the opposite conclusion in a similar case) (English translation *available at* http://elyon1.court.gov.il/files_eng/95/010/024/Z01/95024010.z01.pdf). *See also* Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 97–100 (2006) (discussing *Nahmani*). For further discussion of the laws of various European countries, see *Evans*, 2007 Eur. Ct. H.R. ¶¶ 39–42.

4. David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1068 (2003).

procreate allows us to see that each of the sticks protects different types of interests, and that recognizing one right does not necessarily require recognition of another. I use this framework to focus on the main question of this Article: whether, putting aside federal constitutional issues,[5] it would be desirable for a legal system to recognize a right not to be a genetic parent absent contemporaneous consent when it is unbundled from the other sticks—that is, whether we should recognize a right not to be a genetic parent when the individual asserting the right will not have to be a gestational or legal parent to any resulting child.

In Part III, I use this unbundling to examine the normative case for recognition of each of the three possible rights not to procreate and to identify (and combat) a tendency towards what I call "rights bleed," the unthinking extension of the reasons that support one right to the normative justification for a closely related right. I show that arguments for recognizing the right not to be a gestational parent, most notably in the abortion debate, are justified by a prohibition on invading bodily integrity. But this reasoning cannot be used to directly support a right not to be a genetic parent when it does not require any invasion of bodily integrity. Arguments counseling for the rejection of a right not to be a legal parent often turn on the importance of protecting the best interests of children, but I discuss several difficulties in extending these arguments to a right not to be genetic parent. Therefore, to determine whether to recognize a right not to be a genetic parent, what is required is a separate account of the harm when one is made only a genetic parent against one's will. I offer such an account, focusing on what I call "attributional parenthood," which suggests that the harm stems from the social assignment of the status of parent to the provider of genetic material that persists notwithstanding the fact that the legal system has declared him or her a nonparent.

Using this understanding, in Part IV I evaluate the argument for recognizing and protecting a right not to be a genetic parent in cases where there is no prior consent. I discuss several normative frameworks but primarily focus on a welfarist justification for such a right. I also demonstrate that current tort law protects this right in a very imperfect form.

5. In a companion article, I defend the claim that the U.S. Constitution does not limit the state's discretion in these cases to adopt my preferred solution. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008). For the purposes of this Article, I assume my claims in that article are correct and that there are no constitutional impediments. Even if one rejects my conclusions in that article, and thinks that the U.S. Constitution compels a result contrary to what I advocate for here, this is no bar to other non-U.S. jurisdictions adopting my preferred solution, or reinterpreting or amending the U.S. Constitution to effectuate that result.

In Part V, I turn to the separate question of whether we should allow the advance waiver of the right not to be a genetic parent through contract. After reviewing the positive case for contract in this domain, I separate out a number of anticontract arguments sometimes marshaled against other reproductive and family-law contracts and demonstrate they are inapposite here. Next, I discuss the strongest argument against advance waiver, a set of objections claiming that individuals will make errors in their contractual preferences and that we ought to protect them from these errors by refusing to enforce these contracts. I ultimately conclude that these objections are overstated, and while they prove insufficient as a reason to refuse to enforce contracts compelling genetic parenthood given the benefits of these contracts, they do illuminate a number of ways in which a system could be designed to improve the quality of consent. I also explain why we should reject a compromise solution that would allow the enforcement of these contracts but permit only a damages remedy.

Finally, in Part VI, I argue that in preembryo disposition cases without a contract, the default rule should be non-use, perhaps with a subrule permitting use when non-use would mean the impossibility of one party ever having any genetic children.

While my argument style is largely analytic, I do not want to mask the fact that these disputes are as emotional and personal as any the law must confront. For many these disputes carry still deeper questions such as what is the proper attitude one should take as to preembryonic life. But, unlike the judges in Rome who could throw their hands up and declare a particular dispute *non liquet*, or without law to apply,[6] our legal system does not permit us to escape making a decision about how these disputes should be resolved. Whatever we select as the legal rules in this area will have strong emotional consequences for the parties involved, and it is precisely for this reason that these legal analytics are important. That said, it is also important to recognize that behind the abstract issues the law faces there is an inescapable human dimension.

6. *See, e.g.*, W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 325 (1990) (discussing *non liquet* in Roman law).

In this Article I remain largely agnostic about which institution(s) ought to set the legal rules I propose. Although the courts have been the main rule articulators in the preembryo disposition disputes, there has also been some action by legislatures. *See supra* note 3. While it is plausible that legislatures are better suited to make the kinds of complex trade-offs I discuss, which are contingent on changing technology spurring changing social perceptions, legislatures have been very reluctant to regulate reproductive technology in this country, in part due to its relationship with abortion and religion. *See, e.g.*, DEBORA L. SPAR, THE BABY BUSINESS 30, 228 (2006).

II. UNBUNDLING THE RIGHTS NOT TO PROCREATE

A number of courts and commentators have made reference to a "right not to procreate" or "right to avoid procreation" (singular) in the preembryo disposition context.[7] I argue that many of these authorities have erred by conceiving of a monolithic right not to procreate, and we should instead recognize a bundle of rights having multiple *possible* sticks, consisting of a right not to be a gestational, legal, and genetic parent.

Like "jurisdiction," the term "right" is a bit of a legal weasel-word. For the purposes of this Article, I intend a very functional and Hohfeldian definition of "right": an interest protected against invasion by others by the coercive power of the state.[8] Also, to be clear, I mean a legal rather than a moral right, and a main task of this work is to determine whether the law ought to recognize the possible legal rights in question.[9]

I have developed this framework in more depth in a companion article.[10] For present purposes, I merely discuss the main points of the framework to serve as the grounding for what follows.

First, it is well-recognized that a woman can be a parent in (at least) three possible senses: as a gestational parent, as a legal parent, and as a genetic parent. Men, however, are restricted by biology to only the last two types of parenthood.[11] For example, a woman who undergoes IVF with her egg fertilized by her husband but whose baby is carried by a gestational surrogate is the child's genetic mother and (under certain circumstances) legal mother, but not its gestational mother. By contrast, the surrogate is the gestational mother but not the genetic or legal mother.

What is less obvious is that the concept of *non*parenthood, or rather, freedom from parenthood, can also be unbundled. Therefore, when discussing the right not to procreate, we need to recognize three possible rights *not* to be a parent—a right not to be a gestational parent, a right not

7. *See, e.g.*, *J.B.*, 783 A.2d at 717; *Davis*, 842 S.W.2d at 601; Joseph Russell Falasco, *Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition*, 45 JURIMETRICS 273, 284 (2005); Sara K. Alexander, Note, *Who Is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature*, 38 GA. L. REV. 395, 420–21 (2003); Kimberly Berg, Note, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 508 (2006).

8. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–31 (1913).

9. In a companion article, I focus on whether these are rights protected by the federal Constitution, *see* Cohen, *supra* note 5, but I bracket off that question for present purposes.

10. *See id*. at 1139–46.

11. *E.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE 108–09 (1994) (distinguishing "reproduction *tout court*" from more limited forms of parenthood).

to be a genetic parent, and a right not to be a legal parent.[12]

Conceptually, we can add the three rights not to be a parent and three possible rights *to be* a parent, for a relationship of six possible rights:

A right not to be a gestational parent	A right to be a gestational parent
A right not to be a genetic parent	A right to be a genetic parent
A right not to be a legal parent	A right to be a legal parent.[13]

Each of these rights should be understood as a negative right to be free from interference rather than as an affirmative right to assistance. For example, as I am using the term, the "right to be a gestational parent" should be understood as a negative right against interference with your gestation of a fetus rather than a right to have a fetus provided to you for the purpose of gestation.[14]

Second, a jurisdiction could recognize some of these rights but not others. For example, a jurisdiction could recognize a right not to be a gestational parent as against a marital partner, such that a husband could not force his wife to carry the fetus to term, and yet not recognize an equivalent right to be a gestational parent, such that the husband *could* force his wife to abort the fetus. More importantly for our purposes, a regime could recognize a right not to be a gestational parent but not a right not to be a genetic parent.

12. Some of these rights can be further subdivided, although for the purposes of the analysis in this Article doing so is unnecessary. For example, legal parentage implies both an obligation to provide financial support and a custodial obligation, but we could instead distinguish a right not to be a financial parent and a right not to be a custodial parent. A jurisdiction could recognize one, or make one waiveable, but not the other.

13. Again, this move is, broadly speaking, Hohfeldian. *See generally* Hohfeld, *supra* note 8 (setting forth a scheme of jural opposites and correlatives). *See also* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 131–34 (2000) (discussing Hohfeldian analysis). We could also be even more Hohfeldian and specify jural opposites and correlates for each of these. So, X person either has a right or no right not to be a genetic parent; if he has a right not to be a genetic parent then person Y has a duty not to make him a genetic parent, whereas if he has no right not to be a genetic parent then person Y has a privilege of making him a genetic parent.

14. These rights to affirmative assistance might constitute a third set of rights. *See* Cohen, *supra* note 5, at 1140–41. But, I put these possible rights aside for the purposes of this Article. Even among the negative rights, this list of rights is not exhaustive. Two additional possible rights are worth identifying if only to bracket them off because they do not concern *procreation*. The first is a right to control one's tissue qua tissue, which might involve nonreproductive (for example, scientific) use of one's tissue. The second is a right to control genetic information qua information—for example, the use by insurance companies or employers of information from genetic tests. *See id*. at 1143 n.22.

Third, the various procreative rights can conflict with one another. For example, the preembryo disposition disputes can be conceived of as a conflict between one party's right to be a genetic parent and the other's right not to be a genetic parent. Therefore, if we recognize all of the rights, we will need some mechanism to resolve these conflicts. This could be a metarule which tells us how to resolve conflicts between each of the six rights or a balancing device that is applied on a case-by-case basis rather than at the categorical level.[15] The system could also resolve the conflict by following a written agreement or imposing a majoritarian (or other) default rule in the absence of an agreement.

Fourth, for whichever sticks in the bundle a jurisdiction recognizes as legal rights, the jurisdiction also faces a further question of whether the rights can be waived and, if so, how such a waiver can be effectuated.[16] A jurisdiction could make these rights never waiveable,[17] waiveable in advance, or waiveable only contemporaneously. Once we have unbundled the rights we can see that a jurisdiction *could make different decisions about waiver for each of the rights*. Even if advance waiver is permitted, for each of the rights it could specify different standards as to what constitutes such a waiver. Contractual waivers are an obvious mechanism, but in many areas of the law a waiver can be effective even if is not an intentional relinquishment of the right through an "explicit statement of waiver," but instead merely the "fail[ure] to assert the right or tak[ing] an action inconsistent with its exercise,"[18] referred to as "forfeiture." For example, a system could hold that engaging in intercourse constitutes a waiver of the right not to be a legal parent,[19] or that agreeing to participate in IVF or cryopreserving preembryos itself constitutes a waiver of the right not to be a genetic parent.[20]

15. *See id.* at 1144.

16. I use the term "waiver" here although "alienated" is also frequently used in the literature. In this Article, I am purposefully bracketing off another aspect of the waiver question, relating to whether one should be able to buy sperm, eggs, and fertilized preembryos. *Id.* at 1145–46. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852–54 (1987). I will focus on the anticontractualization arguments, not the anticommercialization arguments, which center on access, voluntariness, and corruption (or commodification) problems. *See, e.g.*, I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003).

17. I am speaking only conceptually. It would be very odd to think of a regime where no one could ever consent to be a gestational, genetic, or legal parent.

18. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 483 (1981).

19. *See* Child Support Enforcement Agency v. Doe, 125 P.3d 461, 469 (Haw. 2005).

20. The trial court in *Kass v. Kass* made such a suggestion, Kass v. Kass, No. 19658/93, 1995 WL 110368, at *2–4 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998), and the Iowa Supreme Court assumes this to be the case for the

In this Article, my focus is on a "naked" right not to be a genetic parent, unbundled from unwanted gestational or legal parenthood. I concentrate on cases where someone will be made a genetic parent, but *only* a genetic parent, against his or her will, and there is no imposition of unwanted gestational or legal parenthood. The preembryo disposition disputes with which this Article began provide such a case. No one will be forced to gestate a child against their will in such a case, and three states (Texas, Washington, and Colorado) have statutes specifying that if a fertilized preembryo is implanted *after* the parties divorce, a former spouse who contributed genetic material is not deemed to be the *legal* parent of any resulting child if the former spouse does not contemporaneously consent.[21] A second example is someone who provided sperm or egg for reproductive use who demands the return of his or her gametic material.[22] Here again, there is no forced gestation, and a number of states have, by statute, absolved donors of gametic material from legal parenthood obligations.[23]

purposes of argument, *In re* Marriage of Witten, 672 N.W.2d 768, 780 (Iowa 2003). *But see* Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992) (rejecting this argument).

21. COLO. REV. STAT. § 19-4-106(7)(b) (2007); TEX. FAM. CODE ANN. § 160.706 (Vernon 2007); WASH. REV. CODE ANN. § 26.26.725 (West 2007). *See also* Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1060 (2004) (supporting the position these states have taken).

22. Few such cases have been reported, but John Robertson notes one such case in the Australian province of Victoria, where the government ultimately decided to allow withdrawal of consent only up until the point that fertilization took place because of concerns about detrimental reliance. John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1021 n.148 (2001).

23. About half of the states have put in place the 1973 version of the Uniform Parentage Act, which absolves sperm donors of legal parenthood so long as the recipient is married and the semen is provided to a licensed physician for use in artificial insemination. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 408 (1973); Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 20 n.78 (2003). Colorado and Wyoming have modified the statute so that it absolves the sperm donor of legal parenthood when the recipient is unmarried as well. Ertman, *supra*, at 20 n.79. The 2000 version of the Uniform Parentage Act, which has been adopted by Texas and Washington, drops both the requirement that the recipient be married and that there be physician assistance. UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000); TEX. FAM. CODE ANN. §§ 160.001-763 (Vernon 2007); WASH. REV. CODE ANN. §§ 26.26.010-26.26.913 (West 2007); Ertman, *supra*, at 20 n.78. There are only five states with equivalent laws for egg donors, all of which relieve egg providers of parental rights and obligations, but only three (North Dakota, Virginia, Oklahoma) make the recipient woman the legal mother; the other two (Florida and Texas) do not specify who is the parent, only that the donor is not the parent. Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 27 & n.185 (2003) (collecting statutes).

Although I use the term sperm and egg "donor" following conventional usage, it is worth noting that it is something of a misnomer because in many of these transactions payment is involved. *E.g.*, Ertman, *supra*, at 17.

In each of these examples there was *prior* consent to genetic parenthood but a contemporaneous objection. In other cases, there is no consent to genetic parenthood *at all*. Let me use two cases as examples. The first is the facts of *Phillips v. Irons*, which I discussed at the beginning of this Article.[24] The second is a science fiction thought experiment I call the "bathtub case": imagine it became possible to use an individual's leftover dead skin in the place of sperm or egg to create a child, and someone collected that material for these purposes from the bathtub of a hotel. In both of these cases there is, once again, no compelled gestational parenthood and, although the matter is not settled, let us assume for the purpose of argument that in these cases the law would not impose legal parenthood on the individual who had never consented. While the bathtub case is still science fiction, science fact is quickly catching up. In April, 2007, German scientists took bone marrow from adult males, derived adult stem cells from it, and coaxed them into spermatagonial cells, the cells found in the testes that normally mature into sperm cells.[25] Still more recently, two teams of scientists announced they had successfully developed methods for making induced pluripotent stem cells—that is, reprogramming adult skin cells and "making the cells into blank slates that should be able to turn into any of the 220 cell types of the human body."[26] I discuss these no-consent cases in more depth in Part IV.

III. THE LOGIC OF THE THREE RIGHTS NOT TO PROCREATE

This Part examines the arguments underlying the discourse about whether (and under what circumstances) to recognize a right not to be a gestational and legal parent. I show that we cannot rely on either of these types of arguments in determining whether to recognize a right not to be a genetic parent. Instead, the argument for recognizing a right not to be a genetic parent stems from concerns about unwanted "attributional parenthood," a harm that comes from the social assignment of the status of parent to the provider of genetic material that persists notwithstanding the fact that the legal system has declared him or her a nonparent.

24. *See supra* note 1 and accompanying text.

25. *Sperm Made from Human Bone Marrow*, BBC NEWS, Apr. 13, 2007, http://news.bbc.co.uk/2/hi/health/6547675.stm.

26. *See, e.g.*, Gina Kolata, *Scientists Bypass Need for Embryo to Get Stem Cells*, N.Y. TIMES, Nov. 21, 2007, at A1.

A. BODILY INTEGRITY AND "RIGHTS BLEED" FROM THE RIGHT NOT TO BE A GESTATIONAL PARENT

The normative argument for recognizing a right to be free from unconsented-to gestational parenthood is drawn from the idea that we should protect women from invasions of bodily integrity, as is evident in normative[27] and doctrinal[28] discussions of abortion. The same rationale also seems to underlie granting women the right to *be* a gestational parent, in that forcing a woman to have an abortion over her objection also constitutes an invasion of her bodily integrity.[29] Standing behind this right is the belief that individuals are sovereign over their own bodies, an idea with very old philosophical and jurisprudential roots[30] that also stands behind a number of familiar legal doctrines like the right to be free from battery, the right to give informed consent, and the right to refuse medical treatment.[31]

One cannot, however, move from the bodily integrity rationale for recognizing a right not to be a gestational parent to a defense of a naked right not to be a genetic parent because a right to be free from interference with bodily integrity does not mandate recognition of a similar right to be

27. *See, e.g.*, Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 49 (1971) (grounding a defense of abortion in the thought experiment of waking up one morning to find a world-famous violinist connected to your vital organs without your permission); Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2117 (1999) (reviewing EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996) and Eileen L. McDonagh, *My Body*, *My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 (1999)) (endorsing the argument that a woman's right to abortion "should be understood as a right to defend herself against the nonconsensual invasion, appropriation, and use of her physical body by an unwelcome fetus, *rather than* as a right to choose medical procedures free of interference by the state").

28. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) (connecting the abortion right to the "right to do with one's body as one pleases" but rejecting the claim that the right is "unlimited").

29. The Supreme Court has conjoined the two rights and framed it as a decisional right. *See Id.* at 153 (finding that the constitutional right recognized in the case was "broad enough to encompass a woman's decision *whether or not* to terminate her pregnancy" (emphasis added)). It may be that the invasion of bodily integrity is less great when one is forced to have an abortion rather than to gestate an unwanted fetus for nine months, but we may believe that either invasion of bodily integrity is sufficient to justify recognition of the right.

30. *See, e.g.*, Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); JOHN STUART MILL, ON LIBERTY 81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (recognizing that "over himself, over his own body and mind, the individual is sovereign").

31. Justice Souter's concurrence in *Washington v. Glucksberg* provides a good summary of the numerous substantive due process rights the Court has based on bodily integrity. Washington v. Glucksberg, 521 U.S. 702, 777–78 (1997) (Souter, J., concurring).

free from the use of the products of one's body. Thus, for example, there is a difference between using a rape kit to collect and analyze DNA from a rapist's semen left on the victim and forcing the rapist to supply semen in the first place; between forcing an attempted robbery suspect to undergo a surgical intrusion to recover a bullet fired by a victim in self-defense[32] and testing the blood on a bullet found at the scene of a crime; and between forcing a tube down a suspect's throat with an emetic to "stomach pump" up pills as incriminating evidence[33] and examining saliva on pills the individual had already regurgitated.[34] One right rests on the protection of bodily integrity while the other does not. The key word in bodily integrity is integrity, and once that integrity is broken when biological material is no longer attached to the body, the rationale of avoiding invasions of bodily integrity is inapposite. Thus, the desire to protect individuals from invasions of their bodily integrity cannot be the basis for a right not to be a genetic parent. We must look elsewhere.[35]

B. BEST INTERESTS AND "RIGHTS BLEED" FROM THE RIGHT NOT TO BE A LEGAL PARENT

The harm posed by unconsented-to legal parenthood is also fairly tangible: it consists of the obligation to pay support for the child as well as any other obligations of a legal parent. A regime that allows the imposition of genetic parenthood but not legal parenthood on a contemporaneously objecting individual, by definition, will not implicate these concerns.

But even where legal parenthood *will* be imposed, courts often deny a "right not to be a legal parent" because of the best interests of the resulting child.

32. *See* Winston v. Lee, 470 U.S. 753 (1985).

33. *See* Rochin v. California, 342 U.S. 165 (1952).

34. Cohen, *supra* note 5, at 1156–57.

35. A different leitmotif that occasionally surfaces in Supreme Court opinions and academic commentary in defense of the abortion right is a kind of antisubordination Equal Protection argument. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.") (citing Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002–28 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992)). In other words, failing to protect the abortion right would exploit a "special vulnerability of women in such a way as to reinforce their subservience to men, and thus their lack of fully autonomous and equal roles in social and political life." Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 338 (1985). That special vulnerability, however, turns on the fact that only women bear the burdens of gestational parenthood, and is inapplicable in cases where unwanted gestational parenthood will not be imposed.

The push and pull of these two concerns appears to have produced a fairly uneven approach across the doctrinal landscape. As discussed above, a number of states absolve those contributing gametic material by sperm (and, in a few states, egg) donation from legal parenthood obligations, but some of those states restrict it to cases where the recipient is married—which seems to be an implicit attempt to ensure that every child has two legal parents capable of providing support.[36] This rationale is taken even further in cases of nonassisted reproduction, which have imposed legal parenthood even on fathers deceived into believing that their partners could not conceive,[37] and cases where conception took place without meaningful consent.[38] A common theme in these decisions is that whatever rights the father might have must give way to the best interests of the child who would otherwise go unsupported, or that the right to support belongs to the child and only the child can waive it.[39] While family law allows a large

36. *See* Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1767-70 (2007); *supra* note 23.

37. *See, e.g.*, Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) (mother misrepresented use of birth control); Hughes v. Hutt, 455 A.2d 623 (Pa. 1983) (mother ceased taking birth control pills without telling father and refused to have an abortion). Other cases have also precluded tort suits by fathers due to such misrepresentations. *See* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980); Linda D. v. Fritz C., 687 P.2d 223, 226–27 (Wash. Ct. App. 1984) (misrepresentation as to use of contraceptives). *See also* C.A.M. v. R.A.W, 568 A.2d 556 (N.J. Super. Ct. App. Div. 1990) (tort claim by mother against father for false representation as to having a vasectomy). For a more detailed discussion of the case law in this area, see Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1065–92 (2005).

38. *See, e.g.*, S.F. v. State *ex rel.* T.M., 695 So. 2d 1186 (Ala. Civ. App. 1996) (father claimed he was intoxicated to the point of unconsciousness and was sexually assaulted by the mother); Evelyn v. Shire, No. 242681, 2004 WL 314915 (Mich. Ct. App. Feb. 19, 2004) (fourteen-year-old father claimed incapacity to consent); Mercer County Dep't of Soc. Servs. v. Alf M., 589 N.Y.S.2d 288 (Fam. Ct. 1992) (similar in regards to sixteen-year-old father). *See also* Dana Johnson, Comment, *Child Support Obligations That Result from Male Sexual Victimization: An Examination of the Requirement of Support*, 25 N. ILL. U. L. REV. 515, 519–29 (2005) (collecting cases on statutory rape of men and imposition of child support).

39. *E.g.*, *S.F.*, 695 So. 2d at 1189 ("The child is an innocent party, and it is the child's interests and welfare that we look to . . . ."); Faske v. Bonanno, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) ("Since a child may not suffer for a parent's release of the child's claim, neither should the child suffer from one of the parents' 'fault' regarding the conception.") (per curiam); *Mercer County*, 589 N.Y.S.2d at 290 ("This Court is not concerned with the child's mother's actions but rather protecting the best interests of and insuring that adequate provision will be made for, the child's needs."). *See also* Ellen London, Comment, *A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape*, 152 U. PA. L. REV. 1957, 1986–92 (2004).

