

## Public Policing of Intimate Agreements

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**ABSTRACT:** Decisions like the one to bear or beget a child, to enter into or disentangle oneself from a long-term relationship or marriage, or to allocate resources and duties within a family unit are often treated as core choices constitutive of a person's identity. But many of these individually constitutive decisions necessarily involve the cooperation of others. One might therefore suspect that contract law—which operates to fix parties' mutual commitments—would be a useful tool for securing greater certainty regarding these important decisions. Nevertheless, courts have often refused to enforce agreements between intimates concerning such decisions on the grounds that they violate public policy.

This Article criticizes the use of the public policy doctrine to avoid enforcement of intimate agreements. It begins with a concrete example of how courts have used the public policy doctrine to invalidate agreements regarding the use of assisted reproductive technologies, a realm in which uncertainty can result in tragic consequences for the users of those technologies. The Article demonstrates that the appearance of the public policy doctrine in this context is just the latest instantiation of a longstanding practice of policing the border between the market and domestic spheres. The extension of the public policy doctrine to the reproductive realm perpetuates the doctrine's historical effects—namely, the perpetuation of gender roles that tend to subordinate women—even as it cloaks courts with power to regulate who can reproduce and in what circumstances. This judicial policing of the family burdens minority family units, such as gay and lesbian couples, who in many cases rely on intimate agreements to structure their lives, and it deprives society of the benefits that a plurality of family structures can provide. The Article therefore calls for greater awareness of the myriad ways in which the public policy

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doctrine regulates intimate behavior and increased skepticism regarding its use in the context of intimate agreements.

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## INTRODUCTION

Before the festivities of their summer wedding even came to a close, guests began peppering the newly married couple with questions: “Are you going to have kids? When are you going to have kids?”<sup>1</sup> The couple, two twenty-six-year-old men, do not plan to have children. But one husband’s mother, who dreams of having grandchildren, has already begun to fantasize about a future in which both her son and son-in-law will have a biological child with the help of a surrogate. “They’re young,” she said. “Maybe they’ll change their minds.”<sup>2</sup>

There has been no shortage of stories in the media involving the expansion of families through the use of assisted reproductive technologies. In articles about “having it all,” ambitious career women are told to freeze their eggs while they pursue professional advancement.<sup>3</sup> Shows and movies like “The New Normal,” “Baby Mama,” and even “The Real Housewives of Beverly

1. Rachel L. Swarns, *Male Couples Feel Pressure to Fill Cradles*, N.Y. TIMES, Aug. 10, 2012, at A1.

2. *Id.*

3. See, e.g., Anne-Marie Slaughter, *Why Women Still Can’t Have It All*, THE ATLANTIC, July 2012 (“I recommend establishing yourself in your career first but still try to have kids before you are 35—or else freeze your eggs . . .”).

Hills” have kept the subject of assisted reproductive technologies in the public eye. The subject even emerged during the 2012 election cycle when Tagg Romney, the eldest son of the Republican Party’s nominee for President, Mitt Romney, announced the birth of two children through the assistance of a gestational surrogate.<sup>4</sup>

Developments in assisted reproductive technologies have multiplied the choices involved in deciding to have children and have extended them to a broader range of people. Single women or lesbian couples may choose to obtain sperm from an anonymous or known donor for intrauterine insemination.<sup>5</sup> Gay couples and other intended parents may use donor eggs to create embryos that are then carried by a gestational surrogate.<sup>6</sup> Egg freezing has become an increasingly popular option for professional women facing the prospect of declining fertility.<sup>7</sup> And the in-vitro-fertilization process (IVF), in which a woman’s eggs are extracted, fertilized in a laboratory, and implanted in a woman’s uterus (either her own or another’s),<sup>8</sup> has skyrocketed in popularity and success: in 2009, clinics performed 146,244 IVF cycles, resulting in the birth of 60,190 infants.<sup>9</sup>

For people using these reproductive technologies, it is a necessary and routine practice to attempt to secure their respective rights through contracts. Like the freezing of eggs or embryos, which defers reproduction until some future time, the law of contracts allows parties to make decisions in advance of when they may take effect: can a child contact her anonymous sperm donor father upon turning eighteen? Must a woman abide by her promise to care for a child conceived by her partner if they later split up? To which spouse should the court award cryopreserved embryos if the couple divorces?

Tagg Romney, his wife, and their gestational surrogate reportedly entered into an agreement that attempted to answer some of these difficult questions. It granted to the surrogate the right to decide to abort the fetus or fetuses “[i]f in the opinion of the treating physician or her independent obstetrician there is potential physical harm to the surrogate.”<sup>10</sup> But it gave the “intended parents”

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4. Ashley Parker, *2 New Grandchildren for Romney, With Help of Surrogate*, N.Y. TIMES: THE CAUCUS (May 4, 2012, 4:53 PM), <http://thecaucus.blogs.nytimes.com/2012/05/04/2-new-grandchildren-for-romney-with-help-of-surrogate>.

5. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY 10-11 (2011).

6. *See id.*

7. Rebecca Dana, *Ice Queens*, NEWSWEEK, Jan. 30, 2012, at 9; Elissa Gootman, *So Eager for Grandchildren, They’re Paying the Egg-Freezing Clinic*, N.Y. TIMES, May 14, 2012, at A1.

8. *See* NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY: SUCCESS RATES, NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3-4 (Nov. 2011), [http://www.cdc.gov/art/ART2009/PDF/ART\\_2009\\_Full.pdf](http://www.cdc.gov/art/ART2009/PDF/ART_2009_Full.pdf).

9. *Id.* at 13.

10. *Mitt Romney’s Son Signed ‘Abortion’ Clause in Surrogate Birth Contract*, TMZ.COM (Sept. 21, 2012, 1:00 AM), <http://www.tz.com/2012/09/20/mitt-romney-son-tagg-abortion-clause-surrogate-birth-agreement-contract-bill-handel/>.

the right to make the abortion decision “[i]n the event the child is determined to be physiologically, genetically or chromosomally abnormal,” requiring the surrogate to “abort, or not to abort, in accordance with the intended parents’ decision.”<sup>11</sup>

Lives are structured around these types of decisions. But people’s attempts to secure their expectations through binding agreements often fail.

