

---

## RESPONSE TO *BIRTH RIGHTS AND WRONGS*

JANET DOLGIN\*

*Birth Rights and Wrongs*<sup>1</sup> challenges limitations in the law's response to tort claims by people who have suffered reproductive wrongs. Arguing for a more flexible understanding of tort law in response to reproductive wrongs, Professor Fox offers a multitude of insights about the implications of negligent errors that have resulted in non-birth (reproduction deprived), unwanted birth (reproduction imposed), and the birth of children who upset parental hopes and expectations about a child's physical or mental condition (reproduction confounded).

This comment employs an anthropological lens to consider the implications of the merging of values undergirding visions of family (including reproduction) with the values of the marketplace. A social transformation, manifest for more than a half-century, has conflated values presumed separate by the worldview that served as a foundation for the Industrial Revolution—those of the family, on the one hand, and those of the marketplace, on the other. Concerns about that transformation, especially with regard to the parent-child relationship, explain some part of judicial reluctance to remedy reproductive “wrongs.”

By the end of the twentieth century, and despite pockets of significant dissent, Western society had largely accepted an understanding of adults within families that encompassed marketplace values. Adult spouses and partners were increasingly viewed as autonomous individuals, able to negotiate the terms of their own relationships—and, equally, to re-negotiate those terms. Society has been less ready to apply that view to children and to the parent-child relationship.

More broadly, by the second half of the twentieth century, marketplace values, identified in the nineteenth century by Sir Henry Maine as those beholden to “contract,” began to appear in social arenas previously separated from the marketplace—preeminently, the domain of family, an arena that Maine characterized through reference to relationships of “status.”<sup>2</sup> That conflation challenged central presumptions about family and personhood, including gender, that characterized Western society for over two centuries after the start of the Industrial Revolution. A world grounded in contract assumes negotiated relationships that endure only as long as those involved choose for them to

---

\* Jack and Freda Dicker Distinguished Professor of Health Care Law and Professor, Maurice A. Deane School of Law at Hofstra University; Professor of Science Education, Zucker School of Medicine at Hofstra/Northwell.

<sup>1</sup> DOV FOX, *BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW* (2019).

<sup>2</sup> HENRY MAINE, *ANCIENT LAW* 179 (1939).

endure. In contrast, a world grounded in status supports fixed social roles and hierarchical relationships that, once formed, are expected to endure. Particularly in the United States, until the second half of the twentieth century, the presumed differences between home and work were understood through the contrasting metonyms of money and love.<sup>3</sup>

The separation of tort law from contract law, and then the expansion of successful tort claims into new spheres (those, for instance, of “libel, slander, defamation, intentional infliction of emotional distress,” and the “right to privacy”)<sup>4</sup> preceded society’s open readiness to envision family relationships, at least those between adults, through the presumptions of the marketplace. The readiness of American tort law to respond to negligence that results in reproduction deprived, imposed, or confounded, depends in large part on the readiness of society broadly to view the parent-child relationship in similar terms.

Many of the disputes occasioned by assisted reproduction reflect similar ambivalence and uncertainty about shifts in the familial domain. These cases have involved intending parents, surrogates, or gamete donors who entered into contracts in contemplation of the conception and birth of a child. Responses to these disputes have reflected the level of society’s readiness to define the creation—though not necessarily the implementation—of the parent-child relationship through marketplace values. While families may be created in the marketplace—involving, for instance, payment to and contracts between surrogate mothers and intending parents—it is not yet clear whether and how changes in the mode through which families are created affects forms of interaction within families, specific relationships, and understandings of personhood. It remains similarly unclear whether, and if so how, compensation for those suffering from reproductive wrongs will affect family relationships and, more particularly, relationships between parents and children.

In the realm of assisted reproduction, social analysts and psychologists have entertained such questions at least since the *In re Baby M*<sup>5</sup> case, considered by courts in New Jersey in the late 1980s. The case involved a custody dispute between a so-called “traditional” surrogate, Mary Beth Whitehead, and the baby’s intending (genetic) father, William Stern and his wife, Elizabeth Stern, the intending mother.<sup>6</sup> The New Jersey trial court held for the Sterns in almost

---

<sup>3</sup> In short, as money was to work; so love was to home. David Schneider, *Kinship, Nationality, and Religion in American Culture: Toward a Definition of Kinship*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 66 (Janet Dolgin, David Kemnitzer & David Schneider eds., 1977). Schneider’s suggestion that love was to family as money was to work understood “love” as an idea, often difficult to locate inside actual familial relationships.