Whether these decisions are themselves justified is a separate question that I will not fully engage here. These decisions are at least prima facie in tension with the policy of several states to statutorily absolve sperm donors of legal fatherhood even in cases where the recipient is unmarried. *See supra* note 23. In each of the two situations, children will be born who will (at least initially) have only one parent, but, counterintuitively, it is only in the case where the genetic father's semen is acquired through deception that legal fatherhood is imposed on him against his will. Although I intend this to be a very

amount of private ordering, similar arguments are made for preventing contracting over child custody and support.

Can the same rationale—the importance of protecting the best interests of children—be transposed into discussions of the right not to be a genetic parent? The answer is complicated by pervasive disagreement over whether preembryos are the kinds of things that have "interests."

First, suppose preembryos, unlike children, are not the kinds of things that have interests. Best interest analysis is therefore irrelevant to the question.

My own view lies along these lines. Preembryos lack even a rudimentary nervous system and thus clearly fail to meet any of the typical criteria for actual personhood: consciousness, the ability to have plans, the ability to feel pain, or even awareness of one's surroundings.[40] An attempt to justify assigning personhood to preembryos based on the fact that preembryos are *potential* persons that have an interest in becoming actual persons also faces significant obstacles. It implies that sperm and egg are also potential persons that have interests, something that seems implausible.[41] One cannot distinguish preembryos from sperm and egg on the ground that this is when the entity becomes an individual, because one

terse and tentative analysis, it seems to me that these two rules could be reconciled in one of two ways—one internalist, one Crit—neither of which is entirely satisfying.

The first approach suggests that whether to impose legal parenthood on the father in each of the two situations ought to depend on *both* "the soundness of the regime (whether children are really better off not being born than being born in to single parent families) and the effect the legal rules have on parental behavior." June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship In an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1016 (2003). While both situations are presumably similar as to the first factor (single parenthood obtains in both), they differ substantially on the second: many men may abstain from being sperm donors if legal parenthood is imposed; far fewer are likely to abstain from sex if the regime assigns legal parenthood to them in the very unlikely case where they are deceived. However, in the run of the mill deception case a man need not avoid sex entirely—only unprotected sex—which seems like a self-protective measure he might plausibly adopt. On the other side, given the patchwork of state laws as to sperm-donor parental status when the recipient is a single mother, the regime can easily be circumvented by traveling to a state that absolves donors of liability for insemination. *See id*.

The second, more Crit approach, is to suggest the distinction is motivated by perceived differences in the socioeconomic status of the families likely to result. Single women using assisted-reproductive technology are perceived to be of high socioeconomic status such that the child is likely to be provided for even with only one legal parent, whereas those in the deception cases are perceived to be of lower socioeconomic status. Such an explanation, though possible, is highly speculative.

40. *See, e.g.*, RUSSELL KOROBKIN WITH STEPHEN R. MUNZER, STEM CELL CENTURY 30 (2007). The primitive streak, which marks the absolute beginning of neural development, occurs only at fourteen days, and preembryos are cryopreserved before that point. *Id*.

41. *See, e.g.*, Philip G. Peters, Jr., Essay, *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199, 220 (2006).

could just as easily say that sperm and egg meet that criteria because "a person's individual life history begins when the gametes that produced her were created or when those gametes were selected and placed in a petri dish together."[42] And, unlike fetuses, we cannot even claim that yet-to-be-implanted preembryos are beings that will develop "naturally" into persons absent interference.

Courts in the preembryo disposition context that have been confronted with best-interests arguments have largely followed this view and found best-interests analysis irrelevant. In *In re Marriage of Witten*, the genetic mother argued that "the embryos are children and their best interest demands placement with her" under state statutes governing custody decisions.[43] The Iowa Supreme Court disagreed, finding the statutory provision inapplicable since the dispute did "not involve maximizing physical and emotional contact between both parents and the child; they involve the more fundamental decision of whether the parties will be parents at all" and "it would be premature to consider which parent can most effectively raise the child when the 'child' is still frozen in a storage facility."[44] The intermediate appellate court in *Davis v. Davis* concluded "[i]t is to the manifest best interests of the child or children, *in vitro*, that they be available for implantation,"[45] but the Tennessee Supreme Court implicitly rejected this analysis. Although it described preembryos as deserving "special respect" that would not be accorded to mere property, it refused to accord them the status of "person" and held that it was the "'gamete providers [who] have primary decision-making authority regarding preembryo'" implantation.[46] It thus analyzed the case as a conflict between the claims of the genetic parents.

But suppose I and these courts are wrong; suppose instead that preembryos *are* persons that do have interests. This is the approach that Louisiana has taken, mandating by statute that "[i]n disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum," and that they are "juridical person[s]" who cannot

42. *Id*. at 221.

43. *In re* Marriage of Witten, 672 N.W.2d 768, 774 (Iowa 2003).

44. *Id*. at 775.

45. Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641, at *2 (Ct. App. Sept. 21, 1989). Likewise, the trial court in *Litowitz v. Litowitz* apparently thought it should apply a best interest test to determine which of the two parents wanting to use the frozen preembryos could provide the resulting child a better home. Litowitz v. Litowitz, 48 P.3d 261, 264 (Wash. 2002). This reasoning was not endorsed on appeal. *Id*. at 271.

46. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

be intentionally destroyed.[47]

If preembryos have interests, then an interest in implantation and eventual birth would usually be a very strong one.[48] But even conceding that preembryos have interests does not get us to something like a must-implant rule; rather, to be philosophically precise, there are a number of intermediate steps. First, one might think that X is the kind of thing that has interests, but not the kind of thing that can make moral claims. Second, one can think that X has interests and is the kind of thing that can make moral claims on others, but cannot make this kind of moral claim; for example, each particular member of a potential future generation may have no claim

47. LA. REV. STAT. ANN. §§ 9:129, :131 (2006). At least one commentator has urged the courts to do the same. *See* Fotini Antonia Skouvakis, Comment, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN ST. L. REV. 885, 904–05 (2005).

48. *Cf.* DEREK PARFIT, REASONS AND PERSONS 356–61 (1984) (arguing that so long as an individual will have a life worth living, bringing that person into existence does not harm it); Dan W. Brock, *The Non-Identity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 BIOETHICS 269 (1995) (same). *See also* Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 402–03 (2005) (applying the best-interests-of-the-embryo analysis to the Louisiana statute). *But cf.* Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 134, 136 (1999) (arguing for an "equivocal view" of procreation even in the normal case because it involves "imposing [without consent] serious harms and risks on someone who is not in danger of suffering greater harm if one does not act" in the name of bestowing the "pure benefit" of existence). I hedge on "usually" because there may be cases where coming into existence is not in the best interests of a thing that has interests. The clearest example is where an individual would have a deficit so bad as to make the life not worth living from the subjective point of view of that person; that is, if asked ex post the individual would rather he had not been born. *E.g.*, ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 224 (2000); Carl H. Coleman, *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*, 50 UCLA L. REV. 17, 45 (2002). *See also* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 161 & nn.117–19 (2005) (discussing "wrongful life" suits permitted in three states). But this exception seems inapplicable to our cases: whatever harms a resulting child will suffer from being born against the contemporaneous objection of one of its parents, there is no plausible argument that those harms could rise to the level of constituting a life not worth living.

In related contexts, some have suggested that the standard should be stronger than merely "a life worth living." Frances Kamm, for example, suggests that one might reason that no one is harmed by not being created because there is no one yet existing to be harmed, and that therefore "we can set a high standard for permissibly creating people [by] demanding that creators create lives that are more than minimally satisfactory." F.M. Kamm, *Cloning and Harm to Offspring*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 65, 72 (2000). *See also* BUCHANAN ET AL., *supra*, at 248 (considering a moral duty to avoid having a child who would "suffer a serious harm or disability or a serious loss of happiness or good that they could have prevented without imposing substantial burdens or costs or loss of benefits on themselves or others"). Whether this heightened standard is the right one is an issue beyond the scope of this Article. For present purposes, I will merely suggest that even under this higher standard it seems implausible that the harms a child would suffer from being born over the contemporaneous objection of one parent would rise to the requisite level.

to come into existence, but they may have a moral claim on the present generation not to destroy the environment into which they may or may not come to live.

Finally, even if X (1) has interests, (2) which generate a moral claim, (3) on me,[49] (4) to come into existence, that does not, standing alone, mandate a must-implant rule, because I may be able to make my own conflicting moral claims.[50] To see this, recognize that, for people who believe fetuses have interests allowing them to make moral claims on the women gestating them, a similar configuration of parties exists where a genetic mother seeks an abortion over the genetic father's opposition. Permitting women to have abortions in such a situation can be justified if one believes that the interest in not being a gestational parent—in avoiding a bodily integrity violation—still outweighs the interests of the other two parties.[51] Thus, Judith Jarvis Thomson, in her thought experiment regarding the world's most famous violinist, argues that women should have the right to have an abortion *even if* we accorded full personhood to fetuses.[52]

But even if, like Thomson, one thought that the interest in not being a gestational parent was so strong as to be essentially a trump, nothing in that reasoning requires us to afford the interest in not being a genetic parent corresponding trumping power. After all, the interest in not being a legal parent is not given similar trumping power; support obligations are imposed even on fathers who in some sense never consented, due to concerns about the best interests of the children. The question would then be where to situate the interest in not being a genetic parent; is it a trump like the interest in avoiding unwanted gestational parenthood, or trumped, like the interest in not being a legal parent?

49. X might also have a moral claim, but may not be entitled to look to me in particular to satisfy that claim. Just as a person X might have a general claim to the health care necessary for full and equal opportunity, *see, e.g.*, NORMAN DANIELS, JUST HEALTH 77–78 (2008) (so suggesting), that does not mean X can come up to me in particular and ask me to pay his hospital bill; rather the obligation is diffuse or is a claim against the state. This might suggest a claim on the part of a preembryo to be implanted *in someone*, but no particular claim against its genetic mother to be the one to implant it. Such an approach could be operationalized, for example, by a law requiring that all frozen preembryos be available for "embryo adoption."

50. The *Davis* court thus skipped a step in concluding that recognizing preembryos as persons would entail "an obligation to provide an opportunity for implantation to occur." *Davis*, 842 S.W.2d at 596.

51. While in the typical abortion case, being forced to continue an unwanted pregnancy will impose gestational, genetic, and (at least initially) legal parenthood on the mother, with gestational surrogates a no-abortion rule will impose only gestational parenthood, and yet most authorities hold that the surrogate has the right to have an abortion. *See* Cohen, *supra* note 5, at 1161.

52. *See* Thomson, *supra* note 27, at 49.

As I said before, the ontological status of preembryos and the nature of their moral claims on us is the subject of pervasive disagreement—disagreement that persists after more than half a century of sustained discussion. I have no illusion of being able to resolve the matter here. In the remainder of this Article, I will for the most part pursue the view taken by the courts that have considered these cases and put to one side the preembryonic best-interests perspective.

Even accepting that best-interests analysis should not play a role in analyzing these disputes, there is a separate question of whether *society* has its own interests that should govern the law of these disputes. Imagine, highly counterfactually, that it were shown that children born against the contemporaneous objection of one genetic parent were 1000 times more likely to commit violent crimes compared to the population at large. That would give society a reason to oppose that preembryo's coming into being even if we assume that coming into being was in the preembryo's best interest—although that reason might still be defeated, for example, by society's countervailing interest in protecting procreative autonomy. In any event, there is no such plausible argument here. Consider two claims sometimes made about the detriments imposed by these kinds of technologies.

First, some attack sperm and egg donation in and of themselves as seriously harming children by depriving them of the ability to develop an identity through exposure to those with whom they have biological ties and shared "family history."[53] But, of course, the children in the cases we are considering will still have ties to one biological parent who is serving as the rearing parent. Moreover, the empirical work demonstrates that "[d]onor insemination has lead to thousands of births and no proof that children of donor insemination have any particular health, psychological, or social problems" and "[e]gg donation, which now leads to nearly 4,000 births per year in the United States, also appears to have a positive track record."[54] As Elizabeth Bartholet has observed, "there is a great deal of empirical evidence showing that children do better with permanent parenting and . . . little or none showing that biologically related parents do better than unrelated parents."[55]

53. *See* J. David Velleman, *Family History*, 34 PHIL. PAPERS 357, 371–72 (2005).

54. John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 36 (2004). *See also* ROBERTSON, *supra* note 11, at 122 (noting that children of sperm donors "have fewer problems than adopted children and their families").

55. Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 337 (2004).

Second, one might attack these practices because they may result in children raised by only one parent. Of course, those seeking to use cryopreserved preembryos for implantation may now be remarried or in another stable parenting relationship (or may enter such a relationship in the near future). But even as to those who will be single parents for the foreseeable future, the argument fails. In reviewing the practice by some fertility specialists of refusing to assist single parents in becoming pregnant out of concern "for the welfare of intended offspring," the American Society for Reproductive Medicine concluded that "[t]he evidence to date . . . cannot reasonably be interpreted to support such fears."[56] The argument also would seem to prove too much in that it would suggest that society should intervene to prevent single parenthood even when achieved without reproductive technology, which the law clearly has not done.[57]

C. THE HARM FROM UNWANTED GENETIC PARENTHOOD: ATTRIBUTIONAL PARENTHOOD

So far we have seen that the interests that underlie the rights not to be a gestational and legal parent cannot explain the interest in not becoming a genetic parent when genetic parenthood is unbundled from the other types of parenthoods. One might take this to mean that the imposition of only unwanted genetic parenthood does not harm an individual.[58]

56. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons*, 86 FERTILITY & STERILITY 1333, 1334 (2006). *See also, e.g.*, Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 196–98 (1996) (finding "little support" for the argument that "children raised in a single-parent household will suffer negative emotional or psychological consequences" and noting that early studies showing negative consequences of single-parent households failed to account for numerous other factors such as income level and trauma from separation, divorce, and death); Waldman, *supra* note 3, at 79–80. I do not want to overstate the level of consensus in the literature on this conclusion; there are several dissenters. *See, e.g.*, Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 861–65 (2005) (claiming that detriments to offspring of having single parents persist even when income is controlled for). *See also* Carbone & Cahn, *supra* note 39, at 1022 (noting studies suggesting any advantages seen in two-parent households "have nothing to do with biology," but instead are related to increased "income, supervision, and parental attention").

57. The law does not make IVF or other reproductive technologies available only to married couples. Instead some states facilitate single parenthood by absolving gamete donors from legal parenthood obligations even when the recipient is unmarried. *See supra* note 23. In fact, some of the states with insurance mandates covering IVF extend the mandate to single women, which is a kind of subsidy for single parenthood. *See* Waldman, *supra* note 3, at 89. While some fertility specialists have undertaken, as a matter of professional discretion, to refuse to provide reproductive technology services to single patients, this practice has been the subject of significant criticism and litigation. *See, e.g.*, John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 353–54 (2004).

58. Sociobiological accounts might be thought to give additional support for this claim. If

That conclusion, I believe, is unwarranted. I argue that there is a harm that stems from the unwanted existence of a child to whom one stands in *the relationship of parent*. But what exactly is this relationship, and why should it matter? No one is compelled to gestate a fetus, and we have eliminated the incidents of legal parenthood, such that no court or government could ever call the individual the child's parent. But, of course, law has its limitations in its ability to reorder our worldview. The conceptual unbundling introduced in Part II does not exhaust the category of types of parenthood, in that there is a residual social category of parenthood—what I call "attributional parenthood"—that remains. The problem, rightly understood, is that the law fails as a mechanism for allocating this kind of parenthood or, perhaps more accurately, it fails at

behaviors which propagate our own genes are selected for, as sociobiologists claim, then far from being a harm, unconsented-to use of one's own genetic material when one is not required to invest in the rearing of that child might be thought of as a boon; one's genetic material line is propagated gratis. *See, e.g.*, RICHARD DAWKINS, THE SELFISH GENE 2, 102-103, 248-49 (2d ed. 1989); EDWARD O. WILSON, SOCIOBIOLOGY 22 (1975); Carbone & Cahn, *supra* note 39, at 1029. However, this sociobiological observation will have difficulty sustaining the no-harm claim for three related reasons.

First, there are well-known difficulties in generalizing from descriptions of what behavior is adaptive among nonhuman animals and our ancestors in the early evolutionary environment to descriptions of adaptive behavior for humans in our current society. To give but one example, for early hunter-gatherer societies it was adaptive to eat whenever food was available because of the scarcity of food and the abundance of exercise; in our current much more sedentary environment, unrestrained eating would be maladaptive and lead to obesity, especially given the much higher amounts of carbohydrates, fats, and refined sugars in our typical diets. *See* Carbone & Cahn, *supra* note 39, at 1028.

Second, sophisticated sociobiologists recognize that simplified claims about imperatives to propagate one's genetic line are inadequate even at the level of description. For example, a simplistic view of sociobiology might lead one to think that it would be maladaptive for an adult male to invest resources in women who already have children—to stepparent—since his resources are being expended without propagation of *his* genetic material. Not so, says the sophisticated sociobiologist, because women are themselves selecting for mates who will invest resources in caring for *all* their offspring, whether they be from prior or current relationships. *See* Carbone & Cahn, *supra* note 39, at 1032–33. Because of this tendency, "while men can be expected to invest more in their own children than in others, they may also care more about ensuring the continuation of the relationship [with the woman] than in guaranteeing paternity, particularly if the care they provide increases their odds of fathering additional children." *Id*. at 1033. Thus, stepparenting can be adaptive, especially for men "ranked" lower in the mating market who are less likely to marry higher ranked mates or to marry at all, because the men can increase their chance of having sexual access to women, and thereby propagating their own genetic line, by showing their willingness to assist with child care of the woman's already existing children. *Id*. at 1033–35 (discussing Kermyt G. Anderson et al., *Paternal Care by Genetic Fathers and Stepfathers I: Reports from Albuquerque Men*, 20 EVOLUTION & HUM. BEHAV. 405 (1999)).

Finally, and most importantly, sociobiology faces a persistent problem if it tries to move from "is" to "ought." Unless one is to fall prey to the naturalistic fallacy, one cannot take the fact that certain behavior is "natural" to be reason to conclude that it is normatively desirable. *See* Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 J. CONTEMP. HEALTH L. & POL'Y 265, 272–73 (1994) (recognizing this problem). To put the point differently, it would be a category error to think that that any action another takes that is good for the propagation of *my genetic line* is good for *me*.

unbundling this kind of parenthood from genetic parenthood.

To put matters more concretely, in the cases we are discussing, three categories of people might nonetheless *attribute* parenthood writ large to an individual because of his or her genetic parenthood of the child: those outside the relationship, the resulting child, and the individual himself.[59]

First, there are those outside the relationship. Imagine a man[60] who, along with his wife, has a son, Jon, using fertilized preembryos and IVF. Imagine that the couple decides to have a second child, fertilizes additional preembryos, implants some, cryopreserves some more, but none of the preembryos lead to a successful birth. The couple divorces, and their fight about the use of the cryopreserved preembryos is resolved by a court order allowing the ex-wife to implant them. One of the implanted preembryos leads to the birth of a daughter, Joan. Imagine our hypothetical man lives in a smaller community. He goes to the grocery store and is told by a neighbor how the neighbor saw his ex-wife and their "daughter" Joan, how Joan helped him rake his leaves, and how wonderful a young woman Joan is becoming. How could the man respond? "Well, actually, I am not her father, although I provided the sperm to her mother during the course of our marriage with the intent of forming a child through IVF, and yes, in fact, we did have one child using that method, Jon, who *is* my son. But this Joan was actually born using extra cryopreserved preembryos over my post-divorce objection. Therefore, the law declares me not to be the father, and I can give you the statutory cite. So, thank you for the compliment but I do not deserve it." The neighbor would, to say the least, walk away somewhat confused.

Second, a resulting daughter may view the man as her father. We know that children born of sperm donors frequently would like to seek out their genetic parents, and until now the major barrier has been anonymity.[61]

59. This division parallels one made in the social norms literature, which distinguishes the pathways through which norms are reinforced. At one end of the spectrum there are community-based pathways such as ridicule, gossip, and ostracism for deviant behavior; on the other there are internally based pathways such as the shame and guilt and individual experiences when he or she violates a norm that has been internalized. *See, e.g.*, Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565, 567 (1992); Yoshinobu Zasu, *Sanctions by Social Norms and the Law: Substitutes or Complements?*, 36 J. LEGAL STUD. 379, 379-80 (2007). The family can be thought of as an intemediate point on this continuum, or as a kind of community with particular salience for norm-reinforcement.

60. I focus on unwanted genetic fatherhood (rather than motherhood) in these examples merely because with fathers in all cases there is no possibility of unwanted gestation, so the description is somewhat simpler. Similarly, while I focus on husbands and wives, what I say largely applies to other family configurations as well.

61. *See, e.g.*, Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006 at A1. This interest goes beyond an interest in having access to one's genetic parent's medical

Such anonymity is much harder, if not impossible, to achieve in the context of preembryo-disposition disputes because the rearing parents and other individuals in the family may reveal to the child that her genetic father was her genetic mother's ex-husband.

Third, and perhaps most importantly, the individual might view himself as the resulting child's father and feel responsibility over the child and that he should have a relationship with the child, notwithstanding the fact that the law frees him from the obligations of being the child's legal parent.[62] This might include concerns that "his" child will be raised poorly, or, in the case of preembryo disposition, not wanting the child to be reared by a now-hated ex-spouse. While my account frames the harm as self-attribution of parenthood, a different frame might emphasize the loss of control over the choice whether to have genetic children. I think this framing, though perhaps more intuitive, merely pushes the question back a level and leads us to ask *why* am I harmed when I lose control, to which the answer, I believe, is attributional parenthood. The attributional framing helps clarify that it is not *merely* the existence of someone who carries my genetic code, but the attribution of parenthood, that is the harm.[63]

history, which might be accomplished in a way consistent with maintaining anonymity—that is, at least in the sperm- or egg-donor context, medical history might be made available in a way that is not donor identifying. *See, e.g.*, Pino D'Orazio, Note, *Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination*, 2 J. HEALTH & BIOMEDICAL L. 249, 257–58 (2006) (discussing guidelines and practice).

62. Is the harm lessened if the legal regime gave him the choice, at the time of implantation, to decide whether or not to be the legal parent of the child, as do Colorado, Washington, and Texas? *See supra* text accompanying note 21. He can choose to be the child's legal parent and give up the freedom from financial (and other legal) obligations, or not and give up any entitlement to decisionmaking and further relationship with the child. What has been removed is a third option of avoiding this choice altogether, and it may be that choosing between these options intensifies rather than diminishes the self-attributional feelings of responsibility.

63. To see this, consider a series of hypotheticals. First, imagine you are a man with an identical twin. Your twin marries a nice woman and they have a child. The child carries your genetic code to the same extent as the child would if your semen had been used without permission to inseminate the child's mother, yet the two cases seem clearly distinguishable and no one thinks you have been harmed in the former case. One might object that you and your twin have a kind of tenancy in common over your genetic information, and the fact that you have no "rights of exclusion" as to your twin does not mean you have no rights of exclusion as to third parties. But consider a variant of the case, where your twin's sperm was used without his permission to create a child. Our intuition is that in such a case *he* has been harmed, not that *you* have, but then the explanation cannot be tenancy in common because the infringement is by a third party, not the tenant in common. What seems significant is that notwithstanding that both twins carry the same genetic material, and are, for the purposes of the children they produce, essentially interchangeable, we only attribute parenthood to the sperm "source."

In support of this account, consider this real life example: Tim Twomey suffered from anorchia, a rare disorder where he was born with a penis but without testicles. Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J. L. & TECH. 593, 600–01 & n.16 (1998). He received a transplant testicle from his identical twin, Terry, which allowed Tim to

The perception of genetic parenthood is often enough to be harmful even when it is mistaken. Imagine that a man, Adam, donates sperm through a sperm bank, has second thoughts and decides he does not want to be a genetic parent. He tries to get the sperm back but under the (hypothetical) state of the law is prevented from doing so, although he is relieved of legal parenthood for any child that results. Imagine further that he donates under a promise of anonymity, but the law changes postdonation and the records of his donation become available. Consider the following variations.