Consider the case of B.Z., who endured more than ten years of failed fertility treatments and two separate ectopic pregnancies<sup>12</sup> that left her without either of her fallopian tubes before finally giving birth to twins through IVF.<sup>13</sup> After the successful procedure, two vials of leftover embryos remained in storage.<sup>14</sup> Before this last cycle, B.Z. and her husband signed the fertility clinic’s consent form, expressing their preference that the clinic return the embryos to B.Z. “for implant” if they separated.<sup>15</sup> When the couple divorced, B.Z. sought enforcement of the agreement, contending that she wanted additional children but could not tolerate “yet another decade of treatment.”<sup>16</sup> The court refused to enforce the agreement on public policy grounds, prohibiting the embryos’ use.<sup>17</sup>

Contracts between intimates<sup>18</sup> governing decisions pertaining to the use of reproductive technologies are just the latest type of intimate agreements that many courts have shied away from enforcing on public policy grounds. Although courts now enforce some types of intimate agreements that they once placed off-limits, like prenuptial agreements,<sup>19</sup> many others—involving the performance of certain duties of support within an ongoing relationship, child-

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11. *Id.*

12. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052 n.6 (Mass. 2000) (“An ectopic pregnancy is one that occurs outside the uterus.”).

13. *Id.* at 1052-53.

14. *Id.*

15. *Id.* at 1054. The evidence also suggested that although both the husband and wife were present when the wife completed the consent form specifying this preference before their first procedure, the husband had signed a blank copy thereafter. *Id.*

16. Brief of Defendant-Appellee, *A.Z.*, 725 N.E.2d 1051 (Mass. 2000) (No. SJC-08098), 1999 WL 34579095, at \*23.

17. *A.Z.*, 725 N.E.2d at 1059.

18. By the term “intimates,” I refer primarily to adults in a sexual relationship, but also to adults who share a relationship characterized by emotional vulnerability, *cf.* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2005 (2010), caring and commitment, and self-identification, *cf.* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 630-37 (1980). As Laura Rosenbury has persuasively argued, this category may extend to friends whose relationships are characterized by most of these features. *See* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 203-06, 209-11 (2007). By “intimate” agreements, I also refer to agreements dealing with matters typically associated with intimacy, like sexual reproduction, even if they are made between people at arms’ length, e.g., surrogacy contracts.

19. *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 70-71 (1998). Courts also generally enforce separation agreements between currently married spouses seeking divorce. *See, e.g.,* Long v. McAllister-Long, 221 S.W.3d 1, 8 (Tenn. Ct. App. 2006) (recognizing a policy “allowing married couples to resolve their disputes and to order their affairs by agreement”).

rearing arrangements, or reproductive decisions—still stand a poor chance of being enforced by courts.<sup>20</sup>

The invocation of public policy reflects a court's determination that an agreement is unenforceable not because of any deficiencies in the bargaining process, but because the substance of an agreement threatens the public good.<sup>21</sup> When it comes to the realm of intimacy, courts' conceptions of the public good are often far-reaching, and potential threats—though rarely expressly identified—can come from many different directions. Courts have theorized, for example, that “[t]he welfare of society is so deeply interested in the preservation of the marriage relation, and so fraught with evil is regarded *whatever is calculated to impair its usefulness, or designed to terminate it*, that it has long been the settled policy of the law to guard and maintain it with a watchful vigilance.”<sup>22</sup> Although changing social views have excepted certain types of intimate agreements,<sup>23</sup> marriage and other types of intimate relationships still persist as a “fulcrum of social control,”<sup>24</sup> so judicial use of the public policy doctrine in this realm remains commonplace.

Based as the public policy doctrine is on a court's conception of the public good,<sup>25</sup> each use of the public policy doctrine to decline enforcement of an intimate agreement reveals a court's normative commitments regarding the subject matter of the agreement.<sup>26</sup> This Article charts the landscape of these commitments, starting with agreements between intimates for the use of reproductive technologies, and then stepping back to look at other types of intimate agreements.

Family law scholars and legal historians have paid extensive attention to the courts' refusal to bring contract law into the domestic sphere and this refusal's historical effect of undervaluing the contributions of women.<sup>27</sup> In the

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20. As in most areas of the law, states differ on how actively they use the public policy doctrine to avoid enforcement of these intimate agreements.

21. See RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b (1981) (describing the “need to protect some aspect of the public welfare”).

22. *Phillips v. Thorp*, 10 Or. 494, 495 (1883) (emphasis added).

23. See, e.g., *Posner v. Posner*, 233 So.2d 381, 384 (Fla. 1970) (allowing enforcement of prenuptial agreements notwithstanding marriage's role as the “foundation of the familial and social structure of our Nation” in light of the “commonplace fact of life” of divorce).

24. Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1903 (1998).

25. For the purposes of this Article, I do not take issue with policies emanating directly from legislative enactments, but rather policies resulting from the extension of statutes into new areas not expressly contemplated by the legislature. See RESTATEMENT (SECOND) OF CONTRACTS §§ 178 cmt. a, 179 cmt. a (1981) (noting the broad range of legislation—including statutes, ordinances, and administrative regulations—and judicially created policies that can serve as the basis for a public policy against enforcement of agreements). Although attempts by legislatures to govern intimate relationships may raise their own substantive concerns, I focus here on instances of judicial lawmaking. See also *infra* notes 103-104 and accompanying text.