<sup>4</sup> Fox, *supra* note 1, at 57.

<sup>5</sup> 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff’d in part, rev’d in part*, 537 A.2d 1227 (N.J. 1988).

<sup>6</sup> *See id.* The case is discussed in Professor Fox’s book on pp. 111-12 and 150.

every regard. It provided for the termination of Whitehead's maternity, granted William Stern full custody of the child, and provided for Elizabeth Stern to adopt the baby.<sup>7</sup> The state's highest court overturned almost every aspect of the lower court's decision, invalidating the contract entered into by the parties, restoring Whitehead's maternal rights, and voiding Elizabeth Stern's adoption of the child.<sup>8</sup> Yet both courts, despite their profound disagreements about applicable law and about the proper outcome, favored a similar vision of family and of the parent-child relationship.<sup>9</sup> Both courts rejected an understanding of family that depended on marketplace values. And both courts sought to buttress traditional family values, including loyalty, fixed statuses, and enduring relationships. Of particular significance, the lower court's view of the manner in which families could (or should) be created did not harmonize with the court's underlying vision of the ideal family, a vision almost identical to that of the state supreme court which expected families to reflect the presumptions of a world grounded on status, not contract.<sup>10</sup>

Over two decades ago, and a little more than a decade after *Baby M*, people began to offer significant amounts of money to egg donors with specific traits. One couple placed an advertisement in the newspapers of several elite universities offering to pay \$50,000 for the ova of a tall, smart egg donor.<sup>11</sup> Many women responded to the advertisement. Interviewed on CNN, the lawyer for the couple who placed the advertisement explained that the couple, though themselves tall and smart (thus presumptively explaining their interest in a tall, smart child), would love any child produced through the donated ova, even if the child were short "or not so smart."<sup>12</sup> Even here, the lawyer seemed to proclaim, the values of the traditional family trumped those of the marketplace.

The lawyer's statement spawns a slew of questions: would this family be diminished, despite the parents' presumptive love for any child, by the parents' having paid for the ovum that led to the child's conception, whether or not the child satisfied the couple's pre-conception wishes? Under what circumstances does an adult—a parent—view a child as his or her *own*? Are love and money now the currencies of both the home and the marketplace? And, if so, how does that amalgamation affect relationships between parents and children, if at all?

These questions are occasioned by agreements providing for payment to gestational mothers and by a couple's readiness to pay tens of thousands of

---

<sup>7</sup> *In re Baby M*, 525 A.2d at 1132, 1159.

<sup>8</sup> *In re Baby M*, 537 A.2d at 1234, 1240.

<sup>9</sup> See Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 536-37, 541 (1990).

<sup>10</sup> See MAINE, *supra* note 2, at 179; Dolgin, *supra* note 9, at 517-25.

<sup>11</sup> See Irene Sege, *A \$50,000 Dilemma on Campus*, BOS. GLOBE, Mar. 6, 1999, at A1; see also Janet L. Dolgin, *Choice, Tradition, and the New Genetics, The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 523 (2000).

<sup>12</sup> Dolgin, *supra* note 9, at 523; *CNN Talkback Live: Buying the Perfect Human Egg* (CNN television broadcast Mar. 12, 1999) (transcript no. 99031200V14).

dollars for ova from women with particular traits. They are also occasioned, though less directly and perhaps less transparently, by negligence cases grounded on claims about reproductive wrongs. Does receipt of—or even recognition of the right to seek—compensation for reproduction confounded or reproduction unwanted alter relationships between a child and others, including parents, grandparents, and siblings? And if so, is that problematic?

At best, answering these questions will take years of lived experience and of nuanced, well-designed research. Even then, research results are likely to be equivocal. Society remains uncertain about the implications of defining aspects of the parent-child relationship through the presumptions of the marketplace, and it remains ambivalent about shifts in family relationships—especially those between parents and children—that increasingly apply the presumptions of the marketplace to relationships within families. That said, families have always changed and will continue to change. Analysis of these changes will elude truly objective assessment because, inevitably, such analyses flow from the analyst's vision of family relationships and personhood.