Case 1: A child, Cain, results from Adam's donated sperm. Cain manages to acquire Adam's name and personal information, tells all his friends and family about Adam, and makes an effort to contact him, an effort Adam resists. Adam may be harmed by the perception of parenthood by himself, by Cain, and by third parties.

Case 2: The same facts as Case 1 except Adam's sperm is contaminated and disposed of, but he is not informed of the matter. Due to a computer glitch, Adam's records are mixed up with those of another man (call him Abraham). Abraham's genetic child, Isaac, is given the incorrect information that Adam is his father and behaves just as Cain does in Case 1. It seems that in this case, Adam is harmed in the same way and to the same extent as he was in Case 1. This suggests that what causes the harm is the assignment of the role of attributional parent to him by himself, by his alleged child, and by third parties, even if it is mistaken.

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produce a son with his wife. *Id*. at 601. As the Silvers point out, it is strange to think that it should make a difference had Tim's wife been inseminated with Terry's sperm, rather than by Tim using his brother's transplanted testicle, *id.* at 601–02, but for the Twomeys it obviously was important enough to justify the transplant.

To give a slightly different example, consider what would happen if human cloning technology became available. Would you be harmed if your identical twin decided to clone himself? Your identical twin is *already* a clone of you, but we do not think his existence harms you even though there exists a person, whose existence you did not will, who contains all (rather than merely half) your genetic material. One potentially relevant difference between cloning and the examples I discuss is that "[b]y confounding and transgressing the natural boundaries between generations, cloning could strain the social ties between them." PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY xxix (2002).

Finally, consider one more example: Maria, a woman of childbearing age, is involved with a young man, Tony, of whom her parents disapprove. Before the marriage, Maria becomes pregnant and the couple informs their respective parents. We do not ordinarily think that the parents have been harmed by the mere fact that their genetic code is being carried forward without their permission. Yet in some ways the claim of harm from losing control of one's genetic code is stronger than in the previous thought experiment (or in the preembryo-disposition-agreement disputes or sperm- or egg-donor cases), in that all contributors of genetic material are objecting to its current use, not merely half of the contributors. But, of course, we can run this hypothetical back up the family tree and make it into a *reductio ad absurdum*.

Case 3: As in Case 1, Adam's sperm is actually used and produces Cain, but, as in Case 2, there is a computer glitch. This time, however, Adam is told his sperm was disposed of when in fact it was used. Now Adam actually has an unwanted genetic child, but he does not believe he has one, and no one knows that he has one—not his child nor any third party. Has Adam been harmed in the way we have been talking about? It seems the answer is no.[64]

64. Our reaction to this last case seems to depend on an assumption of (at least some consequentialist) moral reasoning that there is an "experience requirement" such that "a state of affairs can make me better off only if, in one way or another," it feeds back into my experience. L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 127 (1996). Even among consequentialists, this requirement is hotly debated. *See id*. at 124–28. If my brother's plane crashes in the Indian Ocean and as far as I know he has drowned, is *my* life made better off in a world where he actually washes up on a desert island populated by benevolent and beautiful people without any communication with the outside world, rather than in a world where he actually drowns? People have conflicting intuitions about this kind of case, but in terms of *legal-system design* we do not generally care about unexperienced harms, as is most evident in areas like tort and the requirement of standing. That said, while my account of attributional parenthood treats experience as a necessary requirement, it is not clear to me that someone who did not adopt this requirement would reach a different answer to any of the main cases I discuss.

A different issue, that I do not develop in any depth here, relates to posthumous harms and whether someone must be currently living to suffer the harms we are discussing. This represents a special version of the experience-requirement question, although one where there seems to be more uniformity in intuitions. Consider Baltimore's posthumously naming an airport after Thurgood Marshall. While it may be better for a number of people (his descendants, his admirers, etc.) for this to occur, it seems odd to think it was better *for him* after he died. Nor do we think *he* is harmed if he is posthumously slandered. "Dying has precious few consolations, but surely one of them is that beyond that threshold we are safe from any further misfortunes." *Id.* at 127. Thus, for those who believe that what happens after death cannot affect our welfare, the posthumous harvesting of sperm (or perhaps harvesting from those in persistent vegetative states) cannot make *that individual* worse off. That said, it may be that the fear, while alive, of becoming a parent when dead may itself be a sufficient justification for a rule preventing posthumous use without prior consent. *See* John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1031 & n.18 (1994). It may also be that maintaining taboos about the treatment of dead bodies is desirable not because of their effect on the *dead*, who are beyond harm, but because they support norms preventing the violations of bodily integrity of the *living*. *See* Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1132 (1996). This is a kind of "modified-experience" argument, *see generally* Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293 (1991), the plausibility of which I leave for another day. At most, however, this argument would generate a rule against sperm harvesting and other bodily integrity violations of the dead, not hypotheticals like the bathtub case involving dead individuals.

Posthumous genetic parenthood might also make *others* worse off. There are difficult trust and estates issues related to the interests of the *already existing* children in such cases, *see, e.g.*, Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91 (2004), although the inheritance issues only occur when someone is made the *legal* parent of the resulting child. For one of the very few cases that have arisen on the subject, see *In re* Martin B., 841 N.Y.S.2d 207 (Surr. Ct. 2007) (holding that children posthumously conceived from sperm deposited at a laboratory for cryopreservation were "issue" and "descendants" of trust set up by grandparent). A larger number of courts have considered whether posthumously conceived children are entitled to receive social security benefits, a determination which turns inter alia on state law on intestacy and determination of legitimacy. *Compare* Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004) (permitting benefits for

I have so far treated all three forms of perceptual harms (self, child, third-party) as themselves bundled, but we can imagine variations where an individual experiences one or more, but not all three types of harms. For example, in a regime where one is told whether one's sperm has been used to successfully produce a child, but not given the child's identity (and vice versa), the sperm provider may perceive himself to be the father of a genetic child he never wanted—and perhaps the harm is lessened by it being *an unidentified child*—but he is not forced to confront the perception by the child or third parties that he is the father. By contrast, in a regime where the identity of sperm donors is disclosed, the individual may confront all three types of attributional harms. Sperm donation rates dramatically decrease when regimes change from permitting to forbidding anonymous donation.[65] This suggests that individuals care a lot about attributions by the resulting child and third parties.

These harms depend, at least in part, on the existence of a convention connecting attributional parenthood and genetic parenthood. Such a

child conceived from sperm banked by husband for possible future use), *and* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002) (similar), *with* Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (denying benefits for child conceived from sperm extracted from man's deceased body based on state intestacy law), *and* Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180 (N.H. 2007) (similar as to child conceived with sperm banked by husband for possible future use).

For a discussion of how "persistent concerns that the dead have 'nothing to lose' by destroying property make courts reluctant to permit testamentary destruction" of property more generally, along with a qualified critique, see Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 838–52 (2005).

65. *See, e.g.*, Stuart Jeffries, *Who's the Daddy?*, GUARDIAN (London), Nov. 18, 2006, at 31. *See also, e.g.*, Waldman, *supra* note 21, at 1049–52 (detailing sperm donors' negative reactions to the loss of anonymity); Ken Daniels, *The Semen Providers*, *in* DONOR INSEMINATION: INTERNATIONAL SOCIAL SCIENCE PERSPECTIVES 76, 91–95 (Ken Daniels & Erica Haimes eds., 1998) (collecting studies in support of the traditional view that many current sperm providers would not provide sperm if anonymity was removed, but also reviewing research challenging the extent of that effect and the possibility of countering it through changing the populations from which sperm donors are recruited). One might object that this data is also consistent with a claim that individuals are afraid of a regime change as to the imposition of legal parenthood; that is, that the unwillingness to donate sperm in nonanonymous regimes has nothing to do with negative effects from genetic parenthood standing alone but is instead a fear that the protection against legal parenthood will be changed retroactively, and nonanonymous donation will allow individuals to be tracked down for child support, for example. It is true that this is a possible reading of the data, and it would be very hard to collect data in a way that rules out this confound (even if a study of preferences asked individuals to assume no possibility of retroactive legal-rule change, some might nonetheless answer the question with that in mind). At the same time, this explanation does not seem to be a good fit for the phenomenological experience of why one thinks one is harmed by genetic parenthood without consent. For example, if one were to imagine that the legal rule was such that anonymity could only be removed when a child turns twenty-one—past the age of child support obligations—that does not seem to lessen the feeling of harm from use of one's genetic materials to produce a child without consent.

convention, however, is not inevitable.[66] This is nicely demonstrated by examining anthropological work on kinship in other cultures. For example, as C. Quince Hopkins discusses, in Navajo culture the genetic bond establishes a kinship relationship only for the mother; the "father's kin relationship runs through the child's mother and attaches to the father by virtue of the father's marriage to the mother, rather than flowing directly from father to child," such that if the marriage ends, "the father's kinship relationship to his child is severed as well."[67]

The residents of the Trobriand Islands provide another example of the culturally contingent nature of the association between genetics and parenthood. As Malinowski first detailed in the early part of the last century, the Trobrianders do not believe that men contribute any physical material in the conception of children, and instead believe that a baby is born because a spirit ("*baloma*"), the reincarnation of a person from the mother's wider family, has entered the woman; intercourse does not produce children, according to their beliefs, but it does open up the woman to allow the spirit child to enter.[68] Descent is therefore matrilineal, and in the inheritance sense, a child is the "son" of his maternal uncle, although the mother's husband also plays a role as nurturer.[69]

Another example comes from the Mosuo, a small ethnic group living

66. We might also look to fiction, such as Plato's vision in *The Republic* of a society where children were separated from their parents at birth, reared collectively, and thought of as the children of the community rather than their genetic parents. Plato, *The Republic*, *in* 5 COMPLETE WORKS, Bk. V, 457, 460 (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., 1997). A much more moderate version of this practice was common in early Israeli *kibbutzim* where children were reared collectively so as to allow them to bond with the entire adult population of the *kibbutz*, not just their genetic parents. *See, e.g.*, Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 519 (2003). American history might also provide further examples of the contingent nature of the relationship between genetics and attributions of parenthood, especially as to fathers. For example, under the common law of coverture, there was no transmission of legal parenthood from men (and in some states, women) to their genetic children if those children were born out of wedlock, and thus no obligations of custody or support for illegitimate children. *See, e.g.*, Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1682–85 (2000). That said, it is not clear whether coverture represented a severance of genetic parenthood from attributional parenthood, or merely a severance from the duties of legal parenthood.

67. C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 485 (2004) (citing GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 21, 28, 30–31, 34–35, 75 (1975)).

68. *See* THE ETHNOGRAPHY OF MALINOWSKI 96–111 (Michael W. Young ed., 1979) [hereinafter ETHNOGRAPHY]. *See also* Susan Montague, *Trobriand Kinship and the Virgin Birth Controversy*, 6 MAN 353, 358–59, 365–66 (1971) (refining Malinowski's findings).

69. ETHNOGRAPHY, *supra* note 68, at 109.

in the Yunnan and Sichuan Provinces in China, which have "walking marriages": during courtship, a man enters a woman's household secretly at night and leaves before daybreak; over the course of their lives these "women commonly take several lovers during lives of serial monogamy."[70] Any resulting children are raised by the woman's family, and in generations past, Mosuo children frequently did not know the identity of their fathers and it was considered taboo to ask.[71] The Mosuo are matrilineal, and a man's family name and assets are passed on by his sister to her children, not by his wife.[72]

Several scholars have also discussed the lessened importance of genetic ties to the idea of family among African-American communities.[73]

Even within the dominant American culture, reproductive technology has to some extent caused a dissolving of the convention connecting genetic and attributional parenthood. With a donor-conceived child we already disentangle the sense in which the genetic father is the "father" from the way the rearing father is, as we also do in the case of adoption, although some connection between genetic fatherhood and the "father" label still persists.[74] The law's relationship to this convention is partially dynamic; it seems likely, for example, that the choice of rules assigning legal parentage and resolving disputes in preembryo cases will, to some extent, support or weaken this convention.

All this implies that if we lived in a society without a convention connecting genetic parenthood and attributional parenthood, there would be less harm from forced genetic parenthood when it has no legal or gestational consequences. But in the final analysis, while it is helpful to understand that our conception of parenthood is constructed, already changing, and that we might eventually construct other conceptions of parenthood, that is not much solace for the individual who today is subject to the unwanted conventional label of attributional parent.[75] Such an

70. *See* Indira A.R. Lakshmanan, *Where Women Rule: A Remote Chinese Community Struggles to Retain Its Matriarchal Way of Life*, BOSTON GLOBE, Apr. 23, 2000, at 14 (Magazine); Matthew Forney, *Minority Report*, TIME (INT'L), Nov. 11, 2002, at 68, *available at* http://www.time.com/time/asia/features/china_cul_rev/minorities.html.

71. Lakshmanan, *supra* note 70.

72. *Id*.

73. *See* Hopkins, *supra* note 67, at 493; Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 268–69 (1995).

74. *See* Erica Haimes, *Social and Ethical Issues in the Use of Familial Searching in Forensic Investigations: Insights from Family and Kinship Studies*, 34 J.L. MED. & ETHICS 263, 268 (2006).

75. It would be a mistake to move from the claim that the attributional harm from unwanted genetic parenthood is to some extent a social construct (which the anthropological evidence suggests) to either the claim that it is not a real harm or the claim that the law's decision as to the allocation of

individual will suffer a kind of emotional-distress damage.[76]

How severe a harm is this? It is hard to give a precise answer, but it is

entitlements can eradicate the construct.

The first mistake would be premised on the notion that socially constructed attitudes cannot be harmful. I am not sure anyone actually makes this mistake, but, in any event, it is patently false. The relationship of sex and gender is a good example. While many gender stereotypes are social constructs (for example, they are far from universal across cultures), they are obviously harmful to those who experience them in the workplace or elsewhere.

The latter mistake is more subtle, and comes from collapsing two continua into one. One is a continuum of *origin*: a particular aspect of human thought could be completely biologically hardwired, completely socially constructed, or (more likely) fall somewhere on the continuum between those two poles. The second is a continuum of *malleability*: a particular aspect of human thought could be very easy to change, completely resistant to change, or (more likely) fall somewhere on the continuum between those two poles. Though there is probably some correlation between the location of an aspect of human thought on each continuum, it is fairly weak. Gender is, again, a good example. While many gender stereotypes are social constructs, they have also proven very difficult to change.

As the gender example might suggest, it would be more precise to break down malleability by mechanism of change. Crudely, but sufficiently for this discussion, we might distinguish the law's ability to change aspects of human behavior from all other mechanisms (including, for example, changes in popular culture). So, again, to use gender as an example, the reduction in negative sex stereotypes about women's lack of competency to manage workforces might be driven in part by law (the passage and enforcement of Title VII, for example), but also by nonlegal mechanisms like the depiction of competent women managers on television and elsewhere in popular culture. Law's share is sometimes referred to as the "expressive function of law," and it seems very plausible that law's power to shape norms varies a great deal with the context. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025–29 (1996). It is also very plausible that changes to different strands of doctrine possess different norm-shaping powers, such that one legal-rule change may have a much more powerful effect on norm shaping than another. Moreover, one might think that to truly effect a significant norm shift, changing one rule is insufficient, and that changing multiple doctrines in a single area of law may have an effect greater than the sum of its parts.

These remarks enable me to set out more clearly my view on the attributional-parenthood norm. While I think it is close to the socially constructed pole of the origin continuum, I also think it falls in the middle of the malleability continuity. More importantly, I am skeptical about how much a role the expressive function of law, as opposed to nonlegal mechanisms, has to play if one wanted to change the norm. And, to be very specific, I am quite doubtful that merely changing the default allocation of entitlements in the no-consent case would significantly alter the attributional-parenthood norm. Rather, a much more large-scale reimagining of not only the law of reproductive technology, but also family law more generally, that displaced genetic connectedness would be necessary. Such a reimagining would of course have costs and benefits, but I do not presume to offer anything resembling a tally here. All that I have said here is meant merely as a self-conscious statement of my own priors on the issue, not as a full-blooded proof, or even a quarter-blooded one.

76. What about attributions to others besides parents? What of attributional *grand*parenthood, for example? To return to a point I made earlier, *see supra* note 63, we do not ordinarily think that an individual is harmed when his or her genetic child in turn chooses to have a genetic child of his or her own without the individual's (that is, the grandparent's) consent. This might be explained by a conception of waiver, that by having a genetic child in the first place the individual has waived the right to restrict that child's further reproductive activities, a sort of rough analogy to the first sale doctrine in copyright. A different explanation might be that we think the attributions much weaker in this context, in part because legal grandparenthood carries with it a much weaker set of duties and rights, such that the conflation of genetic grandparenthood with grandparenthood writ large is less likely or significant.

certainly nontrivial. Ellen Waldman, relying on social science data on sperm donors and "disappearing dads" (biological fathers who disengage from their rearing families), argues that the claim "that the creation of biological ties presages a life of psychological bondage" is "empirically unsupported" and that the "threat of psychological bondage is a product of the courts' collective imagination."[77] But this seems like an overstatement.[78]

The disappearing-dad studies Waldman reviews suggest that a genetic father's bond with his genetic children erodes the lesser the residential proximity, the longer they live apart, when the father no longer maintains a romantic relationship with the mother, and when the father takes up a relationship with a new partner.[79] This leads Waldman to conclude that "[p]aternal self-concept is not biologically driven, but rather, socially enacted," it is "strong when a propitious set of social conditions converge to support it, and it is weak under a varying set of conditions."[80]

These studies, however, say very little about how the fathers feel about their own disengagement. More importantly, the fact that the disappearing dads are capable of disconnecting from their genetic and legal children when they choose to does not tell us much about how they react when they are *forced* to do so.

The sperm-donor data Waldman reviews from a number of studies conducted in Sweden, the United Kingdom, and the United States show that sperm donors were emotionally disengaged from their genetic offspring: a majority of donors did not want to have basic information about the sex and birth date of a resulting child or even about whether a child was born, and the vast majority of donors did not want to have contact with children born from their sperm.[81] Some donors expressed a reluctance "to view [donor-conceived] offspring as anything other than 'other people's children,'"[82] and U.S. sperm donors likened donating sperm to donating blood.[83]

77. Waldman, *supra* note 21, at 1040-49, 1059, 1062.

78. *See id.* at 1048. Waldman acknowledges some limits of the data, although they are somewhat different from the limits I see. One important limit she acknowledges is that this data pertains only to fatherhood, not motherhood, although she asserts that "parenthood is largely a socially driven phenomenon for women as well as for men." *Id*. at 1041 n.98.

79. *Id*. at 1040–46.

80. *Id*. at 1048–49.

81. *Id*. at 1049–50.

82. *Id.* at 1051.

83. *Id*. at 1050.

However, the sperm donors in these studies discussed by Waldman are (as far as we know) willing participants throughout the process, not those who have tried to get back their sperm. Further, these studies deal with regimes of anonymous sperm provision, and when that anonymity is removed, many sperm donors become unwilling to donate sperm. In three studies Waldman reviews, 41 percent, 60 percent, and 63 percent of sperm donors suggested they would cease providing sperm absent anonymity, with some expressing "violently negative" reactions to the possibility of a donor-child reunion;[84] other reports mentioned earlier suggest that sperm donation rates decrease dramatically when anonymity is removed.[85] This suggests that harm of attributional parenthood by offspring and third parties is quite significant.

In sum, an individual who contemporaneously opposes implantation of a preembryo *is* harmed when a preembryo is implanted and successfully carried to term, even when he is not obligated to bear the burden of gestational or legal (and consequently financial) parenthood. This harm stems from a convention associating genetic parenthood with parenthood writ large that I have called attributional parenthood. To put the point another way, the failure of the law to treat an individual as a parent does not mean that the imposition of social- and self-attributions of parenthood is insufficient to constitute a harm to which the law should pay attention.

IV. SHOULD THE LAW PREVENT THE IMPOSITION OF GENETIC PARENTHOOD WHEN THERE IS NO PRIOR CONSENT?

We now have an account of the harm that unwanted genetic parenthood imposes, even when it is unbundled from gestational and legal parenthood. This does not, however, in and of itself, determine whether an individual should have the right not to experience that harm without his consent.

That one should have such a right seems, at first blush, intuitively obvious, and the courts and commentators in the preembryo-disposition disputes have sub silentio assumed as much, moving without pause to the question of whether that right can be waived in advance and what constitutes a sufficient waiver.[86] But the attributional parenthood account developed earlier might lead us to be cautious about this assumption

84. *Id.* at 1049–51.

85. *See supra* note 65 and accompanying text.

86. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); ROBERTSON, *supra* note 11; Coleman, *supra* note 2.

because, from a system-design perspective, it enables us to see some similarity between the no-consent cases and the classic nuisance problem. Just as we are faced with a choice between a law granting you an entitlement to blow black smoke onto your neighbor's lawn without her consent or a law granting the entitlement to your neighbor not to have smoke blown onto her lawn without her consent, the law could grant you an entitlement not to be made a genetic parent without your consent or grant other people an entitlement to make you a genetic parent without your consent.[87]

The second possibility may still seem unthinkable, but let me destabilize that intuition, at least as to "discarded" reproductive materials (such as in *Phillips* and the bathtub case) by pointing to two adjacent doctrinal areas where the law has allocated the entitlement in precisely that way.

First, in the search and seizure context, a number of courts have held that the Fourth Amendment erects no bar to the seizure and analysis of "abandoned" bodily materials. Thus, the Seventh Circuit has held that the Fourth Amendment does not apply to the government's analysis of hair "abandoned" by a prisoner during his prison haircut, because "[h]aving voluntarily abandoned his property, in this case his hair, [the inmate] may not object to its appropriation by the Government."[88] The Maryland intermediate appellate court reached a similar conclusion as to the human excrement a defendant had left in his hospital toilet, which the police took to acquire balloons of hashish oil contained within it.[89] As to "abandoned DNA" specifically, Elizabeth Joh claims that the "existing Fourth Amendment law appears not to apply at all."[90] The few cases considering the matter have found no constitutional violation from collecting saliva (and the DNA contained therein) from a discarded coffee cup or the remnants of a smoked cigarette, holding that there was no objective

87. *Cf.* SINGER, *supra* note 13, at 10 ("In analyzing property rights we often adopt unconscious presumptions about who owns the particular entitlement . . . [that] place the burden on the other party to justify redistributing the entitlement.").

88. United States v. Cox, 428 F.2d 683, 688 (7th Cir. 1970). *See also* Commonwealth v. Tarver, 345 N.E.2d 671, 674, 676 (Mass. 1975) (finding no Fourth Amendment violation where hair was snipped from a defendant's head, chest, and pubic area while under arrest because "the taking of the hair samples was not an unreasonable bodily intrusion, if it was a bodily intrusion at all").

89. Venner v. State, 354 A.2d 483 (Md. Ct. Spec. App. 1976), *aff'd*, 367 A.2d 949 (Md. 1977). The court hedged and suggested it might have reached a different result if the defendant had done or said something "to indicate an intent to assert his right of ownership, possession, or control over such material," thus combating an inference of abandonment. *Id*. at 499.

90. Elizabeth E. Joh, Essay, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 865 (2006).

expectation of privacy in those substances.[91]

While some of these cases speak of abandoning "property," the test for abandonment for search and seizure purposes is distinct from the same test for property-right purposes, because "it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object."[92] But as to non-search-related property interests, courts have also been reluctant to allow individuals to assert claims as to "abandoned" bodily materials. In *Moore v. Regents of the University of California*, the California Supreme Court refused to allow a patient to maintain a conversion claim against a doctor who patented cell lines derived from the plaintiff's excised spleen cells.[93] In reaching this conclusion the court assumed that Moore had abandoned his excised organ.[94] More recent decisions involving the donation of tissue to researchers have also barred conversion claims.[95]

A conversion claim was also barred in *Phillips*, one of our test cases, where the defendant allegedly collected the plaintiff's sperm during oral sex and used it to inseminate herself, despite the plaintiff having repeatedly told the defendant he did not want to have children and the couple's restricting of their sexual activities to nonpenetrative sex.[96] The court held that to succeed on a conversion claim the plaintiff must have a "right to immediate, absolute, and unconditional possession," which could not be satisfied because the "[p]laintiff presumably intended . . . that defendant discard his semen, not return it to him."[97]

Of course, it is possible that these existing legal authorities just have it wrong or can be distinguished, but they do demonstrate the need for a normative justification for allocating to individuals a baseline entitlement

91. *Id*. (citing State v. Wickline, 440 N.W.2d 249, 253 (Neb. 1989); State v. Buckman, 613 N.W.2d 463, 474 (Neb. 2000)).