26. See *infra* Parts II.A., II.B.

27. See, e.g., Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 265-67 (2011) (summarizing the history of this critique); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499-501 (2005) (discussing courts' justification for this

process, they have studied particular applications of the public policy doctrine, for example, to surrogacy contracts or prenuptial agreements,<sup>28</sup> and have critiqued certain foundational assumptions underlying the division between the family and the market.<sup>29</sup> Contracts scholars have likewise called for broader enforcement of intimate agreements, describing how such a regime might be implemented and providing normative justifications for increased contractual freedom in this realm.<sup>30</sup> But to this point, both camps have paid less attention to how public policy functions as a contract doctrine in these agreements and how its sustained use across different forms of intimate agreements polices the boundaries of the family. As a result, scholars have from time to time endorsed the use of public policy to invalidate classes of agreements they find problematic without examining the further implications of the policies they have advocated.<sup>31</sup>

This Article takes up that project. I demonstrate how cases involving modern reproductive technologies have revitalized policies from a time when courts expected a wife to “discharge marital duties in loving and devoted ministrations.”<sup>32</sup> Reconceived to protect individual freedom by preventing individuals from making binding agreements on quintessentially private matters, these policies continue to preserve traditional family roles<sup>33</sup> by reinforcing gender norms that have persisted across centuries. These norms limit social approval of a broader range of individual choices pertaining to intimate matters and reinforce structural gender inequalities.<sup>34</sup>

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exclusion); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2181-2206 (1994) (charting the development of doctrines rendering agreements between husband and wife unenforceable).

28. See, 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, 150-58 (1998) (discussing prenuptial agreements); June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988) (discussing surrogacy).

29. See, e.g., Hasday, *supra* note 27, at 493 (challenging the assumption that the law does not already permit economic exchange between intimates).

30. See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 213 (1982). *But see* Silbaugh, *supra* note 19, at 69 (accepting nonenforcement based on public policy as a fact and then arguing for nonenforcement of all intimate agreements).

31. The support by many family law scholars of a public policy against the enforcement of surrogacy agreements is a prime example of this phenomenon. But this tactic has been a double-edged sword. In recent years, several scholars have observed the role of the public policy argument against surrogacy in the limiting of abortion rights. I take up this discussion in Section II.B *infra*.

32. *Coleman v. Burr*, 93 N.Y. 17, 25 (1883).

33. By “traditional family,” I mean the core unit of a husband and wife involving some degree of sexual affiliation, with or without children. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 110 (2004).

34. See, e.g., Ariela R. Dubler, *Balancing Work and Family Is Not Just the Responsibility of Women*, L.A. TIMES, Oct. 21, 2012, <http://articles.latimes.com/2012/oct/21/opinion/la-oe-dubler-women-romney-20121021> (criticizing presidential candidate Mitt Romney’s woman-specific flex-time proposal as reifying the disproportionate amount of childcare done by mothers in two-career families); see also *infra* notes 145-149 and accompanying text.

That being said, use of the public policy doctrine in the intimate context takes a particular toll on people seeking to create nontraditional family relationships. By refusing to bind parties to their initial commitments, courts create uncertainty with respect to the parties' rights and obligations. Within the reproductive context, for example, those who must rely on assisted reproductive technologies—gay and lesbian couples and the infertile, single, or otherwise—face a double bind: the public policy doctrine declares that the decision to become a genetic parent is a highly valued, individually constitutive choice while denying the security that comes from legal enforcement of such decisions *precisely in order to protect that freedom*.<sup>35</sup> Through a close examination of the public policy doctrine in the context of agreements regarding reproduction, I aim to reveal how the doctrine has evolved to police new configurations of intimate relationships and intimate decisionmaking, declaring certain choices legitimate or illegitimate. I therefore call for greater suspicion of the use of the doctrine in the intimate context.

Although agreements regarding the use of assisted reproductive technologies are the focus of this Article, they exemplify but one instance of a larger project of policing undertaken through the public policy doctrine that I expose here.<sup>36</sup> In Part I, I examine several courts' recent use of the public policy doctrine to decline to enforce agreements between spouses providing for the disposition of cryopreserved embryos. I uncover the troubling nineteenth-century roots of the sources relied on by the courts in extending the doctrine to this contemporary context, and demonstrate that neither the use of public policy in this context nor the specific policies themselves were preordained. In doing so, I reveal that the use of public policy can frustrate parties' expectations and result in the substitution of courts' preferences, even in the realm of reproductive decisionmaking.

Part II performs a backward-looking and cross-substantive analysis of public policies used to deny enforcement of intimate agreements. In it, I demonstrate the connection between policies invoked in the embryo disposition cases and policies historically designed to separate the market and domestic spheres and fuse the identities of woman and mother. Although history places assisted reproductive technologies and coverture worlds apart, I demonstrate how the courts' response to modern technologies can reveal the persistence of traditional gender stereotypes.

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35. *See infra* Subsection I.B.2.

36. I do not mean to suggest that all courts share a common vision regarding intimate relations and the public policy doctrine's role in shaping it. In fact, across jurisdictions and times, courts have answered similar questions differently, sometimes approving agreements that other courts disapproved. Neither do I attribute these decisions to the subjective motivations of individual judges. As Ariela Dubler has pointed out, "cases unfortunately offer quite limited insight into the subjective motivations of their cast of characters." Dubler, *supra* note 24, at 1888. Nonetheless, one would be hard pressed to deny the existence of a pattern of regulation—subject, of course, to exceptions—dating back centuries and continuing to this day.

In Part III, I tie public-policy-based decisions regulating *who* can reproduce and in what circumstances to other contemporary applications of the public policy doctrine in intimate contexts. The historical effect of these policies has been to deny women equal access to property ownership and the workplace, and through its extension to agreements in the reproductive context, the public policy doctrine continues to reinforce gender roles that perpetuate inequalities. But the doctrine exacts a particular burden on nontraditional family structures by injecting uncertainty into their legal relationships and declaring their configurations harmful to the public good. I suggest several ways in which the disapproval of innovative intimate arrangements deprives society of the antitotalitarian benefits that a pluralistic institution of the family can provide.

Despite the problems with the public policy doctrine in the intimate-agreement context, agreements of the type I analyze in this Article sometimes raise concerns about unfairness, commodification, and oppression. In Part IV, I briefly explore whether these concerns justify the use of the public policy doctrine. In light of the doctrine's complicity in maintaining gender hierarchies and status privileges, I suggest that the answer to that question is no.

## I. PUBLIC POLICY AND AGREEMENTS REGARDING FROZEN EMBRYOS

This Part examines the evolution of a public policy disfavoring "forced procreation" against a person's contemporaneous wishes,<sup>37</sup> resulting in the nonenforcement of agreements for the use of cryopreserved embryos.<sup>38</sup> I first present the facts of three key cases, and I then analyze the policies used by the courts to ignore the parties' preferences for the use of their frozen embryos.

### A. *The Agreements*

*A.Z. v. B.Z.*<sup>39</sup> Within three years of her marriage to A.Z. in 1977, B.Z. suffered an ectopic pregnancy resulting in a miscarriage and the removal of her left fallopian tube.<sup>40</sup> In the early 1980s, the couple went through a fruitless year

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37. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000); *see also In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003) (stating that "it would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice"); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (protecting the right of a contracting party to "change his or her mind . . . up to the point of use or destruction of any stored preembryos").

38. Not all courts to consider similar disputes have refused to enforce such agreements. *See, e.g.*, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (enforcing an embryo disposition agreement); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006) (same); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (en banc) (same). The courts are about evenly split as to whether the public policy doctrine should apply. Over forty state supreme courts have yet to consider the issue.

39. *A.Z.*, 725 N.E.2d at 1051.

40. *Id.* at 1052.



of unspecified fertility treatments.<sup>41</sup> After moving to Massachusetts for work about eight years later, B.Z. and A.Z. once again sought to conceive through the use of assisted reproductive technologies. They first chose the Gamete Inter-Fallopian Transfer procedure, involving the simultaneous transfer of eggs and sperm into B.Z.'s fallopian tube. Instead of implanting in her uterus, however, the fertilized embryo lodged in her remaining fallopian tube, requiring its removal.<sup>42</sup> Left with no fallopian tubes and no other options, the couple turned to IVF. They underwent seven cycles of IVF over the course of three years until B.Z. finally conceived and later gave birth to twin daughters in 1992, fifteen years after the couple married.<sup>43</sup>

Before each cycle, the IVF clinic required the couple to sign a consent form concerning the ultimate disposition of any frozen embryos that would result from the process.<sup>44</sup> That form explained the general nature of the IVF and cryopreservation processes, including the potential benefits and risks of cryopreservation.<sup>45</sup> The form also required the donors to decide the disposition of leftover frozen embryos on the occurrence of certain contingencies, including the wife or donor reaching menopause; the death of one or both of the donors; or separation.<sup>46</sup> A.Z. and B.Z. completed and signed the first of these consent forms together.<sup>47</sup> The form, filled out by B.Z., stated that if they "should become separated, they both agreed to have the embryo[s] returned to the wife for implant."<sup>48</sup> For each subsequent cycle, the husband signed a blank consent form and the wife wrote in substantially similar language to what she wrote on the first form.<sup>49</sup>

Their last, successful, IVF cycle yielded eight extra embryos, which the clinic cryopreserved.<sup>50</sup> In 1995, without telling her husband, B.Z. attempted to use some of the embryos to have additional children, and her husband only found out about the procedure through a notice from his insurance company.<sup>51</sup> Needless to say, the relationship between the two deteriorated around this time.<sup>52</sup> During divorce proceedings, B.Z. sought to enforce the consent form, which provided her the remaining embryos in the event of their separation, while her husband sought an order permanently enjoining her from "using" the remaining embryos.<sup>53</sup> The court concluded that several deficiencies in the form

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41. *Id.*

42. *Id.* at 1053.

43. *Id.*

44. *Id.*

45. *Id.* at 1054.

46. *Id.*

47. *Id.*

48. *Id.* (quoting consent form).

49. *Id.*

50. *Id.* at 1053.

51. *Id.*

52. *Id.*

53. *Id.* at 1053, 1055.

undermined its enforceability as a contract between A.Z. and B.Z.<sup>54</sup> It also held that the agreement violated a public policy that “individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired.”<sup>55</sup> The court therefore left in place a permanent injunction barring B.Z.’s use of the embryos.<sup>56</sup>

**J.B. v. M.B.**<sup>57</sup> Early in her marriage to M.B., J.B. discovered that she had a condition preventing her from becoming pregnant.<sup>58</sup> Before undergoing IVF, the fertility clinic presented J.B. and M.B. with a consent form that described the IVF procedure and the purpose of cryopreservation and prompted the patient and her partner to execute an “attached legal statement regarding control and disposition of cryopreserved embryos.”<sup>59</sup> The signed form stated that the control, direction, and ownership of their “tissues” would be “relinquished to the IVF Program” in the event of “[a] dissolution of [their] marriage by court order, unless the court specifies who takes control and direction of the tissues.”<sup>60</sup> The form further allowed the parties to change their intended disposition in writing.<sup>61</sup>

The clinic created eleven embryos, implanting some and cryopreserving the remainder.<sup>62</sup> Shortly after J.B. became pregnant and gave birth to the couple’s daughter, the couple separated.<sup>63</sup> At that time, J.B. told her husband that she wanted to discard the remaining embryos.<sup>64</sup> In her divorce petition filed a few months later, she sought an order from the court regarding the remaining embryos.<sup>65</sup> M.B. sought a contrary order compelling his wife to allow the remaining embryos to be implanted or donated to other infertile couples.<sup>66</sup> In support of his motion, he stated that they had many serious discussions regarding the use of IVF, as a result of which they agreed prior to undergoing the procedure that any unused embryos would not be destroyed, but would be used or donated.<sup>67</sup> He asserted that this agreement reflected his ethical and moral beliefs as a Catholic, and that his wife came up with the idea to donate the embryos to encourage his participation.<sup>68</sup> He also provided

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54. *Id.* at 1057.

55. *Id.* at 1059.

56. *Id.* at 1052, 1059.

57. 783 A.2d 707 (N.J. 2001).

58. *Id.* at 709.

59. *Id.* at 709-10 (quoting consent form).

60. *Id.* at 710.

61. *Id.* at 713.