92. United States v. Thomas , 864 F.2d 843, 845 (D.C. Cir. 1989); Joh, *supra* note 90, at 867–68 & n.59.

93. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 487–96 (1990).

94. *See id.* at 488–89. A later decision by the intermediate California appellate court, *Hecht v. Superior Court*, involving a decedent's devising to his girlfriend of sperm held in a sperm bank, distinguished *Moore* on the finding that there was evidence of "decedent's intent and expectation that he would in fact retain control over the sperm following its deposit," such that the sperm was not abandoned. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 280–81 & n.4 (Ct. App. 1993).

95. *See* Wash. Univ. v. Catalona, 437 F. Supp. 2d 985, 999–1000 (E.D. Mo. 2006), *aff'd*, 490 F.3d 667 (8th Cir. 2007); Greenberg v. Miami Children's Hosp. Research Inst. Inc., 264 F. Supp. 2d 1064, 1074–76 (S.D. Fla. 2003). These decisions emphasize the "donative intent" of the tissue donor. *Catalona*, 437 F. Supp. at 999.

96. Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 22, 2005).

97. *Id*. at *6.

not to be a genetic parent in cases like *Phillips* and the bathtub case, a task to which I now turn.

A. TOWARD A NORMATIVE JUSTIFICATION OF THE RIGHT

While the pretheoretical intuition in favor of recognizing a right not to be a genetic parent in the no-consent cases is clear, grounding that intuition in moral and political theory is much more difficult than one might initially suspect.

Consider first the most commonsensical approach to the question. Many people have an intuitive common-sense reaction to the bathtub case that the entitlement to prevent the reproductive use of one's genetic material by a stranger just "belongs" to the individual whose genetic material is being used.

But the ground for this intuition is quite unclear. Is it because the individual "deserves" the entitlement? Desert is often thought to be a function of effort: I deserve my paycheck and you do not because I have worked for it. But when it comes to my genetic material I have invested no effort giving me a claim. The same problem is evident when the theory is framed in economic rather than moral terms, as is familiar in intellectual-property discourse, using entitlement as an economic incentive for productive labor.[98] Unlike with copyright, for example, there is no productive labor to incentivize here; one's genetic material is not something to invest in or develop.[99]

Perhaps we do not need desert or incentives here. One might instead argue for the allocation of the entitlement from a starting point of self-ownership—that my body is my property. This is where John Locke starts, with a thesis that "every man has a *property* in his own *person*," and from this derives his theory that an individual also can claim property in whatever he mixes his labor.[100] But even if we grant the Lockean postulate of self-ownership, it does not clearly resolve the cases that interest us

98. *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 206 (1993).

99. By contrast, the individual seeking to use the material *has* invested effort in securing the material and using it for reproduction.

100. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27, at 19 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690). There are separate more general problems with the Lockean argument I will not discuss here. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174–75 (1974) (asking "why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?"); William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581, 669–70 (2007).

because the material being collected in the bathtub case is no longer part of my body. It has been separated and discarded, and it is not clear why we should not instead think of discarded genetic material as relegated to the commons, at least until another individual mixes her labor with the material through the use of reproductive technology to produce offspring, and thereby makes it her property.[101] To return to an earlier theme, the Lockean self-ownership theory is on much firmer ground as a reason for allocating to individuals the entitlement not to be a gestational parent, given its connection to bodily integrity.

A third approach to the problem is Kantian, and suggests that we wrong another when we treat his person "merely as a means" rather than as an "end in himself."[102] We treat another as a means if we treat his person in a way that he did not (or perhaps, more weakly, could not) consent to.[103] Imposing genetic parenthood on another without any consent because we want to have that person's genetic child might be thought to be an archetypal instance of treating another as a mere means to our own end.[104] The idea is that you are impermissibly "treating my body, and therefore me, merely as a set of resources to be used for your own purposes, and not as a separate person with her own ends."[105] Here it is not just that there was no actual consent, but, if asked, it is reasonable to think that most people would not have consented. Thus, even if hypothetical consent was sufficient to avoid the wrongfulness of the action, here it is unlikely to obtain.

But the Kantian account seems to run into several problems.

A more general problem is that Kant's theory is about the moral

101. *See* LOCKE, *supra* note 100, at §§ 27–31, at 19–21. Interestingly, this is exactly the approach the United States Congress Office of Technology Assessment took in the report it issued on ownership of human tissue, suggesting that human tissue that has been separated from the body may be considered "res nullius," a thing which has no owner. OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS 82 (1987) ("If . . . tissues were removed without the removal itself being wrongful, their status would be that of wild animals in a state of nature and the possessor could attempt to exercise dominion over them. Not having exercised dominion or control over the tissues, the patient's rights therein would be like those of a landowner who had made no attempt to capture wild animals passing over his land.").

102. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 429 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1981) (1785).

103. *See, e.g.*, ONORA O'NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 105–10 (1989).

104. That conclusion might be particularly easy on facts like *Phillips* because the case involves an element of deception, which is itself prohibited on Kantian grounds. *See* KANT, *supra* note 102, at 422.

105. CÉCILE FABRE, WHOSE BODY IS IT ANYWAY? 112 (2006) (discussing a similar Kantian objection to taking body parts from nonconsenting individuals).

obligations individuals have to one another and may not generalize well to an account of the legal system more generally. Depending on how one defines treating another as a mere means, a large array of practices that are permitted in our legal system might be thought to violate the interdiction.[106]

The theory also seems to presuppose some theory of property interest or right not to be a genetic parent, the very question at issue. If I steal your car to have a joyride, perhaps I have treated you as a mere means to my end. If I hotwire an abandoned car, I have not.

Further, it is an open question whether one who uses another's *gametic material* without permission treats the *person* as a mere means. Michael Sandel makes a similar point in discussing whether Rawls's difference principle, and its assumption of common ownership of talents, can be made compatible with Kantian deontology.[107] Sandel suggests that one might try to overcome the seeming incompatibility by suggesting that "not *persons* but only 'their' *attributes* are being used as means to others' well-being," but for attributes like intelligence, he critiques this solution as demanding a "radically disembodied" subject who is completely separable from her attributes.[108] While treating an individual as separable from her intelligence does require this radical disembodiment, treating her as separable from her genetic offspring does not.[109] We are literally separable from our genetic material and children, and we have seen that the tendency to view our genetic parenthood as intimately wrapped up in our personhood is a contingent one that even in our society is eroding.

A similar problem besets what we might call the "personhood theory."[110] This theory would claim that entitlement not to be a genetic parent should be allocated to an individual because that entitlement is

106. To give one example, many legal rules that must be be made overinclusive in order to function could be thought to violate the Kantian interdiction. *Cf*. Shapiro, *supra* note 64, at 1148–49 (questioning whether the Kantian interdiction applies to legal institutions rather than just persons).

107. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 76–79 (2d ed. 1998).

108. *Id*. at 78–79.

109. *Cf.* FABRE, *supra* note 105, at 113 (framing the Kantian prohibition as interference with an individual's ability to pursue their own projects and life plan). This may suggest that the Kantian theory is a better account of why we give individuals the entitlement not to be a gestational parent.

In refuting a Kantian objection to organ sales, Fabre observes (in parallel to Sandel's point) that "even if it is impossible to buy and sell something without treating that thing as an object" it is still the case that "one can sell *a part of* oneself without treating oneself as an object, for the simple reason that renouncing all rights over a part of oneself, a fortiori a detachable part such as an organ, does not mean that one is renouncing all rights over oneself." *Id*. at 140.

110. Some have connected this theory to Hegel. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 331–50 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–78 (1982).

inextricably intertwined with her personhood.[111] Unless it is to devolve into the welfarist argument discussed below, this has to mean more than the claim that an individual would value having this entitlement more than others would value the opposite allocation. It has to suggest something like "an individual's having the entitlement is *indispensable* for the full realization of her personhood."

But framed as such, the argument may founder on both positive and normative shoals. As a positive matter, the anthropological examples discussed above, as well as the sociological literature on sperm donation, adoption, and deadbeat dads, suggest that one can function quite well as a realized person even when one is alienated from one's genetic offspring. It is quite different in this respect from the alienation of one's body, the archetypal example of a type of property that is truly a precondition for personhood.[112] As a more normative or expressive claim, it is far from clear that we ought to be encouraging parents to view their children as extensions of their own personhood, as anyone who has watched parental tendencies at Little League games can attest. The case for doing so becomes even weaker as to genetic, but only genetic, children. Far from being analytic truths, the notion that we should view the integrity of our personhood as compromised by the existence of individuals with our genetic material outside our family structure, the suggestion that we should think of ourselves as parents to those to whom we contribute genetic material but nothing more, and the implicit supremacy given to genetic bonds over those of care and affection all seem subject to doubt.

None of this is a decisive knock against these theories. For present purposes all I mean to show is that the desert, Lockean, Kantian, and personhood views run into problems in justifying allocating to the individual the entitlement not to be made a genetic parent in the no-consent cases. These problems may not be insurmountable, and it is worth noting that with the possible exception of the labor/desert theory, none of the theories give a reason for allocating the entitlement the *other* way. There may be plausible elaborations of some or all of these theories that lead us to the same place as the welfarist justification I discuss next.[113] Such

111. *See* Radin, *supra* note 110, at 959–61; Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 776 (2004) ("[G]enetic information is also integral to the self because it is so central to major life plans.").

112. *See* Hughes, *supra* note 110, at 338; Radin, *supra* note 110, at 966; Suter, *supra* note 111, at 801. Once again, this may be a better account of the right not to be a gestational parent.

113. Might a more contractarian approach also be a promising ground for justifying the allocation of the entitlement? For examples of hypothetical-choice contractarianism, see JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999); T.M. SCANLON, WHAT WE OWE TO EACH OTHER 213–18 (1998).

elaborations would further support my argument by establishing an overlapping consensus among different moral theories in favor of the no-use-without-prior-consent rule.

Many implicitly or explicitly think about legal-system design in consequentialist terms. The question for a consequentialist is which way of setting the initial entitlement maximizes good states of the world. Different forms of consequentialism disagree as to what it is that makes a state of the world good and ought to be maximized—pleasure and the absence of pain (hedonism), the satisfaction of desire, welfare, objective goods, etc.[114] For present purposes, I will largely abstract away from these differences and just assume welfare—defined roughly as an informed and authentic determination by an individual that his or her life is going well[115]—is the thing to be maximized. Further, I will assume a form of welfarism that aggregates across persons, but will not delve into disagreements about

To be sure, Rawls limited his use of the veil of ignorance to generate the principles of justice, and then used those principles only for setting the basic structure and the constitutional essentials. Using the contractarian hypothetical-choice approach to allocate the entitlement here would therefore go beyond the usage Rawls envisioned.

In a hypothetical-choice-contractarian framework, the question is what rule one would endorse ex ante behind a veil of ignorance type of device, unaware of whether one possesses the desired genetic stock or will seek it. If, behind the veil, we would choose a rule preventing the use of our genetic material without consent, then a contractarian would endorse the right not to be a genetic parent as the rule. Among the problems for this approach is that the outcome seems dependent on specifications as to the thickness of the veil and on how choices will be made, specifications which themselves require independent justification. On some accounts of those parameters, the contractarian approach will blend into the welfarist (indeed even utilitarian) approach. *See* John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955); Mark S. Stein, *The Distribution of Life-Saving Medical Resources: Equality, Life Expectancy, and Choice Behind the Veil*, SOC. PHIL. & POL'Y, Jul. 2002, at 212, 229–30 (2002). I leave a discussion of whether these problems might be overcome for another occasion.

114. *See generally* SUMNER, *supra* note 64 (discussing these different theories). Consequentialists can also be divided between rule consequentialists (who want to pick the rule that maximizes good consequences) and act consequentialist (who want to perform the act that maximizes good consequences in each individual case). While rule consequentialism seems a more obvious choice for setting legal rules, a jurisdiction could also adopt a legal standard that instructed a court to make a case by case determination in a more act consequentialist sort of way. The best-interests test for custody has something of this flavor. One could imagine a standard making unconsented-to use of another's genetic material nonactionable in situations where a judge determines that the harm to the party made a genetic parent is outweighed by the benefits to the other party. We might think such a legal standard less desirable than a legal rule, however, because judges make more errors in case-by-case application of the standard than they would in applying a rule that is more precise (even though the rule is facially more over and underinclusive) and because the unpredictability with which the standard is applied might make it less effective in inducing behavioral compliance. *See, e.g.*, Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 267–79 (1993).

115. For more on this definition and how it relates to other possible definitions, see generally SUMNER, *supra* note 64.

exactly how such aggregation should take place.[116] Consider this a stylized welfarist model.

There is a plausible argument that a rule preventing compelled genetic parenthood in the absence of any prior consent is the welfare-maximizing rule.

A first cut at the argument might focus on the undesirability of a world where compelled genetic parenthood became widespread. But even if no legal rule prevented it, it seems unlikely that the imposition of unconsented-to and unwanted genetic children would become common. Further, even assuming arguendo that it would, what then? To be sure, it would produce a world that looked very different from the one we live in today. One might still have only genetically related individuals in one's rearing family, but individuals with equally strong genetic relationships would exist outside of the family structure. Genetic ties would now no longer be a sufficient condition for establishing expectations of family love and bonding. Rather, what would matter would be the decision to undertake those kinds of relationships.

But is there something that makes us think that this world would necessarily be a worse one to live in? Merely that it is "natural" for us to want to parent those to whom we are genetically related?[117] Research on adoption shows us the dangers of that kind of thinking. For years sociobiologists argued that adoption was also "unnatural,"[118] that "[s]ubstitute parents will generally tend to care less profoundly for children than natural parents," but in fact, "studies show adoptive parent-child relationships working essentially as well as biological parent-child relationships."[119] Further, this view carries with it important assumptions

116. By aggregation I mean to refer to the need to make interpersonal welfare comparisons. There is also the separate question, sometimes also referred to as aggregation, of what kind of function to apply to the welfare comparisons. One could adopt either a straight-out maximization function (utilitarianism) or adopt a function that is distribution sensitive (some form of prioritarianism). My own views lean towards a maximization function, and I employ the maximization framework here, but much of the analysis I offer would seem to operate equally well with a more distribution-sensitive function.

117. Another negative result is that there might be a higher likelihood of accidental half-brother and half-sister incest in such a world. However, the practice of anonymous sperm and egg donation already makes this is a possibility, and it is not clear how much of an *increase* in such accidental pairings would occur.

118. ELIZABETH BARTHOLET, FAMILY BONDS 164–86 (1993).

119. Bartholet, *supra* note 55, at 330, 333 (quoting MARTIN DALY & MARGO WILSON, HOMICIDE 83 (1988)). I thus reject what Leon Kass has called "The Wisdom of Repugnance," the idea that the feeling of disgust can itself constitute a sufficient normative guide, Leon R. Kass, *The Wisdom of Repugnance*, *in* THE ETHICS OF HUMAN CLONING 3, 17–24 (Leon R. Kass & James Q. Wilson eds., 1998), although I am prepared to accept the actual experience of disgust as being something to consider

about genetic determinism and genetic essentialism, a belief that our genes are central to our personhood, that we may have good reason to resist. For these reasons, as a justification for allocating the entitlement, this strand of the argument seems suggestive but not conclusive.

One could instead focus on the harms and benefits to individuals of the two possible initial distributions of entitlements. The attributional parenthood account I have offered gives us some sense of the harm that is visited upon individuals who are made genetic parents without their contemporaneous consent. But there is a seemingly paradoxical fact that the harm may be *less* in cases where there is no consent at all than when there is prior consent but contemporaneous objection. That is, the convention connecting genetic parenthood and attributional parenthood (especially third-party perceptions) may be tied to some conception of intentionality or responsibility, and we seem less likely to (or at least are likely to less forcefully) perceive someone to be the attributional parent when parenthood occurs without it.[120]

Even if, in the pantheon of possible harms, the harm of attributional parenthood does not rank particularly high, the corresponding benefits to individuals of a use-without-prior-consent rule seem even lower, and

as part of a welfare analysis.

120. The amount of harm from attributional parenthood is very context dependent, because the type and strength of the attributions vary with the context. My initial exigesis of the attributional parenthood idea in Part III was in the context of a preembryo-disposition dispute with a web of closely connected individuals, all of whom are making attributions—neighbors, children, etc. But, as I discussed above, in some situations this thick web of attributions will be absent and the harm consequently lessened. One example is a case where sperm voluntarily donated is used over the contemporaneous objection of the donor and the regime is an anonymous one such that neither the donor nor the child conceived ever learns of the other's identity. There, the sperm donor may perceive himself to be the father of a genetic child he never wanted, but he is not forced to directly confront the perception by the child or third parties that he is the father.

There are versions of no-prior-cosent cases where the attributional web can be thinned further still in ways relating to to disclosure and the experience requirement discussed above. *See supra* note 64. One can imagine a variant of the bathtub case where an individual is unaware the material was ever taken in the first place. If so, he will not even suffer the self-attributional harm, only a probabilistic version of it—the fear that someone at some point took his genetic material without his knowing. That said, it seems unlikely that these nondisclosure cases would predominate and one might argue for a rule preventing all unconsented-to use, even if it is overinclusive, for reasons that track the usual rules versus standards arguments. One might also arrive at the same rule if one relaxed the experience requirement and "counted" harms that were never experienced, although I myself would not endorse such a rule for the reasons set out above. *See id.*

There is a further issue in that some of the probabilistic fear may persist notwithstanding the legal rule preventing unconsented-to use, because of imperfect compliance. Thus, the availability of the technology to facilitate something like the bathtub case may itself produce that fear. Something stronger, like a ban on the technology altogether, might be needed to reduce that fear, but it would have its own costs, including on those who consent to the technology's use.

insufficient to justify that rule.[121]

Consider first a claim that the rule would benefit individuals by giving them access to reproductive material. A significant number of individuals in present day America require the gametic material of others to reproduce, either because of infertility or because they are without a willing romantic partner.[122] Yet access to reproductive materials in the form of sperm banks and egg brokers is already available. It might be objected that not everyone can access these resources: the average cost of purchasing a vial of sperm in the United States was $250–$400 in 2006, and the cost of an egg was $3000–$8000 in 2004; moreover, for both artificial insemination and IVF, multiple attempts are usually required to succeed.[123] But if *this* is the problem, one would think that welfarists are much better off endorsing a subsidy to assist in the purchase of reproductive materials. Indeed, a de facto subsidy already exists as to the IVF procedure in several states that have mandated insurance coverage of these costs.[124] If the problem is that people are starving, a subsidy to permit them to buy bread seems like a better solution than relaxing the rule against stealing it. Moreover, this argument is a complete non-starter if the cost of using the hypothetical technology in something like the bathtub case is higher than the purchase price for sperm or egg combined with the cost of artificial insemination or IVF. Thus, a rule permitting use without any consent seems very hard to defend as a mechanism of satisfying individuals' *general* desire to

121. An additional complication is that a rule permitting unconsented-to use *might* lead to additional births, each of which adds to total welfare. Even if true, this only matters if we adopt a theory that maximizes *total* welfare rather than one that maximizes *average* welfare. *See, e.g.*, RAWLS, *supra* note 113, at 139–68 (comparing average and total utility theories). The vast majority of modern consequentialists seek to maximize average and not total welfare because doing so avoids the problematic conclusion that all laws in society should be set to maximize child birth "so long as the average [welfare] per person falls slowly enough when the number of individuals increases." *Id*. at 140; PARFIT, *supra* note 48, at 384–90. I follow this tradition.

122. *E.g.*, SPAR, *supra* note 6, at 1 & 235 n.1 (noting that in the U.S. 15 percent of women and 10–15 percent of men meet the clinical criteria for infertility).

123. *Id.* at 39, 45. The American Society for Reproductive Medicine estimates that with artificial insemination "the monthly chance of pregnancy ranges from 8% to 15%." AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 12 (2006), *available at* http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf. For information on IVF success rates, see Ertman, *supra* note 23, at 15. *See also infra* note 161 and accompanying text.

124. Massachusetts, Illinois, Rhode Island, and New Jersey, have full coverage insurance mandates, while Arkansas, Hawaii, Maryland, Ohio, and West Virginia have what Tarun Jain and colleagues call "partial coverage" mandates. Tarun Jain, Bernard L. Harlow & Mark D. Hornstein, *Insurance Coverage and Outcomes of In Vitro Fertilization*, 347 NEW ENG. J. MED. 661, 661 (2002). For a more complete listing of the coverage provided by all the states, see Waldman, *supra* note 3, at 88–89 n.94. Because of ERISA preemption, employers that self-insure can avoid these mandates. 29 U.S.C. § 1144(b)(2)(B) (1994). *E.g.*, Allison Overbay & Mark Hall, *Insurance Regulation of Providers That Bear Risk*, 22 AM. J.L. & MED. 361, 380 (1996).

reproduce.

But might there be an argument based on the interest in getting access to a *particular* person's genetic material? An image comes to mind of chambermaids the world over combing hotel bathtubs for Brad Pitt's dead skin.

One response is that this interest in particular genetic material is based on a factually incorrect assumption of strong genetic determinism. Given the gap between having a genotype and its phenotypic expression, the importance of environmental factors, and the issue of multifactorial inheritance, using the genetic material from an individual with traits one admires far from guarantees the expression of those traits in one's offspring.[125] But there is no denying that it increases the probability of producing offspring with those traits, even if that probability is far from 100 percent. We know that individuals are willing to pay considerable sums for "premium" sperm and eggs,[126] which may be either a function of their uninformed beliefs about genetics, or based on informed expected-value calculations using probabilities of phenotypic expression. Further, the search for some types of characteristics seems both medically well-grounded and normatively less fraught: for example, a Jewish or Asian couple's desire to have access to gametic material from their ethnic group, which is in short supply from sperm banks and egg brokers.[127] All this gives good reason to think that the interest deserves some weight.

The welfare benefit to a single individual in having access to Brad Pitt's genetic material without consent is almost certainly smaller than the welfare detriment Brad suffers (in attributional parenthood or other harms). But it could still be the case that a rule allowing use without consent would be welfare maximizing because the welfare increase to the number of people who want and now get access to his genetic material under the rule, when aggregated, exceeds the welfare detriment to Brad. That said, there is only one Brad Pitt, and cases like his seem few and far between, such that the rule that maximizes welfare across all cases still seems to be the rule that prohibits use of gametic material without consent. Moreover, those who particularly value Brad Pitt's genetic material could try and purchase access directly from him. If he is unwilling to sell, that is some indication that he values the entitlement more than they do.

125. *E.g.*, Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 119–23.

126. *E.g.*, Cohen, *supra* note 16, at 691.

127. *See e.g.*, Alvaré, *supra* note 23, at 13; C. Murray & S. Golombok, *Oocyte and Semen Donation: A Survey of the UK Licensed Centres*, 15 HUM. REPROD. 2133, 2136 (2000).

This is a plausible (though admittedly not ironclad) account, but even if one were uncertain as to who values the entitlement more,[128] law and economics gives us a number of reasons to favor granting to the individual the initial entitlement not to be a genetic parent. Under the Coase theorem, in the absence of transaction costs it would not matter to whom we grant the initial entitlement, since subsequent bargaining will produce the efficient result.[129] Here, however, there is reason to think that as between the two possible initial allocations of the entitlement, one will significantly increase the transaction costs so as to make the initial allocation of the entitlement sticky. If I have the entitlement, I just have to bargain with the person who values it more in order for that individual to get me to give it up. If everyone else has the entitlement, I will have to bargain with a large number of people to bar them all from taking it, and they might feign interest just to get me to pay them.[130] Thus, even if we were agnostic as to who values the entitlement more, we should give individuals the entitlement not to be a genetic parent without prior consent, rather than favoring the opposite allocation.