62. *Id.* at 710.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 710-11.

certifications from his family members corroborating this account.<sup>69</sup> His wife disputed that they ever had a discussion regarding the disposition of frozen embryos in the event of dissolution and claimed that she only ever intended to use the embryos in the context of an intact family.<sup>70</sup>

Like the *A.Z.* court, the New Jersey Supreme Court expressed doubts about the existence of a binding agreement between the spouses, finding the language of the consent form to be too conditional to evince a clear intent on the part of the spouses,<sup>71</sup> and rejecting M.B.'s evidence of a contrary oral agreement on the ground that the parties would have had to change their disposition in writing.<sup>72</sup> But the court went on to analyze whether embryo disposition agreements could ever be enforced in the state, and it adopted a rule that "public policy concerns that underlie limitations on contracts involving family relationships are protected by permitting either party to object at a later date to provisions specifying a disposition of preembryos that the party no longer accepts."<sup>73</sup> Under this approach, if a party reconsiders an earlier choice regarding use of the embryos, the courts will evaluate the interests of both parties, normally favoring the party seeking to avoid genetic parenthood.<sup>74</sup> Performing that weighing in this case, the court agreed with the Appellate Division that because M.B. was already a father, and capable of fathering more children, the remaining embryos should be destroyed or stored indefinitely at his expense.<sup>75</sup>

*In re Marriage of Witten.*<sup>76</sup> Like the women in the previous two cases, Tamera Witten was unable to conceive children naturally, and, with her husband Trip, she turned to IVF in order to become pregnant.<sup>77</sup> Tamera and Trip, as well as a representative of the fertility clinic, signed an informed consent document titled "Embryo Storage Agreement," which provided that the embryos would be used for transfer, release, or disposition "only with the signed approval of both Client Depositors."<sup>78</sup> The agreement had only one exception to the joint-approval requirement: death of one or both of the depositors.<sup>79</sup> It also provided for the termination of the clinic's responsibility to continue to store the embryos if the depositors provided written authorization to release or destroy them, both depositors died, the depositors failed to pay the storage fee, or ten years elapsed from the date of the agreement.<sup>80</sup>

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69. *Id.* at 711.

70. *Id.* at 710.

71. *Id.* at 713.

72. *Id.* at 714.

73. *Id.* at 719.

74. *Id.* at 718-20.

75. *Id.* at 720.

76. 672 N.W.2d 768 (Iowa 2003).

77. *Id.* at 772.

78. *Id.*

79. *Id.* at 772.

80. *Id.*

Unlike the couples in the prior two cases, the IVF process did not work for the Wittens despite several embryo transfer attempts.<sup>81</sup> At the time of their dissolution action, they had seventeen cryopreserved embryos in storage at the clinic.<sup>82</sup> As a thirty-six-year-old woman with a history of infertility, Tamera saw the embryos as her “last chance for a biological baby,”<sup>83</sup> and testified that she would afford Trip the opportunity to exercise his parental rights or to have his rights terminated.<sup>84</sup> She also adamantly opposed the destruction of the embryos.<sup>85</sup> Trip, meanwhile, testified at trial that he did not want the embryos destroyed, but that he did not want Tamera to have them either.<sup>86</sup> The parties presented multiple grounds upon which the court could grant their requested relief; importantly, for our purposes, Tamera sought to invalidate the storage agreement because it would require Trip’s consent for any future use of the embryos, while Trip sought its enforcement.<sup>87</sup>

Finding that the storage agreement addressed the situation at hand, the court considered its enforceability on public policy grounds.<sup>88</sup> Similar to the previous two cases, the court noted that it “would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos.”<sup>89</sup> The solution, it held, was to require contemporaneous mutual consent for the transfer, release, disposition, or use of the embryos.<sup>90</sup> Recognizing that its solution could result in a metaphorical deep-freeze unless the parties arrived at a subsequent mutual agreement, the court also noted that storage costs should be borne by the party seeking to prolong the embryos’ storage (here, both Tamera and Trip), and that the clinic would only be obligated to store the embryos until the expiration of its contract with the other parties.<sup>91</sup> This solution left Tamera’s reproductive future in the uncooperative hands of her ex-husband.

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81. *Id.*

82. *Id.*

83. Brief of Respondent-Appellant/Cross-Appellee at 8, *Witten*, 672 N.W.2d 768.

84. *Witten*, 672 N.W.2d at 772.

85. *Id.* at 772-73.

86. *Id.* at 773.

87. *Id.* at 779.

88. *Id.* at 773.

89. *Id.* at 781.

90. *Id.* at 783.

91. *Id.* Because it is unlikely that most fertility clinics would agree to store frozen embryos indefinitely, this approach effectively creates a default rule of termination upon the expiration of the parties’ storage contract. The operation of various default rules created by the public policy decisions in these three cases is beyond the scope of this Article but warrants further consideration.

*B. The Policies in Context**1. State Regulation of Intimacy*

The use of the public policy doctrine to avoid enforcement of embryo disposition agreements in the foregoing trio of decisions is at least somewhat surprising, because it takes place in front of a backdrop of contractual freedom and involves choices typically characterized as highly personal. The essence of contract law involves enforcement of voluntary private choices allocating value and risk.<sup>92</sup> The bargain principle in contract law<sup>93</sup> presumes that “[p]arties are normally the best judges of their own utility, and normally reveal their determinations of utility in their promises. Bargain promises are normally made in a deliberative manner for personal gain . . . .”<sup>94</sup>

Although this view of personal decisionmaking is unrealistically optimistic,<sup>95</sup> it is also undoubtedly true that the vehicle of contract allows parties to achieve goals that they could not accomplish without it. The binding nature of the promise enables a party to secure a reciprocal commitment from the other party, allowing both to achieve their goals more easily than if one party could renege at no (or low) cost.<sup>96</sup> Without contract law, parties cannot

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92. See RESTATEMENT (SECOND) OF CONTRACTS ch. 7, intro. note (1981) (“Contract law has traditionally relied in large part upon the premise that the parties should be able to make legally enforceable agreements on their own terms, freely arrived at by the process of bargaining.”); Shultz, *supra* note 30, at 213; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302-03 (arguing that where intentions regarding procreative arrangements are “deliberate, explicit and bargained for, . . . they should be honored”). By emphasizing voluntariness, I exclude from this discussion agreements that are the products of defects in the bargaining process. Although I am sympathetic to the argument that certain reproductive decisions may be the product of systematic defects or structural inequalities, those concerns are not always present in intimate agreements.