The argument for the rule becomes stronger when one factors in the cost of the self-protective measures an individual might take if the law did not protect that person's interest in unwanted genetic parenthood without any prior consent.[131] That is, if the bathtub case became a reality, it would be difficult and expensive for one to make sure to leave behind no remnants of any genetic materials, and one could spend at least half one's time scrubbing surfaces with Lysol.[132] For all these reasons, there is a plausible

128. The so-called endowment effect might be one reason for such uncertainty—giving someone the entitlement can change that person's valuation of it and thus what result is efficient. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 96–97 (1991). If the result varies with the initial allocation of the entitlement, we need some other criteria to figure out which allocation is more desirable. *Id*.

129. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

130. *Cf.* CHARLES FRIED, RIGHT AND WRONG 92–93, 98 (1978) (discussing a similar point as to rape). One should be careful not to overstate the strength of this reasoning. It is less persuasive in a case like *Phillips* where a known individual with whom one has an intimate relationship is the one who will acquire one's genetic material. In such a case, the problem of having to bargain with large numbers of unknown people seems less acute.

131. *Cf.* RICHARD A. POSNER, SEX AND REASON 386–87 (1992) (making a similar point as to rape).

132. *Cf.* United States v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting) ("[W]e can't go anywhere or do much of anything without leaving a bread-crumb trail of identifying DNA matter."). Perhaps under facts like those of *Phillips* there were less expensive or difficult steps that could have been taken (searching one's lover's body for saved sperm?). But a regime that requires taking those steps to avoid unconsented-to genetic parenthood might seem undesirable in that it would transform lovers into detectives. A different problem with the focus on self-protective measures is the question of whether individuals would take these measures whatever the legal rule is. *See supra* note

case that a rule barring unconsented-to reproductive use of discarded genetic materials is justified.

B. THE CURRENT STATE OF THE LAW

I have argued that the law should prevent unconsented-to reproductive use of "abandoned" genetic material. How well does the current law instantiate the desired rule?

As discussed above, the court was hostile to the claim of conversion in *Phillips* because of its view that one cannot steal bodily material that has been discarded.[133]

Emotional distress torts represent a more indirect instantiation of the rule and have fared slightly better in this context. Indeed, the *Phillips* court itself recognized the validity of a claim for intentional infliction of emotional distress.[134] Phillips' claim, however, could go forward only because Illinois did not impose a physical injury or disability requirement for this tort,[135] but many other states do,[136] and some states do not even recognize the tort.[137] Even then the *Phillips* court only allowed the suit

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133. Given Phillips' repeated statements that he did not want to become a genetic parent and his refraining from vaginal sex for that reason, the case actually seemed to present particularly good facts for a claim of conversion.

There might be an additional problem in bringing a conversion claim if what was necessary for reproduction could be copied (for example, through some kind of "scan") rather than taken, in analogy to case law holding that "the possession of copies of documents—as opposed to the documents themselves—does not amount to an interference with the owner's property sufficient to constitute conversion." FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300, 303 (7th Cir. 1990). *See also* Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); Pearson v. Dodd, 410 F.2d 701, 706–08 (D.C. Cir. 1969).

134. Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *3–5 (Ill. App. Ct. Feb. 22, 2005).

135. *Id.* at *3.

136. Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 70 n.93 (1999) (noting that the physical injury requirement persists in Arkansas, Nevada, Florida, Montana, Idaho, Hawaii, Kansas, and Alaska).

137. *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 492 n.98 (1998) (noting that Pennsylvania has yet to recognize intentional infliction of emotional distress as a tort). This problem is even more acute in cases of negligent infliction of emotional distress ("NIED"), where the physical injury requirement remains the majority rule, *see id*. at 492, and has posed problems for reproductive tort claims. *See, e.g.*, Creed v. United Hospitals, 600 N.Y.S.2d 151, 151–53 (App. Div. 1993) (denying a NIED claim where a doctor mistakenly implanted one of plaintiff's embryos in another woman because it did not "endanger[] the plaintiff's physical safety or cause[] the plaintiff fear for his or her own physical safety," and this requirement could not be met by the initial "intrusion into the wife's body to extract her ova" because it "was not a cause of the subsequent improper implanting of the wife's fertilized ova into the other woman"); Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 68–72 (Utah 1998) (denying, for similar reasons, an NIED claim

because the plaintiff had alleged "severe" emotional distress, noting that it was "great and its duration long-lasting" and that the plaintiff "'often finds himself nauseated and unable to eat, especially when—as a family practitioner—he treats small children who are the same age as the child he allegedly fathered.'"[138]

Whether intentional infliction of emotional distress ("IIED"), with all its requirements (extreme and outrageous behavior, severe emotional distress, and in some states physical injury),[139] should be viewed as sufficiently protective of the right not to be a genetic parent will depend both on how strongly one is moved by the argument for protecting the interest in not being a genetic parent and how much one is convinced by the usual arguments for restraint as to emotional distress torts (for example, that emotional distress is too easily faked or is too hard to measure).[140] Balancing these concerns may lead one to intermediate remedial possibilities such as treating these cases as falling within the category of IIED but having a rebuttable presumption of severe emotional distress. There will likely be some heterogeneity in the population as to one's reaction to unwanted genetic parenthood—some, like the *Phillips* plaintiff, may suffer greatly,[141] while others, like some sperm donors, may not attach much importance to it.[142] That said, it is not completely clear what type of

resulting from clinic's insemination of a woman with sperm from a donor who did not resemble her husband, rather than sperm from donor chosen by the couple). *See also* Joshua Kleinfeld, Comment, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury,"* 115 YALE L.J. 237, 239–40 (2005) (noting the difficulty of finding a legal theory that allows recovery of procreative injuries). *But see* Perry-Rogers v. Obasaju, 723 N.Y.S.2d 28, 29–30 (App. Div. 2001) (allowing emotional distress claim on facts similar to *Creed* because the emotional distress was foreseeable and because there were medical affidavits attesting to "objective manifestations of their emotional trauma" that created "'a guarantee of genuineness'").

138. *Phillips*, 2005 WL 4694579, at *4. It seems likely, if not completely certain, that most cases of this kind would meet the other two requirements of IIED: that the conduct was extreme and outrageous, and that defendant intended or knew to a high probability that her conduct would inflict severe emotional distress. *Id.* at *3–4. *Phillips* presented particularly good facts for these requirements, including the plaintiff's explicit admonitions that he did not want to be a parent, the defendant's deception, and the fact that she informed him of fatherhood in a way calculated to impose distress. *Id.*

139. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). *See also supra* note 137.

140. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 360–61 (5th ed. 1984); Chamallas, *supra* note 137, at 493–94.

141. *Phillips*, 2005 WL 4694579, at *4.

142. Waldman, *supra* note 21, at 1049–51. There may be demographic characteristics that correlate well with this heterogeneity. A recent study of two U.K. sperm clinics by Ken Daniels suggests that there are significant differences in preferences for anonymity among sperm donors. In a population of donors made up primarily of older married men with children of their own, 41 percent said they were willing to continue donation if anonymity was removed and 35 percent said they would be very unhappy if genetic offspring traced them, whereas, in another clinic with a donor population made up of unmarried students and young professionals the comparable numbers were 18 percent and

evidence one might try to offer to refute the plaintiff's claim that he was suffering severe emotional distress. In the states that have a physical injury requirement, another intermediate possibility would be to relax that requirement in cases involving the imposition of unwanted genetic parenthood.

A different potential issue with protecting the right through IIED is that it does not provide protection in the form of a property rule[143]—permitting the court to enjoin violations of the rule ahead of time—but only as a liability rule, such that a court is limited to requiring the violator to pay damages for the violation at a court-determined price.[144] There is a familiar argument under the Calabresi and Melamed framework for preferring property-rule protection for the right not to be a genetic parent—the difficulty in valuing the deprivation of the right.[145] This is not to say it would be impossible to value the deprivation of the right; wrongful birth, wrongful conception, fetal wrongful death, and loss of fertility torts present roughly comparable problems of valuation.[146] But just because we can determine damages from a violation of the right when necessary does not mean we ought to rush to embrace a rule that would force courts to do this on a routine basis. Thus, property-rule protection seems preferable, and it may be desirable to specify the availability of injunctive relief for these situations, contrary to what IIED usually provides.

However, even if property-rule protection is the first best solution, there will be cases where injunctive relief will come too late (such as the actual facts of *Phillips* where the plaintiff found out about the child only postbirth), or where there are other constraints.[147] For such cases, a

73 percent, respectively. Daniels, *supra* note 65, at 94. It is also possible that some of the heterogeneity might map onto gender lines, although the currently available evidence on gender differences in donors' reactions to the removal of anonymity is mixed. *See* Olga van den Akker, *A Review of Family Donor Constructs: Current Research and Future Directions*, 12 HUM. REPROD. UPDATE 91, 93–94 (2006) (collecting studies).

143. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); Thomas T. Uhl, Note, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties that Bind*, 61 BROOK. L. REV. 1399, 1449 (1995).

144. Calabresi & Melamed, *supra* note 143, at 1092.

145. *See id.* at 1106.

146. *E.g.*, Hawkinson v. A.H. Robins Co., 595 F. Supp. 1290, 1318–36 (D. Colo. 1984) (awarding damages for loss of fertility); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 919 (Mass. 1975) (finding damages in a fetal wrongful death case no more speculative than any other tort claim); Hensel, *supra* note 48, at 161–62 & n.122 (noting the states that have found damages for wrongful birth and conception "easily ascertainable").

147. Thus, while a theoretical remedy would be to force an abortion in a case where a plaintiff became aware of his impending genetic parenthood after his gametic material had been used for

modified version of IIED seems like a good way of protecting the right.

V. THE CASE FOR PRIVATE ORDERING: SHOULD THE RIGHT BE SUBJECT TO ADVANCE WAIVER THROUGH CONTRACT?

Let us assume, as I have argued in Part IV, that we ought to adopt a baseline right not to be a genetic parent in the absence of any prior consent. This does not tell us if it is normatively desirable to recognize a rule that prevents an individual from giving binding advance consent at an earlier time ("Time1") to the risk of suffering the harms of unwanted genetic parenthood at a later time ("Time2"). I will use the preembryo disposition cases of husbands and wives who cryopreserve preembryos they fertilized together as my primary example of the advance waiver of the right not to be a genetic parent, with the donation of sperm and egg to third parties as a secondary example.

In this part, I make the case for permitting the advance waiver by contract of the right not to be a genetic parent.[148] I begin with the positive case for contract in this domain. I then discuss and evaluate a series of arguments that are (or could be) offered against enforcement of contracts compelling genetic parenthood. I separate out a number of arguments marshaled against contracts to have or refrain from having an abortion and other family law contracts and show that, although they are commonly invoked by courts and commentators as to preembryo-disposition agreements, these arguments are inapplicable in this context. Instead, the

insemination but before delivery, that remedy would be ruled out because it would violate the woman's constitutionally protected right to be a gestational parent. *See, e.g.*, Cohen, *supra* note 5, at 1154–59.

There is a further question whether this reasoning might lead us to allow recovery for emotional-distress damages in cases involving natural reproduction and deception as to infertility, where the courts have been hostile to allowing recovery. *See supra* note 37 and accompanying text. That said, the courts in these cases frequently appeal to a desire not to invade the privacy surrounding intimate sexual relationships and this may distinguish these cases. *See supra* note 37 and accompanying text. The lack of consent in these cases might also be thought of as less deep than in the bathtub or *Phillips*-type cases and involve an element of assumption of risk.

148. In the preembryo-disposition cases that have arisen so far, the "contract waiver" has taken the form of a consent form to IVF that has served both as an advance directive and as a contract either between the parties and the clinic or between the parties, or both. Both advance directives and contracts function as precommitment devices whereby a party at the present time specifies a result to occur at some time in the future. However, advance directives, which are fairly common in many bioethics contexts including end of life decisionmaking, differ from contracts because they do not involve an exchange of promises or reliance and the maker is free to change or revoke the directive if capable. *See, e.g.*, Robertson, *supra* note 22, at 992, 996–1004. To be clear, when I talk about contract waivers I am interested in the contract function of these forms, and one obvious policy suggestion I discuss below, *see infra* text accompanying note 214, is that contract waivers ought to be severed from consent to treatments and advance directives to the clinic.

best argument against advance waiver here is classically paternalistic and consists of a set of objections claiming that individuals will make errors in their contractual preferences and that we ought to protect them from these errors by refusing to enforce these contracts. This set consists of two objections specific to contracts between married couples specifying what should happen in the event of divorce (objections relating to signaling problems and overoptimism bias) and a more general objection that because of errors individuals make as to affective forecasting, they are likely to underestimate how much they will be bothered by the imposition of unwanted attributional parenthood. I conclude that these three objections are overstated, and while they prove insufficient as a reason to refuse to enforce contracts compelling genetic parenthood given the benefits of these contracts, they do illuminate a number of ways in which a system could be designed to improve the quality of consent. I also reject an argument that these contracts should be unenforceable because they concern subject matter "central to personhood."

At the end of this part, I briefly explain why we should reject a compromise solution that would allow enforceable contracts compelling genetic parenthood but permit only a damages remedy for breach.

A. THE BENEFITS OF CONTRACT

Allowing individuals to enter into enforceable contracts is typically defended in three ways: (1) as a way of respecting persons, (2) as a way of "enabl[ing] persons to combine resources and energies to achieve welfare-enhancing goals that could not be achieved without enforcement of the mutual promises,"[149] and (3) as a way of protecting individuals from harms associated with reliance. Here I focus on how these three theories play out as to contracts compelling genetic parenthood specifically.[150]

1. Respect for Persons

The first frame is essentially Kantian. As Charles Fried has so

149. Robertson, *supra* note 22, at 1002.

150. For a similar division, see generally Daniel Markovits, Essay, *Making and Keeping Contracts*, 92 VA. L. REV. 1325 (2006). My claim is not that making contracts compelling genetic parenthood unenforceable would be "contagious" to contract law in general. There is nothing logically inconsistent with recognizing a general rule of freedom of contract but carving out an area of freedom *from* contract surrounding reproduction; nor is doing so likely to undermine the general commitment to contracts (or promise keeping). This is evident from the decision of a number of states to make surrogacy contracts unenforceable, which has coexisted with the enforceability of most contracts. *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790, 793–94 (Mass. 1998) (surveying state laws on surrogacy contracts).

eloquently explained, "[R]espect for others as free and rational requires taking seriously their capacity to determine their own values," and "[i]f we decline to take seriously the assumption of an obligation because we do not take seriously the promisor's prior conception of the good that led him to assume it, to that extent we do not" respect him as a person.[151] Contract is necessary to effectuate that commitment because "[i]f it is my purpose, my will that others be able to count on me in the pursuit of their endeavor, it is essential that I be able to deliver myself into their hands more firmly than where they simply predict my future course."[152]

Under this view, allowing individuals to contractually waive their right not to be a genetic parent, notwithstanding that they may later regret that decision, is a necessary part of respecting them as persons. Indeed, it is sometimes argued that freedom of contract is especially important here because individuals attach particular value to procreative autonomy. Thus, in one of the preembryo disposition cases, the New York Court of Appeals emphasized how the enforceability of these contracts would "minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision," and that "[t]o the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice."[153]

2. Enabling Welfare-Enhancing Activities

The concern in the second frame is that certain welfare-enhancing options will be denied to an individual if one cannot, absent contract, insure against a later defection by another party.

For contracts involving third parties, such as the case of an individual who requires a sperm donor for IVF, it is quite clear why one would not undertake certain activities absent contract. As I will discuss, IVF carries with it health risks and requires significant emotional and financial investments; all this would be for naught if the sperm donor could prevent the implantation of preembryos that had been fertilized using his sperm. Another plausible example is when a couple relying on a sperm or egg donor wants to have multiple children that will be full genetic siblings.[154]

151. CHARLES FRIED, CONTRACT AS PROMISE 20–21 (1981).

152. *Id.* at 13. *See also* Robertson, *supra* note 22, at 1006–07.

153. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

154. This need for contract would be greater still if the donor of genetic material could demand destruction not only postfertilization but post*implantation* as well. However, the current abortion jurisprudence prevents that by treating the right not to be a gestational parent as a trump. *See, e.g.*,

In order to do so they must retain access to the cryopreserved preembryos even after they have their first child.

Other welfare benefits, especially for contracts between husbands and wives over cryopreserved preembryos, are no less significant but require a little more exposition.

First, there are individuals who are opposed to preembryo destruction and use contract to guarantee it will not happen. This opposition may derive from a personal attachment an individual believes he will feel to these particular preembryos—that is, that he will view them as his "pre-born children" and cannot bear the thought of their destruction.[155] Or, it may stem from more general religious or nonreligious beliefs leading him to oppose the destruction of preembryos.[156] While some religious traditions (for example, Roman Catholicism) are opposed to both the purposeful destruction of preembryos and IVF more generally, others (including some Protestant and Evangelical sects) are opposed only to destruction.[157] Moreover, even within a religious group like Roman Catholicism, some individuals may subscribe only to the interdiction against willful

Cohen, *supra* note 5, at 1157–59. Therefore, I focus on cases where the demand will come before implantation.

155. This is a phrase that the Snowflakes Embryo Adoptions program uses in its literature. *See* NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTIONS: FACT SHEET, *available at* http://www.nightlight.org/Snowflakesfacts.pdf (last visited Sept. 8, 2008).

156. *See, e.g.*, COMM. ON DOCTRINE, U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES pt. 4 (4th Ed. 2001), *available at* http://www.usccb.org/bishops/directives.shtml; 1 NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH 49–51 (1999); Coleman, *supra* note 2, at 66; James J. McCartney, Essay, *Embryonic Stem Cell Research and Respect for Human Life: Philosophical and Legal Reflections*, 65 ALB. L. REV. 597, 624 (2002). This was the concern expressed by the husband in *J.B. v. M.B.*, 783 A.2d 707, 710 (N.J. 2001) ("For me, as a Catholic, the I.V.F. procedure itself posed a dilemma. We discussed this issue extensively and had agreed that no matter what happened the eggs would be either utilized by us or by other infertile couples."). These concerns cannot be met with a regime that prohibits destruction but mandates indefinite freezing of preembryos in the event of a disagreement as to disposition, both because preembryos cannot survive cryopreservation indefinitely, *e.g.*, Avery W. Gardner, *Reproductive Health: Massachusetts Court Holds Contracts Forcing Parenthood Violate Public Policy*, 28 J.L. MED. & ETHICS 198, 198 (2000), and because, for those who believe that embryos are ensouled, indefinite cryopreservation may itself be repugnant. *E.g.*, CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY (1987), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (last visited May 22, 2007).

157. *See, e.g.*, David M. Smolin, *Does Bioethics Provide Answers?: Secular and Religious Bioethics and Our Procreative Future*, 35 CUMB. L. REV. 473, 503–04 (2005). Indeed, even the Roman Catholic Church's opposition to IVF has been somewhat muted; it has not, for example, "actively opposed the development of the industry in infertility care." Janet L. Dolgin, *Surrounding Embryos: Biology, Ideology, and Politics*, 16 HEALTH MATRIX 27, 37 (2006).

preembryo destruction but not IVF.

It might be objected that contracting for future access to cryopreserved preembryos is not the only way such an individual can pursue IVF yet protect his or her interest in avoiding preembryo destruction. This is true, but in this context the other options are relatively undesirable. For example, one could fertilize and attempt to implant a large number of preembryos to increase the chance that one will successfully attach, but this leads to higher rates of multiple births, especially of three or more infants, and multiple births, in turn, are associated with increased risks to the gestating mother and infants.[158] This is to say nothing of the expense and stress for the family of raising triplets or larger multiple births. Transferring large numbers of preembryos and then using "selective reduction" (injecting potassium chloride into the fetal chest) to terminate some of them would address this concern, but the procedure increases the risk that the woman will lose *all* the embryos, and seems to contravene the views leading individuals to oppose preembryo destruction in the first place.[159] That leaves the possibility of undergoing multiple egg retrievals and IVF cycles seriatim with low numbers of transferred non-frozen preembryos, but, as I discuss below, this imposes significant health risks and financial costs.

A second benefit of contract in this context is that it may enable individuals to delay reproduction. A couple may want to wait to have children until they have more resources, or they may just prefer not to face the responsibility of child rearing early on in their relationship. Delayed reproduction may also facilitate career advancement, particularly for women, for whom pregnancy and childrearing often require a substantial career disruption.[160] For all women, however, fertility declines after age twenty-seven, and this is especially true for women who require the use of IVF in the first place.[161] Further, as women age, they are at increased risk

158. Jain et al., *supra* note 124, at 665. This includes maternal risks of premature labor and delivery, pregnancy-induced hypertension, gestational diabetes, and uterine hemorrhage. *Id*. The risks to the child include still birth and physical and developmental disability, as well as respiratory distress syndrome, intracranial hemorrhage, cerebral palsy, and blindness associated with premature birth. *Id*.

159. *E.g.*, Alvaré, *supra* note 23, at 24 (reporting that in 1999, 7 to 13 percent of all selective reduction procedures led to the loss of all fetuses being carried); Judith F. Daar, *Selective Reduction of Multiple Pregnancy: Lifeboat Ethics in the Womb*, 25 U.C. DAVIS L. REV. 773, 780–81 (1992).

160. *See, e.g.*, Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 60–68 (2006); Susan A. Kidwell, Note, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287, 1311 (2001).

161. *E.g.*, SPAR, *supra* note 6, at 15 ("In the aggregate, female fertility peaks at around age twenty-seven and then declines dramatically after thirty-five"); CTRS. FOR DISEASE CONTROL & PREVENTION, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT 75 (2005), *available at*

of producing children with Down's syndrome and birth defects, and the risk is primarily determined by the "age" of the eggs rather than age of the gestational carrier.[162] Cryopreservation allows a woman to delay reproduction and increase her welfare while decreasing the risk of not being able to reproduce or producing a child with birth defects, but only if she is guaranteed later access to the cryopreserved preembryos;[163] contract serves as this guarantee. Cryopreservation also permits individuals to space out the births of their children or decide to have more children later on.

Finally, some individuals are unwilling to bear the financial costs or health risks of IVF in the first place without assurance that preembryos not immediately implanted will be available for future use, especially since, statistically speaking, the preembryos immediately implanted will more likely than not fail to produce a successful child birth.[164] In terms of health risks, the hormones used to induce the production of eggs for harvesting frequently induce mood swings and abdominal pain, and may lead to ovarian hyperstimulation syndrome (pain resulting from the production of too many eggs and the swelling of the body with fluid), bleeding, and (rarely) an allergic reaction to the hormones administered, with long term health implications still largely unknown.[165] In terms of the financial costs, IVF typically costs $12,400 per cycle, for an average cost of $66,667 to

http://www.cdc.gov/ART/ART2003/PDF/ART2003.pdf (noting the average live birth rate for IVF using frozen non-donor eggs is 29.4% for women under age 35, 28.2% for women aged 35 to 37, 22.6% for ages 38 to 40, and 16.5% for ages 41 to 42).

162. AM. SOC'Y FOR REPROD. MED., GENETIC SCREENING FOR BIRTH DEFECTS: PATIENT'S FACT SHEET (2005), *available at* http://www.asrm.org/Patients/FactSheets/genetic_screening.pdf; Naomi D. Johnson, Note, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 862 n.77 (2003). Having a child with birth defects may also impose externalities on others if public resources are needed for its care.

163. *See* Coleman, *supra* note 2, at 61; John A. Robertson, *Ethical and Legal Issues in Cryopreservation of Human Embryos*, 47 FERTILITY & STERILITY 371 (1987) (explaining that cryopreservation may be considered "insurance against future sterility."). An alternative insurance strategy—freezing eggs before they are fertilized—has not been particularly successful as of this date, although there is some suggestion in the scientific literature that it is improving. *See* SPAR, *supra* note 6, at 60–61; Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 294 (2006).

164. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 161, at 75 (noting that only 11%–37.3%, depending on the mother's age, of IVF cycles using fresh embryos from nondonor eggs result in child birth); Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 616 (2003).

165. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 12 (2007), *available at* http://www.asrm.org/Patients/patientbooklets/ART.pdf (noting that 30 percent of patients suffer mild ovarian hyperstimulation while 1 to 2 percent suffer a severe case, and discussing other risks and treatment); Noah, *supra* note 164, at 620–21; Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donaltion in Human Sperm and Egg*, 36 LAW & SOC'Y REV. 257, 264–65 (2002).

$114,286 per live birth (the large range depending on factors such as the age of the mother).[166] Very few states mandate insurance coverage of IVF, so most individuals will have to pay for these costs out of pocket.[167] An individual may be willing to bear a certain financial cost or health risk for a good chance at successful childbirth, but not when that chance is significantly reduced.

One might object that contract is unnecessary in the spousal context because individuals are willing to undertake IVF without contract (perhaps because of the overoptimism bias about the success of the marriage discussed below). This claim, however, has trouble explaining the fact that some couples *do* actually make preembryo disposition contracts, as is evidenced by the case law.[168] At most this objection suggests that these contracts will not prove particularly common, but it does not reduce the value of these contracts to those who seek to employ them.

3. Actual Reliance

A final theory focuses on harm to those who have *actually* relied on contracts promising access to cryopreserved preembryos. As discussed above, women incur discomfort, pain, and health risks in the harvesting of eggs. Because of the relationship between age and fertility, unprotected reliance on the availability of the preembryos may make successful healthy reproduction less likely, and more costly even if successful since more attempts at IVF will be needed.[169] Further, both men and women have made emotional and financial investments in fertilizing the preembryos in the first place.

166. SPAR, *supra* note 6, at 213 tbl.7-2 (citing Peter Neumann et al., *The Cost of a Successful Delivery with In Vitro Fertilization*, 331 NEW ENG. J. MED. 239 (1994)). Cryopreserving preembryos is much less costly than repetitive fresh embryo transfers. For example, for the Jones Institute in Norfolk, Virginia, the variable costs of pursuing multiple cycles with fresh eggs instead of cyropreserving consists of $5720 for "cycle stimulation," $2499 for "egg retrieval," and $3000 for "medications" for a per cycle cost of $11,219, in contrast to $1650 for cryopreserving preembryos that have already been harvested. *Id*. at 59 tbl.7-2.

167. *See supra* note 124 and accompanying text.

168. This rejoinder, however, is complicated by the fact (discussed above) that in the cases that have so far been litigated these contracts are often part of an advance directive presented by the IVF clinic. Because the IVF clinic may initiate the discussion by presenting the form, it may not be good evidence that the parties really would insist on contract of their own accord. The claim is also complicated by the issue of whether the parties are operating under false impressions as to what the default rule is. More empirical information would be informative here, although it is difficult to measure the segment of the population who is not undertaking assisted reproduction because of lack of contract enforcement.

169. *See, e.g.*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 161, at 75; Waldman, *supra* note 21, at 1054–56.

These concerns about reliance have particularly worried some of the American courts that have dealt with these disputes, causing them to explicitly hedge on whether the rules they articulate apply when a party has since become infertile and will be unable to reproduce at the time of performance absent access to the preembryos.[170] But while it is natural for a court resolving a dispute to focus on the plight of the parties before it who have actually relied on a contract, from a system-design perspective this argument in favor of enforcement is of secondary importance because it seems transitional. These are reliance costs incurred under a belief that these contracts are enforceable, costs which might not be incurred if the governing regime was one of nonenforcement of these contracts.

I say "might" for a couple of reasons. First, a change in the law will still affect a significant number of people since some may already have relied on a contract at the point at which the legislature or state supreme court announces a nonenforcement rule. This can be avoided, however, by announcing a rule that has only prospective, not retroactive, application. Second, we may have some doubts as to publicity, that is, whether individuals would know about the unenforceability of these contracts. That said, it is not unrealistic to think that IVF clinics—the repeat-players with expert knowledge—would communicate that information to those undergoing IVF, and the law could mandate that they do so.[171]

Most of the reported court cases involve contracts allowing the woman to implant preembryos over the opposition of her now ex-husband, though in one case the woman wanted instead to donate the preembryo to an infertile couple.[172] A case could arise, however, where a husband contracted to have access to the preembryo to implant it in a surrogate or a new wife and have the resulting child reared by him. While my argument in favor of enforcing preembryo disposition contracts is framed in gender-neutral terms, the argument for enforcement is admittedly stronger when the person seeking enforcement is a woman, both because of the decline in female fertility and the fact that the harvesting of eggs and IVF imposes health risks for women. Men still can articulate interests in their emotional

170. J.B. v. M.B., 783 A.2d 707, 719–20 (N.J. 2001); *id.* at 720 (Verniero, J., concurring); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). *See also* Evans v. United Kingdom, 2007 Eur. Ct. H.R. 264, ¶6, ¶13 (2007) (joint dissent of Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele); CFH 2401/95 Nahmani v. Nahmani [1996] IsrSC 50(4) 661 (arguing for permitting use in this situation).

171. Further, even if one knows that such contracts will not be enforced there may be limits on what an individual can do to protect oneself against these negative future consequences, for the reasons discussed in the previous section.

172. *Davis*, 842 S.W.2d at 588. In another, it was the man who wanted to donate to an infertile couple. *J.B.*, 783 A.2d at 710.

and financial investment in the preembryo, as well as any religious or moral opposition to preembryo destruction; they just cannot articulate these additional interests. While I think the argument is sufficiently strong to justify contractual enforcement for both sexes, this difference could conceivably lead one to think that these contracts should only be enforceable by women. Such a rule would, however, face a federal constitutional challenge under the Equal Protection clause. While I have elsewhere argued that the best reading of the current doctrine is that enforcement of preembryo-disposition agreements may not be state action, it likely would be state action to enforce these agreements only when they favor one gender.[173] Although it is conceivable that such a rule could survive intermediate scrutiny, I think it unlikely.

B. THE ANTICONTRACT ARGUMENTS

1. Inapposite Objections and "Rights Bleed" Revisited

I begin by considering a number of arguments that are (or could be) raised against contract waivers of other sticks in the bundle of rights not to procreate, and in family law more generally. These arguments are often marshaled as reasons why preembryo-disposition contracts should be struck down as contrary to public policy, but I find them inapposite.

First, courts refuse to enforce premarital agreements to the extent that they cover child custody, visitation, or child care payments, and will not enforce separation agreements to the same effect when they run contrary to the best interests of the child.[174] The idea is that an individual cannot waive a right that "belongs" to one's child.[175] However, as I have argued above, best-interests reasoning is a poor fit in this context, and, in any event, it is very hard to see how enforcement of these agreements would go against the best interests of the potential child, because being born usually serves those interests.

Second, some courts refuse to enforce contracts requiring an individual to have or refrain from having an abortion.[176] We may think that

173. Cohen, *supra* note 5, at 1173–85.

174. *E.g.*, Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148 & n.12 (1998); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 892–93 (2000).

175. *See supra* text accompanying note 39.

176. *E.g.*, *In re* Baby M, 525 A.2d 1128, 1143 (N.J. Super. Ct. Ch. Div. 1987), *rev'd in part*, 537 A.2d 1227 (N.J. 1988). *See also* Cohen, *supra* note 5, at 1191–92.

there are advantages to a very strong taboo against invasions of bodily integrity and fear that a rule that allowed invasions where there is contemporaneous objection (even when there is contracted-for consent) would undermine that rule to an uncomfortable degree. Those concerns, however, are not operative when the contract does not require an invasion of bodily integrity, as is the case with contracts over cryopreserved preembryos. Laurence Tribe has argued against the enforcement of abortion contracts on an antisubordination or Equal Protection theory, suggesting that they "exploit[] [a] special vulnerability of women in such a way as to reinforce their subservience to men, and thus their lack of fully autonomous and equal roles in social and political life."[177] This "special vulnerability," however, is connected to sex differences as to gestational, not genetic, parenthood, so it is inapplicable to contracts compelling only the latter.

A third set of concerns, limited to paid-for reproduction (for example, paid surrogacy or egg donation), suggests that while consent is freely given in a formal sense (that is, there is no proverbial gun to the head), the background conditions make that consent not truly free. It is frequently claimed that market duress or undue inducement renders suspect the consent in such cases because participation is driven by poverty, and that this pressure is so difficult to detect through case-by-case analyses that we ought to favor a prophylactic rule barring such contracts. There has been a great deal of literature on this objection in a number of different contexts.[178] I myself am a skeptic, but for the purposes of this Article I bracket off this objection, as I do the other anticommercialization objections in order to focus purely on anticontractualization arguments. Doing so also reflects the facts of the preembryo-disposition agreement cases that have been litigated so far, wherein neither party is paying the other as part of the contract. Of course, pressures can exist even when no money changes hand, but in the preembryo context there is no reason to think that one party will systematically be in a position to exert such

177. Tribe, *supra* note 35, at 3338. The argument encounters a counterclaim that by suggesting that women must be protected from their own choices in this domain, nonenforcement might institutionalize rather than combat gender hierarchy. Further, in the surrogacy context, it may be other women that are benefiting from such contracts in addition to or instead of men. *See* FABRE, *supra* note 105, at 206.

178. S*ee, e.g.*, *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988); FABRE, *supra* note 105, 126–53 (organ sales); KOROBKIN, *supra* note 40, at 177–208 (eggs and stem cells); Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811, 1818–19 (1988) (surrogacy); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 777 (1983) (slavery); Radin, *supra* note 16, at 1910–11 (selling children and body parts).

nonmarket pressure on the other.[179]

Fourth, in support of the anticontract position, a number of courts and commentators have tried to draw analogies to the traditional reluctance of courts to enforce agreements to marry, never to seek a divorce, or not to have children during the marriage.[180] But part of what underlies these doctrines is the difficulty of supervising performance and the threat of defective performance that also underlies the more general reluctance to specifically enforce labor contracts. These concerns seem largely inapposite as to contracts compelling genetic parenthood: the preembryo which has been cryopreserved is already in the custody of the clinic and the party now objecting to the contractual arrangement need not *do* anything for the contract to be enforced.[181]

A distinct but related concern expressed by the analogies to the unenforceability of contracts to marry or to refrain from divorce is a reluctance to force persons into family relationships through contract.[182] Part of this stems from supervision difficulties, but another part is a recognition that court orders are very poor vehicles for creating a family or "order[ing] either party to do what is necessary to make the other

179. S*ee, e.g.*, Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2365–66 (1995) (expressing concern that *unpaid* surrogates may be *more* pressured by friends and relatives than a surrogate paid by a stranger). It is sometimes argued that postnuptial asset agreements favor husbands, but this is due to the financial subject of the agreement and the relative wage disparities between the two. It is hard to see this same dynamic play out in this context, and some have suggested that even for financial postnuptial agreements the effect is more imagined than real. *See generally* Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827.

180. *E.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1057–59 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 717–18 (N.J. 2001); Coleman, *supra* note 2, at 92–93.

181. *Cf.* Susan M. Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance*, 4 N.Y.L. SCH. HUM. RTS. ANN. 375, 393 (1987) (making a similar point as to agreements by a surrogate to relinquish custody). This argument gives a further reason to distinguish abortion contracts, which present in extreme the types of concerns that make courts unwilling to require specific performance of labor contracts. At the same time, that reasoning is only sufficient to justify rejecting specific performance of abortion contracts, not a damages-only remedy in analogy to the one I discuss in Part V.C.

For contracts to provide sperm or egg we need to distinguish cases where the gametic material has not yet been provided, which pose obvious enforcement problems and invasions of bodily integrity, *see* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 368–69 (1990), from attempts to retake gametic material already provided but not yet used, which do not since the gametic material is already in the hands of a sperm bank, an IVF clinic, or the ultimate recipient. Sperm banks and IVF facilities also routinely require testing of the health of the provider for months after the gametic material is provided, *see, e.g.*, Alvaré, *supra* note 23, at 10; Ertman, *supra* note 23, at 15 & n.48, 18, so there may be problems enforcing the requirement for postprovision testing.

182. *E.g.*, *A.Z.*, 725 N.E.2d at 1058–59; *J.B.*, 783 A.2d at 717–18.

happy."[183] But someone seeking to use a fertilized preembryo is not demanding that the other party make them happy or enter into a family relationship with them. This is especially true in a regime where legal parenthood is not imposed on the objecting party.

Removing these arguments allows us to see clearly that the impulse to prevent contracting in this domain is classic paternalism—protecting individuals from making bad choices by barring contract.

2. Signaling Problems and Overoptimism Bias

Two objections are applicable only to contracts between married parties made in the contemplation of divorce—the fact pattern behind most of the case law in this area.[184]

One argument relates to signaling problems, the fear that a party will have considered his or her preference but chose not to express it because of the costs of sending a bad signal.[185] For example, Saul Levmore has suggested that couples tend to avoid prenuptial agreements because it signals distrust in the marriage.[186] However, as applied in our context, this just means that fewer individuals may contract about preembryo-disposition than would like to do so; it does not present a reason why we should not enforce the contracts of those who do. Moreover, because the negative signal stems primarily from the decision to contract about divorce given a baseline practice of not doing so, we could dampen that signal through a required-choice regime that obligates individuals to enter into a preembryo disposition agreement or a weaker requirement that they must be presented with an opportunity to choose (for example, requiring IVF clinics to offer preembryo-disposition agreements).[187]

183. *A.Z.*, 725 N.E.2d at 1058.

184. *See supra* note 3 and accompanying text.

185. *See, e.g.*, I. Glenn Cohen, Recent Case, *Supreme Court of New Jersey Holds that Preembryo Disposition Agreements Are Not Binding when One Party Later Objects:* J.B. v. M.B., 115 HARV. L. REV. 701, 708 (2001).

186. Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 2021 (2000).

187. California mandates that a physician present those seeking fertility treatments with a standardized form in which they can specify dispositional preferences at to unused preembryos. CAL. HEALTH & SAFETY CODE § 125315(b) (West 2006). Coleman briefly suggests there may be an "inherently coercive aspect of a rule that makes signing an advance agreement a condition of undergoing treatment with IVF." Coleman, *supra* note 2, at 104. I fail to see what is wrong with requiring individuals to make a choice as to preembryo disposition, rather than requiring the courts to do it for them ex post. In a sense, the parties cannot avoid choosing—if they do not contract around it they will have chosen the default, whatever it is set at. Things might be different if we feared that "a physician would condition treatment on a patient's consent to a *particular* disposition option." *Id*. (emphasis added). But even Coleman recognizes this as "unlikely," *id*., and even assuming *dubitante*

One might object that the real problem is that *particular* dispositional choices carry bad signals, such that the preferences reflected in the contract do not reflect actual preferences. How to read the signal, however, seems quite murky. Does a man's Time1 preference to destroy the preembryos in the event of a divorce reflect badly on him as "selfishly" depriving his future ex-wife of the ability to implant those preembryos? Or should she instead have doubts about a man who is willing to allow her postdivorce use of the preembryos, since it suggests he does not attach sufficient psychological importance to parenthood? For this reason, the signaling problem seems overstated.

The second objection, a bounded-rationality objection, focuses on cognitive psychology's finding that individuals tend to underestimate the likelihood of negative future events, which is called overoptimism bias.[188] As Baker and Emery have shown, overoptimism bias leads those applying for marriage licenses to underestimate the likelihood that they *themselves* will divorce, even when they can accurately state the national average divorce rate.[189] In our context, the argument is that if couples do not take seriously their chances of divorcing, why should we put stock in the wishes they express about preembryo disposition should that contingency arrive?

Once again, this observation works better as a predictor of why fewer individuals will enter into these contracts than as an argument for nonenforcement. Doubts as to whether you accurately predicted the likelihood of a future negative event should not lead us to disregard the genuineness of preferences expressed when asked what you would want should that event occur. You may not take the chance of being in a persistent vegetative state seriously, and hence may not fill out an advance directive, but that does not mean that if you do fill out the advance directive we should doubt the preference you list for removal of a nasogastric tube.

Moreover, we have not made unenforceable other contracts entered into under comparable conditions of overoptimism bias. Prenuptial

that it did prove to be a concern, the better solution would be to make the conditioning of treatment on choosing a *particular* disposition illegal.

188. For background on bounded rationality, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075–1102 (2000).

189. *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993). These studies were performed on those seeking marriage licenses, and there has been some suggestion that the already-married suffer from less overoptimism bias. *See* Williams, *supra* note 179, at 849–50.

agreements also present cases of bounded rationality through overoptimism about the strength of the marriage. Yet in stark contrast to the preembryo-disposition agreements, all states treat prenuptials as enforceable, although they split on whether and how much "second-look" scrutiny to give these contracts upon enforcement: the majority approach is to enforce prenuptials as one would other contracts, with one minority approach to enforce them as long as it does not leave one party a public ward, and another minority approach to give a full second look and determine if the contract is fair and reasonable at the time of dissolution of the marriage.[190] Indeed, one problem related to overoptimism bias—exploitation by a more sophisticated party—seems much less plausible in this context: there is no reason to think that either husband or wife is less likely to suffer from overoptimism and exploit the other's comparative naïveté. In any event, even if we were to employ the full second-look kind of review here, it is hard to see how enforcement would be unfair or unreasonable in the way enforcement of a very one-sided prenuptial might be.

3. Affective Forecasting and Transformative Experiences

While arguments about bounded rationality focus on cognitive errors, arguments about affective forecasting focus on the errors individuals make in predicting their future emotional states.[191] An emerging literature indicates that there are errors individuals do *not* tend to make: individuals are fairly accurate in predicting the valence of the emotional reaction they will experience to a possible future contingency (positive or negative) and which specific emotion they will experience.[192] But the same literature suggests that individuals are "surprisingly inaccurate at predicting the intensity and the duration of future emotions," even for events such as winning the lottery or becoming a paraplegic.[193] As applied in our context, the argument is that individuals will underestimate how much unwanted attributional parenthood will bother them.

Concerns about affective forecasting are common in the debate on surrogacy agreements. For example, Vicki Jackson posits that because of the "changes in feeling that we know frequently occur, and that we generally want to occur, during pregnancy and at birth . . . . it may be quite

190. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254–58 (1995).

191. Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L. J. 155, 162–63 (2005).

192. *Id*. at 166.

193. *Id*. at 167–68.

difficult, even impossible, accurately to evaluate, prior to birth, the ability to surrender the child."[194] There is pervasive disagreement about the merit of this claim: does it represent sensitivity by courts to the actual bond that develops between mother and child during gestation or does it represent an ultimately disabling view of women? As the California Supreme Court noted, "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law."[195] That is, "if a surrogate is released from her agreement because she could not assess what her emotions would be at the end of the pregnancy, how can any person be held to any agreement when their emotions may change over time?"[196]

Of course, many U.S. jurisdictions have found these affective-forecasting concerns unpersuasive and have treated surrogacy contracts as enforceable, especially when the surrogate is a gestational one that contributes no genetic material.[197] My aim is not to definitively resolve the surrogacy contract question here, but instead to show that however one resolves this disagreement in the surrogacy context, the affective forecasting argument loses much of its power when transposed into the context of contracts compelling only genetic parenthood. The argument is premised on the assertedly transformative nature of the *gestational bonding* experience. For example, in its surrogacy-agreement jurisprudence, the New Jersey Superior Court focused on the inability of a woman to anticipate the "bond [that] is created between a gestational mother and the baby she carries in her womb for nine months" and traces it to the gestational mother's contribution of "an endocrine cascade that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life."[198] Katharine Bartlett notes the widespread belief that through gestation a mother and fetus form a "mystical bond" that "is perceived of as inevitable and more powerful than any woman can realize in advance."[199] Likewise, Jackson takes pains to emphasize that "the profound emotional effect of the

194. Jackson, *supra* note 178, at 1818–19 (internal footnote omitted).

195. Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993).

196. JULIA J. TATE, SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH! 3–4 (1994). *See also* ROBERTSON, *supra* note 11, at 131–32; Shultz, *supra* note 181, at 384.

197. For recent state by state surveys on this issue, see JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW (2006); Kevin Tuininga *The Ethics Of Surrogacy Contracts And Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185, 188–90 (2008).

198. A.H.W. v. G.H.B., 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000).

199. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 333 (1988).

child's birth has its roots in the pregnancy itself."[200]

This gestational bonding experience, however, is absent when the individual contributes only sperm or egg and performance occurs before any gestation of the preembryo has taken place. This is a distinction that courts in preembryo disposition cases have elided by relying on the analogy to surrogacy.[201]

Still some, like Jeremy Blumenthal, argue that even without gestational bonding the research on affective forecasting means that in the preembryo context "it makes more sense to see the Time2 preference—which is generated in response to an actual event—as worthy of being privileged over the Time1 preference—which was hypothetical, generated in response to an imagined event."[202]

This seems, however, to be the right answer to the wrong question. We already know that at Time2, the "true" feeling of an individual who objects to contractual enforcement is to oppose implantation, and we know that this was different from her Time1 preference as expressed in the contract. What we do not know is whether to allow an individual to bind him or herself in advance in spite of the risk that this particular individual did a poor job of affective forecasting.

Blumenthal seems to tacitly undercut his claim through his discussion of surrogacy in two ways. First, he points to social-science literature suggesting "that some surrogate mothers apparently 'learn' not to attach to the unborn child."[203] In a regime where preembryo-disposition agreements are routinely enforced, individuals might also "learn" to attach less psychological significance to unwanted genetic parenthood. Second, he acknowledges that the potential inaccuracy in emotional forecasting actually "cuts against the current approach of affording leeway to surrogate mothers" because "allowing a surrogate to change her mind and 'escape' a

200. Jackson, *supra* note 178, at 1819 n.19. Jackson emphasizes not only the observation that the bond *does* develop, but the normative claim that we want it to occur. *Id*. at 1818–19. Although she does not spell out her reasoning, such a bond may be important in ensuring, for example, that the surrogate not undertake activities (such as alcohol consumption) that will harm the fetus. This argument too is inapposite as to cryopreserved preembryos, where the formation of the pregestation bond does not have the same beneficial qualities.

201. *E.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1058–59 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 717–18 (N.J. 2001). *See also* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 421–22 (1990) (advancing this view).

202. Blumenthal, *supra* note 191, at 217 (citing Coleman, *supra* note 2, at 119).

203. *Id*. at 212 (citing Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57 (2002)).

contract may stem from courts' (or policymakers' or other third parties') overpredictions of the emotional difficulty of relinquishing a child and of the subsequent pain of having separated."[204] The same seems true here.

Related to such overpredictions, it is worth noting that Blumenthal's argument about preembryo-disposition agreements is premised on generalized data regarding the difficulty of predicting future emotions, not evidence relating to affective forecasting regarding unwanted genetic parenthood specifically. Although far from complete, the available empirical work does not evidence the robust affective-forecasting errors his argument seems to require.

For example, a number of follow-up studies on those who have donated eggs for reproductive use in the United States fail to find significant incidences of ex post regret by egg donors.[205] In their reviews of the existing literature both van den Akker in 2006 and Jordan and colleagues in 2004 found no demonstrated evidence of negative psychological consequences from egg donation.[206] To be sure, the existing

204. *Id*. at 212.

205. *See, e.g.*, Caren B. Jordan, Cynthia D. Belar & R. Stan Williams, *Anonymous Oocyte Donation: A Follow-Up Analysis of Donors' Experiences*, 25 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 145, 147–48 (2004) (finding that, at a mean follow-up time of 21 months after donating, 83.3% of 24 egg donors had no regrets about participation, and those who did express regret primarily identified health problems and financial difficulties as the cause); A.L. Kalfoglou & J. Gittelsohn, *A Qualitative Follow-Up Study of Women's Experiences with Oocyte Donation*, 15 HUM. REPROD. 798, 799, 803–04 (2000) (finding in a follow-up study on thirty-three paid egg donors who had donated in the past 3 years "[n]one of the participants reported that they regretted the oocyte donation," although some had complaints about the medical care they received and wished they were informed about whether the eggs they had donated lead to successful births); Susan Caruso Klock, Andrea Mechanick Braverman & Deidra Taylor Rausch, *Predicting Anonymous Egg Donor Satisfaction: A Preliminary Study*, 7 J. WOMEN'S HEALTH 229, 229–30, 232–36 (1998) (follow-up study on 25 paid egg donors two weeks after donation finding that 80% would be willing to donate again and 76% reported being "very satisfied" on a measure of psychological satisfaction with donation); L.R. Schover et al., *Psychological Follow-Up of Women Evaluated As Oocyte Donors*, 6 HUM. REPROD. 1487, 1487–89 & tbl.2 (1991) (follow-up at the 6- and 12-month point with 23 paid egg donors finding that 91% reported moderate to extreme satisfaction with the experience of egg provision, 74% would provide again if asked, and 100% would recommend that a friend consider donating). *See also* Viveca Söderström-Anttila, *Follow-Up Study of Finnish Volunteer Oocyte Donors Concerning Their Attitudes to Oocyte Donation*, 10 HUM. REPROD. 3073, 3073–75 & tbl.1 (1995) (follow-up at the 12–18 month point with 30 altruistic Finnish egg donors, finding that no donor expressed regret at having donated eggs, and 78% said they would donate again if asked). For a study with a somewhat less positive report on donor psychological satisfaction, see Matthew Partrick et al., Correspondence, *Anonymous Oocyte Donation: A Follow-Up Questionnaire*, 75 FERTILITY & STERILITY 1034 (2001) (finding that after 2 years, of 21 paid egg donors, 5 (23.8%) regretted their donation and 6 (28.6%) reported feeling sad, angry or regretful, but only one of these pointed to concerns about the child rather than medical issues and the time-consuming nature of the process).

206. Jordan et al., *supra* note 205, at 147; van den Akker, *supra* note 142, at 94. In terms of sperm donation, "there appears, to date, to be no data on apparent long-term psychological damage from such

studies have some important limitations,[207] but given the weight that the affective forecasting argument seeks to place on these negative emotions, one would expect to find more instances of postdonation regret even in these studies.

The small amount of evidence available on husbands and wives who cryopreserve preembryos is more inconclusive. Studies conducted in the United Kingdom and France comparing the initial disposition preferences of couples at the time they cryopreserved preembryos with their preferences at a follow-up point several years later find that for approximately 72 to 76 percent of couples there is no change in preference.[208] On the other hand, a non-peer reviewed study with a much smaller sample size done by Susan Klock and her colleagues at their IVF clinic at Northwestern University reported on very briefly by correspondence to the *New England Journal of Medicine* suggested markedly different results.[209] Of the forty-one couples for whom Klock and her colleagues had information allowing a comparison of their initial dispositional preference and their preference at the time of a three-year storage deadline set by the clinic, they reported that "only 12 of these couples (29 percent) kept their initial disposition choice; 29 couples (71

activities," although there is considerably fewer follow-up studies on *ex post* regret. Mehmet R. Gazvani et al., *Payment or Altruism? The Motivation Behind Gamete Donation*, 12 HUM. REPROD. 1845, 1845 (1997).

207. These limitations include the small sample sizes of the studies, the possibility of selection bias in responders versus nonresponders, and the fact that follow-up was done within three years from the date of donation such that it could not measure the possibility of a longer time lag before regret sets in. Moreover, egg donation differs in important ways from the preembryo-disposition cases, in particular as to the possibility of anonymity.

208. Peter R. Brindsen et al., *Frozen Embryos: Decision in Time in the U.K.*, 10 HUM. REPROD. 3083, 3083–84 (1995) (finding that of 90 couples who initially offered their preembryos for donation, 69 (76.7%) remained firm in their desire to donate years later); J. Lornage et al., *Six Year Follow-Up of Cryopreserved Human Embryos*, 10 HUM. REPROD. 2610, 2613 (1995) (finding that of 145 couples who had cryopreserved preembryos, only 40 (27.6%) had changed their attitude regarding disposition at the 5-year mark).

That said, one might think that this level of change in preference is itself too high. If one were to imagine a universe of all enforceable contracts entered into in our society, it is quite possible that the rate of change in preference for the median contract would be below 25 percent. On the other hand, there are certainly contracts that we do treat as enforceable which have changes in preferences that are that high or higher (prenuptial contracts, for instance). My larger point, however, is that this form of head counting is only part of the equation; while the likelihood that individuals will change their minds matters, so does the need for contract in a particular domain. For the reasons I have provided above, I think contract is particularly important in this domain, such that we ought to tolerate a substantially higher risk of changed preferences than we might for other contracts. Of course, how one will calibrate this balance will depend to a great extent on the amount of paternalism in contracts one is comfortable with.

209. Susan C. Klock et al., Correspondence, *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69 (2001).

percent) changed their preferences."[210] Other elements of the Klock study, however, are less supportive of the affective-forecasting argument. The argument would be strong if it showed that people made certain systematic errors—for example, if it was found that 90 percent of the men who at Time1 wanted to allow their wives to implant preembryos in the event of divorce instead wanted them destroyed at Time2. Their results, however, do not suggest systematic tilts but instead that couples' preferences change over time in a number of different directions.[211]

All these studies have significant limitations as applied to the claims that interest us: they measure preferences regarding donation to infertile third parties, not regarding dispositional preferences as to one's partner's use in the event of divorce. These studies do not tell us anything about the strength of the preferences at either the initial or follow-up point; it may also be that initial preferences are more stable among couples who choose to contract. Finally, they collect data only from cases where the two marital couples agree both initially and at a later time, and their application to cases where their later preferences diverge—the cases that interest us—is unclear. Future studies will hopefully give us more clarity on the affective-forecasting issue, but the currently available data seems insufficient to justify making these contracts unenforceable, given the benefits of these contracts discussed above.

4. Improving Consent and Centrality to Personhood

In the previous sections I have noted several concerns about errors individuals make—cognitive and affective—that cause us to doubt the "quality" of their consent. I have suggested that some of these perceived problems are overstated, but in this section I want to dispute the notion that even if we were to take these arguments seriously, this should lead us to refuse to accept an individual's prior contractual choice rather than to treat these problems as guides to improve contractual consent.

Justice Ginsburg makes a parallel point in her dissent in the Supreme Court's most recent partial-birth abortion decision. The majority offers an

210. *Id*. at 69.

211. The authors report that:

> Thirteen of 22 couples who had initially opted for disposal now wanted either to use or to donate the embryos. 9 of 11 couples who had initially opted for donation to an infertile couple no longer chose that option: 2 couples now decided to use the embryos, 2 chose to thaw them, 3 continued storage, and 2 donated the embryos to research. Seven of eight couples who had initially planned to donate the embryos to research now chose either to use the embryos or to dispose of them.

Id.

affective forecasting argument against allowing women to choose that procedure, stating that "[w]omen who have abortions come to regret their choices, and consequently suffer from '[s]evere depression and loss of esteem.'"[212] She critiques "[t]he solution the Court approves," which is "not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks," but instead to "deprive[] women of the right to make an autonomous choice, even at the expense of their safety," a view she argues "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[213]

Here, too, there are a number of ways, short of denying contractual choice, with which we might better deal with the problems identified. To begin with, the law might impose the fairly obvious requirements that preembryo disposition contracts be in writing, that the agreement be separate from the consent form for IVF, that it make clear that it is a contract between the genetic parents and not an advance directive to the clinic, and that it be unambiguous as to the contingencies it anticipates.[214]

We could also add informational interventions such as acquainting couples with the research on the tendency of individuals to underestimate their likelihood of divorce and on affective forecasting, and discussing with couples some of the reported judicial decisions on preembryo-disposition agreements to give them a sense of the ways in which the parties' feelings as to preembryo disposition might change.[215]

Stronger (but more costly) interventions are also possible, such as

212. Gonzales v. Carhart, 127 S. Ct. 1610, 1648 (2007) (Ginsburg, J., dissenting) (quoting the majority).

213. *Id.*

214. For criticisms of the actual forms used along these lines, see A.Z. v. B.Z., 725 N.E.2d 1051, 1056–57 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 713–14 (N.J. 2001).

215. This would use a different cognitive bias, the availability heuristic (the tendency of people to overestimate the likelihood of occurrence of particularly vivid and salient events) to counteract overoptimism bias, a promising debiasing strategy but one that also has significant limits. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 209–16 (2006); Sean H. Williams, Sticky Expectations: A Cost-Benefit Approach to Persistent Irrational Optimism 25–26 (unpublished manuscript, on file with author). One countervailing consideration against using debiasing strategies in this context, even when effective, is the possibility that "[u]nrealistic optimism creates benefits" for the marriage relationship, Williams, *supra*, at 26, although the existing empirical literature has not examined the effect on relationships of "marriage-specific optimism," only the effects of "overall dispositional optimism," *id.* at 28. Even if it were demonstrated that there were robust relationship benefits from overoptimism about the chance of divorce, there would be a further question about the morality of fostering such "false consciousness" given the very tangible costs of individuals failing to protect themselves against the possibility of divorce.

requiring counseling before the recording of dispositional choices.[216] Or, to borrow from the practice of some states as to surrogacy contracts, we could impose a waiting period before the form becomes effective and not permit IVF until that period ends, or require judicial preclearance of the agreement.[217]

One can see these interventions as making the altering rule more demanding than simple contract. Such interventions will be less noxious to the antipaternalist in that they are "libertarian paternalist," because they "influence behavior while also respecting freedom of choice,"[218] and many are "asymmetrically paternalistic" in that they create "large benefits for those who make errors, while imposing little or no harm on those who are fully rational."[219]

While these interventions do much to dampen the appeal of the anticontract argument, they are not a complete panacea—debiasing strategies are far from perfect[220]—and there will continue to be at least some individuals who make contractual choices about genetic parenthood they will later regret. But this is not a problem specific to the reproductive area; in every area where contract is possible, individuals can and do make a very large number of errors of prediction at the time of contracting that they regret at the time of performance. Some of these errors will have very large effects on welfare—for example, losing my life savings because of a contract to sell wheat at particular price that turns out to have been ill informed. Yet we do not think that the law should render such contracts unenforceable.

One might object that the reproductive contract, but not the wheat contract, will impose on persons a harm "central to personhood," such that

216. Such counseling is already common in egg donation, and sometimes includes an opportunity for prospective egg donors to meet those who have already undergone the process. *See, e.g.*, Mark V. Sauer & Richard J. Paulson, *Oocyte Donors: A Demographic Analysis of Women at the University of Southern California*, 7 HUM. REPROD. 726, 727 (1992).

217. *See* N.H. REV. STAT. ANN. § 168-B:23(III) (2008) (judicial preclearance of surrogacy contracts). Other kinds of interventions used in the surrogacy agreement context, such as requiring that each party be represented by an attorney before signing the agreement, *e.g.*, 750 ILL. COMP. STAT. ANN. 47/35(a) (2008), seem to be less useful as to these cases since attorney involvement is a corrective for actual duress or inability to understand the contract, not for bounded rationality and affective forecasting errors. *But see* Robertson, *supra* note 22, at 1016 (advocating this intervention in the preembryo context).

218. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159–60 (2003)

219. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1212 (2003).

220. For a review of the research on debiasing, see generally Jolls & Sunstein, *supra* note 215.

some form of reproductive exceptionalism is warranted. Thus, Coleman argues that because these contracts implicate a right "central to most people's identity and sense of self," it ought to be inalienable.[221] This claim, however, is subject to attack from a number of vantage points.

First, exactly what does "centrality to personhood" mean and why should it matter? Is it enough that I view the object as central to my personhood or do I need more widespread societal agreement, and how much? As we have seen, some individuals are unbothered by the notion that they may have genetic children in existence with whom they have no relationship, expressing a reluctance to view them as anything other than "'other people's children.'"[222] Moreover, why should we be focused on the category of the harm rather than the magnitude of its welfare effect on us? If it were the case that, given one "get out of contract free" card, many would choose to get out of a contract in which performance would rob them of their life savings rather than a contract compelling genetic parenthood, it is not clear why the law should single out the latter contract to be unenforceable.

Second, American law has consistently refused to prevent individuals from relinquishing their rights over other items that are frequently claimed to be "central to personhood." Radin suggests one's family home, one's wedding ring, and one's blood as examples of property "closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities."[223] And yet the law does not permit me to retake my family home when I have sold it, to demand the return of my wedding ring once the pawn shop has resold it, or to demand the return of my blood once I have donated it to the Red Cross.

Consider also a bundle of objects that collectively seem very tied to personhood: my name, face, and voice. A number of states give famous individuals a right to prevent unauthorized commercial use of these things, prototypically to sell a product.[224] Nevertheless, it is beyond cavil that a celebrity can enter into an enforceable contract at Time1 to *permit* that use, notwithstanding that they may regret doing so at Time2.[225] If Susan Sarandon uses her name and likeness to record a commercial for Halliburton and contracts to allow them to air it for ten years, knowing that

221. Coleman, *supra* note 2, at 95.

222. Waldman, *supra* note 21, at 1051.

223. *See* Radin, *supra* note 110, at 959, 966–67.

224. *See, e.g.*, J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM-VLA J. L. & ARTS 129, 130–31 (1995).

225. *See, e.g.*, *id*.

it will be a major supplier of the armed forces in Iraq, the contract is enforceable; this is true even if the mounting death toll later causes her to lose confidence in the morality of the war and to view Halliburton as repugnant, and notwithstanding any negative effects on her personhood that stem from constantly seeing her name and likeness paired with the company. That she, too, may have done a poor job of affective forecasting changes nothing.

Art offers another analogy. Because of "the presumed intimate bond between authors and their works, which are almost universally understood to be an extension of the author's personhood," France, Germany, and Italy, afford artists and authors inalienable "moral rights" in their works, including "the right to decide when and how the work in question will be published (right of disclosure)."[226] While these countries prevent the advance waiver of this right by contract, at least as to a specific enforcement remedy,[227] the United States has taken a fairly hostile approach to moral rights in art. In the Visual Artists Rights Act of 1990, it gave protection only to original works of visual art not made for hire, and even for them refuses to recognize a right of disclosure.[228]

Third, and perhaps most importantly, even if we take the centrality-to-personhood criterion seriously, it is not clear that it militates against contract enforcement. An individual resisting enforcement of the contract claims he will lose something central to his personhood, but the party seeking enforcement claims she will as well if the contract is *not* enforced—that is, she will lose the ability to bring into being her genetic child. This claim is particularly powerful in cases where an individual has become infertile since cryopreservation and access to the cryopreserved preembryo represents the last chance to have another child. The law cannot

226. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355–56, 359 (2006) (internal citation omitted).

227. *Id*. at 373–74 (describing the French case Whistler v. Eden, Cass. ch. civ., Mar. 14, 1900, D. P. 1900 I, 497 (Fr.)). Even in continental Europe the right is limited in that the right ceases at the point where the art is actually delivered to the patron, *id*. at 373 (citing Whistler v. Eden, D.P. 1900, I, 497, 500), and the breaching artist is liable for damages; it is only a specific performance remedy that is not available. *Id*. at 373–74. This suggests that the real rationale may not be moral rights at all but the normal difficulties with ordering specific performance of contracts for labor. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 30 (1994); Rigamonti, *supra* note 226, at 374.

228. 17 U.S.C. §§ 101, 106A. (2000). *See also* Rigamonti, *supra* note 226, at 405–07; Brandi L. Holland, Note, *Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 VAND. J. TRANSNAT'L L. 217, 219 (2006). Even as to the moral rights the United States does recognize, the Act does not prevent advance waiver, but merely requires waivers to be done by a written instrument that identifies the work and uses to which the waiver applies, rather than a blanket waiver. Rigamonti, *supra* note 226, at 406.

avoid making a choice between the interests of these two individuals, but why should it not favor the choice the parties themselves made in advance?[229]

I have argued that courts and commentators are wrong to conclude that one should not be able to relinquish one's right not to be a genetic parent by contract. In part this error is driven by reliance on inapposite arguments connected to other sticks in the bundle of rights not to procreate. In part it is driven by a flawed analogy to judicial hostility to the enforcement of surrogacy contracts, an analogy which disregards the central importance of the transformative experience of gestational bonding in that context. I have instead argued that the threat of cognitive biases and affective-forecasting errors in this context are overstated and cannot meet the high bar necessary to justify prohibiting individuals the freedom to contract in this realm; that freedom of contract is valuable not only as the respect due for a mature and autonomous will, but also as a necessary mechanism to enable individuals to pursue reproductive goals. Rather than justifying the nonenforcement of contracts, these concerns are better understood as guides for how to improve the consent process. Of course, even with these interventions in place, there will be individuals that come to regret having entered into these contracts. But that is a risk that is endemic in all contracting, and I have argued that we should resist the claim that these contracts deserve exceptional treatment.

C. COMPROMISE: A DAMAGES-ONLY REGIME?

For the reasons noted, I support a full contractual-enforcement regime. Some authors have considered a more Solomonic solution in the surrogacy context: make contracts enforceable but permit only damages, not specific performance.[230] This is also essentially the compromise adopted by those non-U.S. jurisdictions that grant to artists moral rights in their work.[231] The equivalent solution here is to make contracts compelling genetic parenthood enforceable but permit only damages as a remedy for the failure

229. Further, to reiterate a point I made earlier, by singling out contracts compelling genetic parenthood for nonenforcement, the law seems to endorse the view that our genes really *are* central to our personhood, a view that reifies genetic determinism.

230. *E.g.*, *In re* Baby M, 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987), *rev'd in part*, 537 A.2d 1227 (N.J. 1988); Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's* Surrogacy: The Case for Full Contractual Enforcement, 81 VA. L. REV. 2377, 2390 (1995); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 1015 (1986).

231. *See supra* note 227 and accompanying text. For art, however, this might be better explained by the usual reasons the law forbids specific performance of contracts for labor. *Id*.

to perform.

Many find this kind of compromise attractive because it allows the promisor to substitute something very far removed from personhood (money) for something asserted to be central to it (genetic parenthood). Along these lines, Anthony Kronman offers a hypothetical about a drug company employee who enters into an employment contract but only later discovers that his company's drug is used to produce a lethal chemical weapon. He suggests that if forcing continued employment would be inconsistent with the "deeply-held moral convictions, the violation of which would be a serious blow to his self-respect, [the employee] should be permitted to quit," but that he should have to pay damages.[232] The reasoning is that if the employee is forced to specifically perform rather than pay damages, "his feelings of regret are likely to be intensified, particularly when performance entails some ongoing personal cooperation with the other party or subjection to his personal supervision" and he "is likely, as a result, to feel more directly tied to the goals he has repudiated and to be more painfully reminded of their continuing influence in his life."[233] By contrast, if he can substitute damages for performance he can give "his original commitment an abstract form less closely linked to the specific goals that led him to make the commitment in the first place; the edge of his regret is dulled and its disabling consequences ameliorated"—that is, "the right to depersonalize a contractual relationship is an aid to forgetfulness, which—within proper limits—is a condition of moral health."[234]

Putting aside several interesting questions as to how one would actually implement this compromise,[235] I want to make clear why we

232. Kronman, *supra* note 178, at 783–84.

233. *Id.* at 783.

234. *Id.*

235. Would expectation damages be too speculative, *see* RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981), or could we analogize to damages in tort cases like wrongful death of a fetus and loss of fertility? *See supra* text accompanying note 146. There is also a problem in that the majority of IVF cycles fail, so even had the preembryo been made available it may not have led to a successful childbirth. However, this might be dealt with by conceiving the injury as a "loss of chance" for genetic reproduction, in analogy to the theory recognized in some wrongful death cases, *e.g.*, Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474. 479 (Wash. 1983), or in analogy to the Restatement's treatment of aleatory contracts, RESTATEMENT (SECOND) OF CONTRACTS § 348(3) & cmt. d. (discussing recovery for a "chance of winning"). If expectation damages were a problem, using a liquidated damages clause, *see id*. § 356(1), may be a possible solution, as would granting reliance damages, *see id*. § 349. There is a further question about the duty to mitigate damages from breach of contract. It seems unlikely that courts would treat adopted children as a mitigative substitute given that they are not genetically-related and tend to be older. Requiring a still-fertile individual to seek out a sperm or egg donor to mitigate damages is more plausible but still seems unlikely, and perhaps we can

should reject this approach. Contracts relating to frozen preembryos seem like the paradigmatic case where specific performance is appropriate. These contracts cover unique subject matter, they do not represent a case where it will be difficult to determine if the contract has been performed, and, as discussed above, these contracts do not implicate the concerns about judicial supervision that personal-services contracts implicate.[236]

Moreover, if "the law can give the injured party exactly what he would have had if the wrongdoer had acted properly. . . . [w]hy shouldn't it do so?"[237] Under the "indifference principle," damages should be set in an "amount necessary to leave the plaintiff absolutely indifferent, in subjective terms, between having the defendant breach and pay damages or having the defendant perform."[238] But in this context, at least for some cases, there may be no amount of money that we could pay the promisee to choose to forego performance.[239] This is clearest in cases where nonperformance means the impossibility of ever having another genetically related child and for individuals who believe that it is a sin to destroy or indefinitely freeze preembryos—for them, damages may be insufficient.

Moreover, even if there existed a damages amount that could satisfy the indifference principle, we would expect it to be very large, and the breaching party will likely be at least partially judgment proof such that full compensation will not be achieved.[240] Further, in the context of now-divorced parties, money damages may come from the pool of funds that would be available for alimony (and child support, if the parties had previous children).[241]

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analogize to the case law that developed around breaches of contracts to marry (when those contracts were still recognized) holding that "the fact that the plaintiff in a breach of promise suit has subsequently married another cannot be considered in mitigation of damages resulting from the breach of the marriage contract." J.P. Ludington, Annotation, *Measure and Elements of Damages for Breach of Contract to Marry*, 73 A.L.R.2d 553, 601 (1960). If this form of mitigation were required it would lead to difficult questions about whether the substitute provider must have similar characteristics (and which ones).

236. *See, e.g.*, Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 1016, 1021 (2005).

237. *Id*. at 1019. This is the so-called "bargain principle." *Id*. at 1018.

238. *Id.* at 979 (quoting Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 (1988)).

239. *Cf.* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2337 (1995) (making this point in the context of surrogacy).

240. *Cf. id*.

241. A different objection that I do not find persuasive is that such a regime would problematically commodify the value of having genetically related children. *Cf*. Shultz, *supra* note 181, at 361 (making a similar argument as to damages for breach of a surrogacy agreement). This is a form of the larger anticommodificationist claim that putting a dollar value on certain goods is value

For these reasons, a damages-only regime is inferior, in this context, to one of full-enforcement. That said, it may be a second-best solution if political or other forces make a full-enforcement regime impossible.

VI. CHOOSING A DEFAULT RULE IN THE PREEMBRYO CASES

In Part V, I made the case for private ordering—that a party should be allowed through contract to waive in advance his or her right not to be a genetic parent.[242] However, as we have seen from the case law, in the preembryo context some parties may fail to contract. In this part, I take up what courts or legislatures should do in that situation.[243] In other words, what should the default rule be?[244] Relying primarily on the majoritarian default approach, I endorse non-use as a general default rule. I also examine whether a system might do even better by adopting a more sophisticated default—for example, by permitting an individual to use the

denigrating and does violence to the way we think these goods are best characterized, a claim that I and others have critiqued. *E.g.*, FABRE, *supra* note 105, at 135–41, 190–91; Cohen, *supra* note 16, at 692–701. Even on its own terms, however, that argument does not clearly require rejection of a damages-only remedy here. This is not like selling a child, a paradigmatic exchange the anti-commodificationist wants to block. Selling a child expresses an attitude of "value equilibrium" or even-steven symmetry between the things being exchanged on both sides of the transaction, that one values the child as much and in the same mode as one values the amount of money. *See* Cohen, *supra* note 16, 693–705. By contrast, the same failures of the indifference principle mean that collecting damages for breach of a contract to provide preembryos does not indicate that one believes there is value equilibrium between the damages award and the preembryos one has been denied. It is more like collecting $5 million as tort damages for the wrongful death of a child: it does not express that one would trade the $5 million for the child. *Id*. at 703–10. S*ee also* MARGARET JANE RADIN, CONTESTED COMMODITIES 184–205 (1996). This anticommodification argument also seems to prove too much in that it would require one to forbid (and police) the making of side payments to avoid pursuing an action for breach, a sort of specific-performance-only regime.