93. A bargain refers to “an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other.” Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982).

94. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211-12 (1995).

95. Like many scholars, I view any assumption of perfect rationality with suspicion, *see, e.g.*, Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1257-58 (1998) (offering a critique of the rational choice assumption), and acknowledge that individual choices may be predetermined to some degree, *see, e.g.*, Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 167, 175 (2000) (arguing that choices like marriage are really constrained by social conditions). But my argument does not depend on an assumption of perfect rationality. That is because the use of public policy in this context categorically eliminates the ability of parties to make enforceable ex ante decisions regarding reproduction. It is therefore an inappropriate context in which to address concerns about the limits of rational decisionmaking absent evidence of categorical irrationality. In a future work, I will explore more fully which choices can be legitimately associated with a decisionmaker based on the nature of those choices and the effect of the intervening passage of time.

96. See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1255 (1998); *see also* E. ALLAN FARNSWORTH, *CHANGING YOUR MIND* 13 (1998) (describing contracting as the exchange of promises for the purpose of getting “something that you want”); Shultz, *supra* note 30, at 214 (observing that the “freedom to pursue individualization and diversity that

secure commitments from each other that both might consider necessary to embark on a venture.<sup>97</sup>

That said, although individuals generally have the power to govern their affairs as they see fit through the execution of legally enforceable agreements,<sup>98</sup> courts have long limited freedom of contract when enforcement of an agreement would harm the public interest.<sup>99</sup> This history of courts' use of public policy to resolve legal disputes extends back to the "dawn" of the English legal system, "when law had to be made in some way or other, and when there was not much statute law and practically no case law at all to summon to the judges' assistance."<sup>100</sup> From its origins, the doctrine sought to preserve the "public weal" or the "inviolable" nature of the "social fabric"<sup>101</sup> from the injurious influence of private interests.<sup>102</sup> By focusing on an agreement's effect on the public welfare rather than considering aspects of the bargaining process, the public policy doctrine is more accurately described as "a principle of judicial legislation"<sup>103</sup> than a traditional contract defense. The refusal to enforce an agreement has been justified as a punishment in itself, and also a deterrent to future unsavory conduct.<sup>104</sup>

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characterizes private ordering" involves "yesterday's legally binding private choice . . . overrid[ing] today's contrary private choice").

97. See Scott & Scott, *supra* note 96, at 1232 ("A legal regime that constrains the freedom to commit actually limits individual freedom.")

98. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (1981); Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 598 (1969) (describing the "increased respect accorded to freedom of contract" in the draft version of the Second Restatement of Contracts).

99. See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (3d ed. 2004); see also *Nebbia v. New York*, 291 U.S. 502, 510 (1934) (recognizing that although "the making of contracts is normally [a] matter[] of private and not of public concern . . . government cannot exist if the citizen may at his will . . . exercise his freedom of contract to work [his fellows] harm").

100. Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 77 (1928); see also *id.* at 85-86 (noting the use of the public policy doctrine "as early as Elizabeth" to invalidate agreements in restraint of trade, and citing examples of other types of agreements in the eighteenth and nineteenth centuries).

101. Thomas H. Breeze, *The Attitude of Public Policy Towards the Contracts of Heirs Expectant and Reversioner*, 13 YALE L.J. 228, 228 (1904).

102. See Winfield, *supra* note 100, at 82-83 (citing the commentaries of Sir Thomas de Littleton, Sir Edward Coke, and others).

103. Winfield, *supra* note 100, at 92 (quotation marks omitted).

104. See, e.g., Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 483-84 (2010) (criticizing the remedy of nonenforcement as disconnected from the justifications for nonenforcement); Juliet P. Kostriksy, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 118-20 & n.9 (1988) (noting arguments both suggesting and questioning the existence of deterrence); Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1446 (2006) [hereinafter Note, *Law and Economics*] ("[R]efusal to enforce such contracts deters their formation, which benefits public welfare."). Of course, the deterrent effect of decisions not to enforce a particular agreement on public policy grounds cannot easily be measured and might depend on a variety of factors, from the likelihood that parties expect to enforce similar agreements in court to the availability of extra-legal mechanisms for enforcement. See *id.* at 1448. It might also be possible that—at least for certain types of agreements including agreements between intimates—a policy of non-enforceability would not have a consistent or measurable deterrent effect.

Traditionally, courts invalidated most intimate agreements because of their suspicion of any legal relationship that could undermine the institution of marriage, “the foundation of the familial and social structure of our Nation.”<sup>105</sup> In explaining the longstanding refusal to allow divorce by consent of the parties, one court observed that “in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses.”<sup>106</sup> Public policies against the enforcement of intimate agreements therefore developed to protect the public’s interest in upholding the sanctity of the marital relationship and regulating morality in matters of sex and intimacy.<sup>107</sup>

The Restatement (First) of Contracts, published in 1932, devoted nine sections to different categories of impermissible agreements: Bargain in Restraint of Marriage, Marriage Brokerage, Bargain for Custody of Minor Children, Bargain for Separation or Maintenance, Bargain for Reconciliation, Bargain Facilitating Divorce, Bargain to Change Essential Obligations of Marriage, Bargain by One Already Married to Marry Another, and Bargain for Immoral Sex Relations.<sup>108</sup> As is evident from their titles, these sections identify policies that protected the status of marriage by disallowing changes to its duties, prohibiting agreements interfering with entrance into marriage or inducing separation or divorce, and hindering the development of marriage-like relationships.<sup>109</sup> Although the Restatement (Second) of Contracts streamlined its treatment of this topic, it too recognized the continued limits on the “power of individuals by legally enforceable private agreement to alter the incidents of marriage or to shape legal relationships within the family.”<sup>110</sup>

The boundaries of these broad, court-created limitations on enforcement of intimate agreements are not fixed, but shift from time to time to encompass or exclude new types of agreements, as the next section will demonstrate.