242. Or, more accurately, we might call the requirement "contract plus," because a number of interventions I suggested would improve consent. *See supra* text accompanying notes 213–19.

243. Another way of putting the issue is that if we treat individuals as having a baseline right not to be a genetic parent without any consent, we have at least two options in setting the "altering rule," the rule that tells "private parties the necessary and sufficient conditions for contracting around a default." Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 6 (2006). *See also* Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1810 (2007) (invoking the similar idea of a "transformation rule," a rule that specifies the "conditions for transformation of the legal arrangement with respect to either . . . the brand of legal entitlement or its enforcement rule"). Part V establishes that contract is a sufficient altering rule, and now the question is whether it is a necessary one. We could have an altering rule of forfeiture, that one has contracted around the default without contracting, but by merely cryopreserving preembryos in the first place, as two courts have suggested. *See supra* note 20.

244. There are further questions about what the default rule ought to be for nonreproductive uses of gametic material, such as donation of preembryos to research. These are interesting issues, *see, e.g.*, Russell Korobkin, *Autonomy and Informed Consent in Nontherapeutic Biomedical* Research, 54 UCLA L. REV. 605, 626 (2007), but because they do not implicate rights not to *procreate*, I do not explore them here.

preembryos when he or she would otherwise not be able to have any genetic children—although I find the case for such a rule less determinate.

There are two predominant theories as to how to set default rules: information-forcing (or penalty) and majoritarian defaults.[245] A third approach, the "policy-supporting" default approach, is more controversial but also has some support.[246]

Under the information-forcing, or penalty, default approach, the default is set against the interests of the more-informed party, forcing that party to reveal private information in the process of contracting around the default rule.[247] It is unclear which general default rule this approach would endorse in the context of preembryo implantation. One might think that the key piece of information is how much one will be bothered by unwanted genetic parenthood and that this information is in the hands of the individual who will face the unwanted genetic parenthood. Setting the default to allow use would force the objecting parent to reveal that information in order to contract around the default. Given some of the concerns about affective forecasting discussed above, however, we might have some doubt about the accuracy of that individual's information on the subject. Moreover, we could run the argument the other way and suggest that the key piece of information is how important it is to the party seeking use of the preembryos that he or she be able to do so. One might instead try for a discussion-forcing rather than information-forcing default to try to get the parties to talk about how they really feel on the subject, but it is not clear what default is most likely to effectuate that result.[248]

The policy-supporting approach suggests that the default rule should be set in a way that supports a larger public interest (in the sense of positive externalities) while still enabling individuals to contract around that default.[249] The policy-supporting approach takes advantage of the cognitive phenomenon behavioral law and economics terms "status quo bias," the

245. *E.g.*, Russell Korobkin, *"No Compensation" or "Pro Compensation":* Moore v. Regents *and Default Rules for Human Tissue Donations*, 40 J. HEALTH L. 1, 14–18 (2007).

246. *Id*. at 18–21.

247. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE. L.J. 87, 97 (1989); Korobkin, *supra* note 245, at 16.

248. Might it be possible to set a default that would create incentives for the IVF clinic, a repeat player in these interactions, "to inform the couple about the default rule and to encourage full and frank discussions that would likely minimize post-divorce disputes," by setting the default at destruction and thereby depriving the clinics of preembryos for research use or availability for other individuals to "adopt"? *See* Cohen, *supra* note 185, at 708. It is unclear how strong the IVF clinic's incentive is or how sizable an effect this would have in practice, but perhaps this provides an additional reason to favor the non-use default.

249. Korobkin, *supra* note 245, at 18.

fact that default rules are frequently sticky even when transaction costs are low.[250] The idea is that the defaults always have to be set in some way, and we can set them in such a way that is best for others while still respecting an individual's freedom of choice through contract.[251]

One such policy, a proadoption one, would suggest that the default be non-use. Although the supply of nondevelopmentally delayed newborns available for adoption in the United States is low, the number of older children and special needs children waiting for adoption is quite high.[252] Some think that the availability of reproductive technology has diminished the number of adoptions.[253] As far as I am aware, there has been no empirical work demonstrating the truth of this claim or quantifying the effect size, and I hope to examine the issue in future work.[254] But even assuming a statistically significant and large effect could be demonstrated, we would have a further question as to how to balance the interests of adopted children with the happiness of individuals denied genetic children. The preference for genetic children over adoptive children is not a naked preference for the genetic bond; children available for domestic adoption in America differ in several other dimensions from those one might have through assisted reproduction: for example, they tend to be older, rather

250. *E.g.*, *id.* Two good examples of status quo bias in default rules are the empirical finding that car owners will stick with either no-fault or fault-based insurance depending on what the default law of the jurisdiction is, and the finding that with workplace-sponsored 401Ks, more workers will invest "if they must opt-out of participation than if they must opt-in, even when opting in or out is easy and costless." *Id*. at 19 (citing David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 OSGOODE HALL L.J. 737, 747 (1992); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149, 1149 (2001)).

251. Korobkin, *supra* note 245, at 18. *Cf.* Sunstein & Thaler, *supra* note 218, at 1162, 1187–88 (making a similar point in the context of consumer protection). To be sure, the policy-supporting approach is not endorsed by everyone, with some rejecting on philosophical grounds the use of defaults to influence behavior to the benefit of *third parties*. This is an interesting political philosophical debate that I will not fully engage here.

252. *See, e.g.*, SPAR, *supra* note 6, at 174–89 (discussing the population of adoptees available from U.S. foster care and comparing it to those available for international adoptions); *id.* at 176–78 (noting that adoption of older and special needs children "[s]adly . . . is the one area of adoption that does not suffer from a lack of supply"); Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1179 (2004) (noting "the shortage of non-special needs, American-born children available for adoption"). *See also* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2008), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf (collecting demographic information on children in U.S. foster care in 2006).

253. *See, e.g.*, BARTHOLET, *supra* note 118, at 24–38; Martha A. Field, *Surrogacy Contracts—Gestational and Traditional: The Argument for Nonenforcement*, 31 WASHBURN L.J. 1, 8 (1991).

254. In a future project, *The Adoption and Reproductive Technology Trade-Off?*, I plan on examining the issue in part by looking at the introduction of insurance mandates covering IVF in certain states and the effect they have had on adoption rates.

than newborns, and there are many who are developmentally delayed or psychologically scarred from early rearing in difficult conditions.[255] The vast majority of available adoptees are also nonwhite, a difference that may matter to many white couples.[256] When polled ex ante, most individuals have a sizeable preference for children genetically related to them over adopted children,[257] but it is not clear whether these attitudes carry forward ex post, or, as has been demonstrated with quality of life measures related to disability, whether individuals instead "adapt" their evaluations to some extent.[258] Moreover, to the extent we think there is some obligation to adopt, it is not clear why this obligation should fall on the shoulders of the infertile rather than being shared equally among all members of society. Indeed, on Rawlsian or prioritarian type grounds, one might think it particularly unfair to single out those who are infertile, and already worse off in that respect compared to society at large, to shoulder the obligation.

A second policy, call it "pronatalist," pushes in the opposite direction. As discussed in Part III, although there is pervasive disagreement on the matter, a number of individuals believe that preembryos are persons, or are at least personlike, and can make a moral claim to come into existence. I have suggested that there is sufficient doubt as to the truth of the claim to allow it to justify a rule requiring individuals to implant (or make available for "embryo adoption") preembryos over both genetic parents' objections, or even an immutable rule that could not be contracted around that requires the availability of a preembryo for implantation whenever one party wants to use it over the objection of the other party. However, the required threshold of certainty may be different to justify merely setting the default to allow preembryo implantation, a sort of "choose life" default, as an attempt to accommodate the pro-life position. Whether this was the right approach to take would depend on how certain we as a society were about

255. *E.g.*, SPAR, *supra* note 6, at 176–77; Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1435–39 (2006).

256. *See* Maldonado, *supra* note 245, at 1431–34.

257. *See, e.g.*, Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1153 (2003) (noting the results of a 2002 survey finding that "only 75 percent believed that adoptive parents love their children as much as they would have loved their biological children, and fewer (less than 60 percent) believed that adoptive parents receive the same amount of satisfaction from raising an adoptive child as from raising a biological child") (citing HARRIS INTERACTIVE, INC., NATIONAL ADOPTION ATTITUDES SURVEY: RESEARCH REPORT 6, 20, 37 (2002), *available at* http://www.adoptioninstitute.org/survey/Adoption_Attitudes_Survey.pdf).

258. *E.g.*, Paul Menzel et al., *The Role of Adaptation to Disability and Disease in Health State Valuation: A Preliminary Normative Analysis*, 55 SOC. SCI. & MED. 2149 (2002). *But see* MARK S. STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, 25–30 (2006) (arguing that accounts of adaptation are exaggerated). As in the disability literature, there are interesting normative questions of which preferences (adapted or unadapted) to "count."

the moral issue, how much we thought it would matter if we got it wrong, and how important we thought it was to accommodate the pro-life view.[259]

It seems to me that reasonable people will disagree on all of these issues, as well as on the further issue of how to weigh either of these policies in relation to the interests of the contracting parties. For that reason, the policy-supporting approach is unlikely to yield a clear-cut answer.

That leaves the majoritarian approach, in which the law sets the allocation of rights in the way that most parties would have done had they explicitly addressed the question. This approach has the dual benefit of saving the parties the transaction costs of contracting, and, because it "most often provide[s] parties what they would have explicitly negotiated for, [it] makes them jointly better off than any other allocation of rights."[260] When economists speak of majoritarian defaults, they usually mean the default rule that is predicted to maximize the welfare of the contracting parties.[261]

259. *Cf.* BLAISE PASCAL, PENSÉES 211–14 (Roger Ariew ed. & trans., 2005) (1670) ("Pascal's wager" argument for acting as though one believed in God). To make a parallel point, a number of courts and commentators have suggested that even if we were certain that preembryos were not persons, they might nonetheless be accorded a sort of lesser moral status and be due "special respect" because of their potentiality for personhood or their symbolic association with human life. *E.g.*, Davis v. Davis, 842 S.W.2d 588, 596–97 (Tenn. 1992); Coleman, *supra* note 2, at 67–68. While that status would be insufficient to justify a prohibition on destruction or a rejection of private ordering, it too might be deemed sufficient to justify setting the default at preembryo use.

260. Korobkin, *supra* note 245, at 14. In this case (as in all of these cases) one might respond that to the extent we err in picking the welfare-maximizing default, the individuals can always renegotiate after the fact such that all that is at stake is transaction costs—if I really value access to the preembryos more than you value the entitlement not to be a genetic parent, I can purchase it from you, making both of us better off. The problem is that given that the conflict is occurring postdivorce, it is probable that acrimony will make these welfare-enhancing trades unlikely to occur. *See, e.g.*, Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 212 (2002). This acrimony also raises the possibility that an individual will oppose reproductive use of the preembryos by his ex-spouse not because of an aversion to unwanted genetic parenthood, but purely out of spite. Even if one thought this motivation was problematic, it is not clear that the legal system has ready tools to identify and separate out these kinds of cases.

261. Korobkin, *supra* note 245, at 14–15. Related to the majoritarian approach, but more deeply rooted in a consent rather than economic theory, is the "conventionalist" approach to setting defaults that sets the default to match "the commonsense expectations that are implicit in the parties' silence in the absence of any bargaining." Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 893 (1992). This approach also supports setting a default rule at non-use, at least in the preembryo cases, in that it seems plausible that most individuals understand the act of cryopreserving preembryos as making them available for use in the course of that (and only that) marriage.

There is some (weak) empirical support for the claim that non-use would be the conventionalist default from studies showing that only a minority of patients favor reproductive uses of their cryopreserved preembryos. *See, e.g.*, Karin Hammarberg & Leesa Tinney, *Deciding the Fate of Supernumerary Frozen Embryos: A Survey of Couples' Decisions and the Factors Influencing Their*

As Part IV suggested, it seems that the interest in avoiding unwanted genetic parenthood will ordinarily be greater than the interest in becoming a genetic parent over the objection of the other genetic parent, as long as one can purchase or acquire reproductive assistance elsewhere.[262] Thus, non-use appears to be the majoritarian default. Because it is only a default rule and because the costs of contracting around it are low, the rule is both "libertarian paternalist," because it influences behavior in such a way as to help people choose what is most likely to be in their best interests while permitting them to choose otherwise,[263] and it is "asymmetrically paternalistic" in that it creates "large benefits for those who make errors, while imposing little or no harm on those who are fully rational."[264]

But might we maximize welfare even better with a more sophisticated (or tailored) default? Consider the facts of the European Court of Human Rights case of *Evans v. United Kingdom*, where a husband and wife cryopreserved preembryos in anticipation of the wife's undergoing treatment for ovarian cancer, necessitating the removal of her ovaries and thus resulting in the impossibility of her producing more eggs for reproduction.[265] After removal of the woman's ovaries, the couple

Choice, 86 FERTILITY & STERILITY 86, 88 tbl.2 (2006) (survey of 311 couples at one IVF clinic finding that only 16% wanted to donate embryos to another couple compared to 30% who wanted to discard and 42% who wanted to donate the embryos to research); Klock, *supra* note 209, at 69–70 (survey of 52 couples at one IVF clinic finding that only 13% chose to donate them to an infertile couple, compared to 33% choosing to discard, 29% continuing storage, 12% using them immediately, 10% donating to research, and 4% who were undecided); Anne Drapkin Lyerly & Ruth R. Faden, *Willingness to Donate Frozen Embryos for Stem Cell Research*, 317 SCIENCE 46, 46–47 (2007) (finding that of 1020 U.S. respondents who had cryopreserved preembryos currently in storage, only 22% indicated that they "were somewhat or very likely to donate them to another couple intending pregnancy," with a comparable percentage "likely to thaw and discard them," and 49% "were somewhat or very likely to donate their embryos for research purposes.").

To be clear, these studies concern preferences for reproductive use of fertilized preembryos by *strangers*, and their application to spousal-use preferences is uncertain. Moreover, there may be a divergence between the results from polling preferences and the results that actual bargaining may bring about—the polling does not take into account the strength of preference, and one partner might easily cede a weak preference to another partner's much stronger one. More empirical work would be desirable to support the conventionalist account.

262. In Lon Fuller's classic article, *Consideration and Form*, he suggested that certain contract formalities, such as the writing requirement, serve a cautionary function by forcing the parties to undertake a minimal amount of reflection before being bound by a contract. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). *See also* Ayres & Gertner, *supra* note 247, at 124 (discussing the cautionary function of contract in Fuller's work). To the extent that, as suggested by some of the authors discussed in Part V, paternalistic impulses should lead us to want to protect individuals from too lightly assuming the burden of unwanted genetic parenthood, setting a default at no-use is also desirable in that it serves this cautionary function.

263. *See* Sunstein & Thaler, *supra* note 218, at 1162, 1187–88.

264. Camerer et al., *supra* note 219, at 1212.

265. Evans v. United Kingdom, 2007 Eur. Ct. H.R. 264, ¶¶ 13–17.

separated, and the man sought to withdraw his consent to the use of the preembryos in accord with the provisions of the U.K. Human Fertilisation and Embryology Act of 1990, which allows for the withdrawal of consent by either party up until implantation.[266]

While it seems that the interest in avoiding unwanted genetic parenthood is greater than the general interest in access to *particular* genetic material, one might think that the balance between the interests is different when not having access to the preembryos makes it impossible to have *any* genetic children at all. Thus, we might want the general default rule to be no use without contemporaneous consent, but to have an exception (or a default sub-rule) for such infertility cases.

The courts that have considered this particular situation have reached different conclusions: In *Evans*, the grand chamber of the European Court of Human Rights stated it was unable to conclude that the interest in becoming a genetic parent outweighed the interest in avoiding genetic parenthood; it therefore found that the British Parliament's decision to privilege the right not to be a genetic parent fell within the "margin of appreciation" it afforded to it under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[267] By contrast, a dissenting opinion in the case thought that the interest in becoming a genetic parent clearly trumped because the "effective eradication of any possibility of having a genetically related child" represented "a disproportionate moral and physical burden on a woman."[268] The Israeli Supreme Court, sitting on rehearing, reached the same conclusion as the *Evans* dissent in the similar case of *Nahmani v. Nahmani*, finding that parenthood is "a basic value for the individual and society" such that "[t]aking parenthood away from a person is like taking away that person's soul."[269]

Which court got it right? There is nothing definitive that we can point to, but it seems plausible to me that the impossibility of having genetic children reduces someone's welfare more than having unwanted genetic

266. *Id*. ¶¶ 15–19, 37–38. At the time of cryopreservation, the couple was apparently informed about the provision of the law allowing the withdrawal of consent. *Id*. ¶ 15. The woman challenged the Act's provisions authorizing withdrawal of consent as violative of various provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id*. ¶¶ 1, 3.

267. *Id.* ¶¶ 81, 90.

268. *Id*. ¶¶ 6, 13 (joint dissent of Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele).

269. Waldman, *supra* note 3, at 99–100. I quote from Waldman's translation of the passage, since a full English translation of the decision, CFH 2401/95 Nahmani v. Nahmani [1996] IsrSC 50(4) 661, is not currently available.

children raised by an ex-spouse;[270] that is, it seems plausible that if forced to choose between suffering one or the other, most people would choose not to go without genetic children. This conclusion seems particularly likely as to the subpopulation who have undergone IVF: adoption was open to the couple to begin with, and they instead chose IVF, notwithstanding that it is very expensive and poses significant health risks. If this conclusion is right, then the majoritarian default approach should permit preembryo use when it will otherwise be impossible for one party to have genetic children. On the other hand, there is enough uncertainty here that perhaps this is the ideal place for experimentation among different jurisdictions, with some adopting a pure non-use default and some adopting a subrule for these kinds of cases.

Indeed, jurisdictions could experiment with still more sophisticated default rules. For present purposes, let me just highlight two situations that present even harder cases for tailoring: prior genetic children and probabilistic infertility.

The *Evans* appellant had no genetic children. What about a now-infertile woman who already has one genetic child, such that loss of access to the preembryos means only that she cannot have others? How does her interest compare to the interest of someone in avoiding unwanted genetic parenthood?[271] Should the answer change if she already has three, or seven, genetic children rather than just the one? To put the question another (and perhaps jarringly economic) way, do we think there is some idea of diminishing marginal utility of having genetic children? My own sense is that the balance of interests favors use when an individual has no genetic children but not when he or she has more than one, but this is admittedly somewhat arbitrary. One might also argue that in cases where the individual already has a genetic child from that marriage, unwanted genetic

270. Is the cause of the infertility relevant? Would it be desirable to differentiate between the appellant in *Evans* who has become infertile through no fault of her own and someone whose infertility is caused by "bad" behavior? The question of assigning "responsibility" for poor health states is a very controversial one, and there is an emerging literature debating when it is appropriate. *See, e.g.*, Daniel Wikler, *Personal and Social Responsibility for Health*, 16 ETHICS & INT'L AFF. 47 (2002). Putting to one side when it would be appropriate to consider responsibility for health states in other settings (such as setting insurance premiums, determining Medicaid benefits, or allocating organs), tailoring the default rule to "good" behavior here seems a poor choice; from the point of view of deterring bad health behavior, this seems like a very attenuated stick, and it seems costly and undesirably invasive (if even possible) for courts to be making these kinds of inquiries into the causes of infertility.

271. Thus, in the prior Chamber's decision in *Evans*, two justices who would have favored the mother's right to use the preembryos were careful to note that that the balance of interests "might lead to a different conclusion if the applicant had another child." Evans v. United Kingdom, 2006 Eur. Ct. H.R. 200, ¶ 6 (Traja, J., & Mijović, J., dissenting). *See also id.* ¶ 9.

parenthood is likely to be particularly burdensome because the strength of the attribution of parenthood will be very high, especially as to self- and offspring attribution: in visiting the child from the marriage to whom he is *both* the genetic and legal parent, the father will be unable to avoid contact with the child born from postdivorce implantation for whom he is the genetic, but not legal, parent.[272]

A different kind of problem arises from the issue of probabilistic infertility. In the *Evans* case, removal of the ovaries meant that the impossibility of having genetic children was certain. In many, if not most cases, however, infertility is a more probabilistic matter. As discussed above, fertility declines with age. This effect is especially sizeable for women who suffer from fertility problems, and the key determinant is the age of the eggs rather than the age of the woman.[273] Should the default rule admit an exception for cases where having further genetic children is only improbable and not impossible? One might think it quite difficult to set the correct probability threshold and to judicially administer such a standard. On the other hand, these problems may not be insurmountable; perhaps one could use population age-related estimates from the Centers for Disease Control as a starting point, supplemented with expert testimony about a particular patient's chances?

An alternative possible solution to the problem of probabilistic infertility would be to adopt a sort of "wait and see" approach—that is, to require women to attempt IVF several times without the cryopreserved preembryos, and to allow their use only once those other attempts have proven unsuccessful. We would still have a problem in specifying how many unsuccessful attempts are required.[274] We would also have a problem of judicial supervision in that the court would be required to monitor and determine whether a party made the requisite number of attempts. A different problem with wait and see is that the patient is herself getting older through each successive attempt such that she may reach an age where we think it undesirable for child-rearing purposes for her to

272. This reasoning would not, however, be valid in cases where the prior genetic child stemmed from a prior marriage; for example, if Abigail has a genetic child with Ben, her first husband, but wants to use preembryos fertilized with Mark, her second (now ex-) husband.

273. *See supra* notes 161–62 and accompanying text.

274. And what of women who cannot afford multiple attempts? On the one hand, both cost barriers and biological barriers to having genetic children are equally real as obstacles. On the other hand, we might think that cost barriers are faced by all women seeking to use reproductive technology, and demand a more general solution such as including IVF in insurance mandates, as some states have done. *See supra* note 124.

conceive.[275]

In sum, the majoritarian approach gives us good reason to select a general default of non-use. The case for a still more tailored rule is a good deal less certain, and this seems like an area where using the states as laboratories is particularly desirable.

VII. CONCLUSION

To grapple with how the law ought to resolve the new dilemmas posed by reproductive technologies, I have argued that it is essential to unbundle the possible rights not to be a genetic, gestational, and legal parent, and to recognize that the three rights (and their attributes) do not stand and fall together. I have shown that we cannot move from the discourse surrounding the rights not to be a gestational and legal parent, centered on bodily integrity and best interests, to a justification for a right not to be a genetic parent. I have instead suggested that such a right is best understood as a way of protecting against what I call attributional parenthood, a convention that attaches genetic parenthood to parenthood writ large.

Using this framework, I have argued for the recognition of the right not to be a genetic parent in the no-consent cases, primarily on welfarist grounds. At the same time, I have rejected the claim, common among courts and commentators, that this right should not be capable of advance waiver. I instead conclude that we should permit advance waiver through contract, with several interventions aimed at improving contractual consent. I have suggested that the default ought to be set to forbid the reproductive use of frozen preembryos, perhaps with a default subrule permitting the reproductive use in cases where, absent access to the preembryos, an individual will be unable to have any genetic children.

In the course of this argument, I have parenthetically noted some related legal questions: What property rights should an individual have as to scientific uses of their tissue and their genetic information? How should the law treat posthumous reproduction—for example, recent proposals that soldiers freeze sperm before going off to war? What about cloning? Stem cells? Should we permit contracts relating to abortion? Much of what I have said here is suggestive of the approaches the law should take on these issues, but I hope to more fully develop those answers in future work.

275. Many U.S. clinics limit the providing of IVF services to women under age forty. *E.g.*, BARTHOLET, *supra* note 118, at 192. Whether these age restrictions are justified is a contentious issue; for present purposes I just want to note that "wait and see" may move some women from being within range to being outside of the permissible age range for particular clinics.