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105. Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970).

106. *Id.* at 383.

107. FARNSWORTH, *supra* note 99, § 5.4 (noting the traditional importance of marriage and the use of public policies to guard against the “impairment of family relations”); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 209-10 (2011) (noting courts’ suspicion of the power of private agreements to change the status of marriage); Note, *Marriage, Contracts, and Public Policy*, 54 HARV. L. REV. 473, 473 (1941) [hereinafter Note, *Marriage, Contracts*]. As innumerable critics have demonstrated, the regulation of the marital relationship went hand-in-hand with the regulation of sex. See, e.g., K. N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1297-98 (1932) (identifying as a function of marriage the organization of sexual relations into permissible and impermissible forms).

108. RESTATEMENT (FIRST) OF CONTRACTS §§ 581-89 (1932).

109. Contracts in restraint of marriage were thought to pose an undue temptation on young men and women to engage in sexual relations outside of the marital relationship. Likewise, courts declined to enforce agreements between cohabitants on the grounds that they might “weaken marriage as the foundation of our family-based society” by encouraging cohabitation, *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979), itself a crime in the nineteenth and twentieth centuries. Premarital agreements were also discouraged on the grounds that they might provide an economic incentive for spouses to divorce. See GROSSMAN & FRIEDMAN, *supra* note 107, at 210.

110. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 3, intro. note (1981).

*1. Forging a Public Policy Against Forced Procreation*

All three of the embryo disposition cases discussed above refused to enforce agreements between spouses expressing future preferences regarding the use of their cryopreserved embryos.<sup>111</sup> In the absence of state statutes addressing the use of assisted reproductive technologies or the enforceability of such contracts,<sup>112</sup> the courts looked to older policies used to invalidate other types of intimate agreements and to evolving constitutional norms expressing a preference for individual freedom in personal decisionmaking.

***Policies Designed to Protect the Institution of Marriage.*** To justify the existence of a policy favoring contemporaneous choice regarding procreation, the courts first pointed to statutes or prior decisions preventing parties from contractually binding themselves to enter or exit family relationships and to policies refusing to resolve disputes between intimates. These policies, the court suggested, protected choice by preventing adults from being “forced” by agreement to enter or exit intimate relationships.

For instance, the courts identified statutes abolishing the cause of action for breach of promise to marry<sup>113</sup> and public policies in their states against the enforcement of agreements to abandon a marriage.<sup>114</sup> The cause of action for breach of promise to marry “was a remedy for respectable, mostly middle-class women—women (above all) who had been seduced and abandoned.”<sup>115</sup> Designed to compensate women for the injury being jilted would cause to their value on the marriage market, this cause of action was eventually repealed by legislatures in order to protect the institution of marriage from what had become widely seen as a greater threat from abuse of the action by gold-diggers and extortionists.<sup>116</sup> Similarly, the refusal to enforce agreements to abandon a marriage stemmed from an interest in protecting the sanctity of marriage even over the wishes of spouses who no longer wished to remain married rather than

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111. *In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

112. See, e.g., *A.Z.*, 725 N.E.2d at 1055; *J.B.*, 783 A.2d at 718 n.8.

113. *A.Z.*, 725 N.E.2d at 1058 (citing MASS. GEN. LAWS ch. 207, § 47A); *J.B.*, 783 A.2d at 717-18 (citing N.J. STAT. ANN. § 2A:23-1).

114. *Witten*, 672 N.W.2d at 781; *A.Z.*, 725 N.E.2d at 1059.

115. GROSSMAN & FRIEDMAN, *supra* note 107, at 90. Because the cause of action was designed primarily to compensate a woman for the opportunity costs of being off the marriage market in her prime years, actions for breach of promise would not typically result in a compelled marriage. See *id.* at 92-93. But see Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 23-37 (2012) (noting that marriage was sometimes used as an alternative punishment for the crime of seduction, presumably resulting in some unwanted marriages).

116. See GROSSMAN & FRIEDMAN, *supra* note 107, at 96-100; Nathan P. Feinsinger, *Legislative Attack on “Heart Balm.”* 33 MICH. L. REV. 979, 983-84 (1935) (cataloging abuses of the breach-of-promise cause of action); see also *Segal v. Lynch*, 993 A.2d 1229, 1236 (N.J. Super. Ct. App. Div. 2010) (noting that the Heart Balm Act “was intended to eliminate the abuses attending the so-called ‘heart balm’ actions—alienation of affections, criminal conversation, seduction and breach of promise to marry”) (citation and quotation marks omitted). Freedom of contemporaneous choice for the breaching party does not seem to have been the legislatures’ concern.



any solicitude for individual choice.<sup>117</sup> By reinventing these older policies protecting the institution of marriage as policies protecting individual choice, the courts breathed new life into policies that had largely fallen into desuetude.

The courts also relied on the perceived unsavoriness of resolving disputes regarding “intimate questions inherent in personal relationships.”<sup>118</sup> For example, the *Witten* court pointed to a nineteenth-century case, *Miller v. Miller*,<sup>119</sup> in which a wife sued her husband for breach of an agreement requiring him to pay her \$200 per year in monthly installments as long as she upheld the terms of their interspousal agreement obligating her to “keep her home and family in a comfortable and reasonably good condition,” among other things.<sup>120</sup> The *Witten* court spoke approvingly of the statement in *Miller* that

[i]t is the genius of our laws, as well as of our civilization, that matters pertaining so directly and exclusively to the home, and its value as such, and which are so generally susceptible of regulation and control by those influences which surround it, are not to become matters of public concern or inquiry.<sup>121</sup>

It advanced this family-protective rationale even though the agreement involved the creation by and storage of frozen embryos in a fertility clinic, not the performance of matters within the home.<sup>122</sup>

***Policies Regarding Reproductive and Parental Decisionmaking.*** The courts also looked to more recent state statutes and policies regulating the termination of parental status as the basis of a right to change one’s mind

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117. See *supra* note 115; see also RESTATEMENT (FIRST) OF CONTRACTS § 586 & illus. 1 (1932) (noting that an agreement between married spouses to obtain a divorce is illegal). The policy against enforcing contracts encouraging divorce was to discourage divorce from occurring, not to save a good marriage that would otherwise be torn apart. In *A.Z.*, for example, the Massachusetts Supreme Judicial Court cited an earlier decision in which it refused to enforce a man’s promise to support a woman and her children as consideration for her promise to end her marriage. 725 N.E.2d at 1059 (citing *Capazzoli v. Holzwasser*, 490 N.E.2d 420, 426 (Mass. 1986)). Similarly, in *In re Marriage of Witten*, the Iowa Supreme Court looked to a century-old case in which an attorney and detective entered into an agreement with a husband to secure a divorce from his wife, who had already planned to initiate divorce proceedings. *In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003) (citing *Barngrover v. Pettigrew*, 104 N.W. 904, 904 (Iowa 1904)). The spouses in these cases had already decided to end their marriages; the policy of nonenforcement therefore had nothing to do with protecting their freedom of choice.

118. *Witten*, 672 N.W.2d at 781.

119. 42 N.W. 641 (Iowa 1889).

120. *Id.* at 641.

121. *Witten*, 672 N.W.2d at 781 (quoting *Miller*, 42 N.W. at 642).

122. For these reasons, a prominent scholar has argued that this rationale for nonenforcement of embryo disposition agreements is inadequate. See I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1171-72 (2008) (arguing that an embryo disposition contract differs from agreements that involve the difficulty of supervising performance or threat of defective performance).

regarding reproductive decisions. These policies have commonly arisen in two circumstances: adoption and surrogacy.

All three states in the above cases impose brief waiting periods during which a woman may change her mind before surrendering her child for adoption. In Massachusetts, for example, “no mother may agree to surrender her child [for adoption] ‘sooner than the fourth calendar day after the date of birth’ . . . regardless of any prior agreement.”<sup>123</sup> New Jersey likewise disfavors private-placement adoptions<sup>124</sup> and prevents a mother from consenting to the surrender of her child until three days after its birth,<sup>125</sup> and an Iowa statute imposes a seventy-two-hour waiting period after the birth of a child before parents can terminate their parental rights.<sup>126</sup>

Relatedly, the supreme courts of both Massachusetts and New Jersey have recognized a public policy against enforcement of surrogacy agreements that allow the birth mother a short window of time in which to reconsider a decision to give up the child.<sup>127</sup>

The waiting periods imposed by these statutes and decisions all protect individuals from making improvident decisions about the termination of parental status. But the courts reasoned that the waiting periods likewise should provide individuals the opportunity to change their minds regarding decisions about entrance into family relationships, here not limited to a short period of time but extending indefinitely.<sup>128</sup>

Finally, to support the policy against forced procreation, the courts also invoked the freedom to make procreational decisions without state interference recognized in *Griswold v. Connecticut*,<sup>129</sup> *Eisenstadt v. Baird*,<sup>130</sup> *Roe v. Wade*,<sup>131</sup> and related state court decisions.<sup>132</sup> The courts identified in those decisions a right to procreational autonomy that could protect a person’s decision to reconsider becoming a genetic parent even over his or her prior commitments to the contrary.<sup>133</sup>

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123. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (citing MASS. GEN. LAWS ch. 210, § 2 (1999)).

124. *J.B. v. M.B.*, 783 A.2d 707, 718 (N.J. 2001).

125. N.J. STAT. ANN. § 9:3-41(e) (West 2012).

126. *Witten*, 672 N.W.2d at 781.

127. *See R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998); *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

128. *See, e.g., A.Z.*, 725 N.E.2d at 1059.

129. 381 U.S. 479 (1965) (regarding the use of contraceptives by married spouses).

130. 405 U.S. 438, 453 (1972) (access to contraceptives by single persons).

131. 410 U.S. 113 (1973) (abortion).

132. *See, e.g., In re Baby M*, 537 A.2d 1227 (N.J. 1988) (holding that the “right of procreation,” although protected by the federal and state constitutions, would not be infringed by its decision not to enforce a surrogacy agreement); *Doe v. Doe*, 314 N.E.2d 128, 132-33 (Mass. 1974) (declining to recognizing a husband’s right to interfere with his wife’s decision to have an abortion).

133. *J.B. v. M.B.*, 783 A.2d 707, 716 (N.J. 2001) (citing decisions involving the use of contraception, the right to undergo sterilization, and the choice not to give birth to a child with a genetic defect); *see also In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (calling family and reproductive decisions “highly emotional in nature and subject to a later change of heart”); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (invoking the Supreme Court’s recognition of a “‘freedom of

The courts wove together the foregoing policy strands to form a new policy against the enforcement of embryo disposition agreements between intimates.<sup>134</sup> In so doing, the courts engaged in a troubling alchemy, extending arguably anachronistic views about family and gender relations to a new context and twisting constitutional guarantees of freedom to limit, rather than enhance, choice. As I will discuss in the next Part, the use of public policy to regulate assisted reproductive technologies builds on, and helps to propagate, the policing of other forms of intimacy performed by the doctrine.

## II. REGULATING INTIMATE RELATIONSHIPS THROUGH THE PUBLIC POLICY DOCTRINE

Nonenforcement of intimate agreements denies people all the advantages contract law is thought to provide in their efforts to structure important life relationships such as marriage, cohabitation, and parenthood. Yet as we saw with the embryo disposition agreements discussed in the previous Part, courts often employ policies against enforcement of agreements affecting the entrance into, exit from, or governance of intimate relationships and the family. Indeed, as many others have observed, courts usually only enforce the provisions governing property, and even then do so only when a relationship is at its end.<sup>135</sup>

Courts rely on the character of intimate relationships to justify nonenforcement of these contracts, but the nonenforcement of contracts simultaneously helps to constitute which relationships the law considers “intimate.”<sup>136</sup> By keeping certain relations outside of the market, the law performs a sorting function, dividing the spheres of the market and the home, and separating the legitimate and illegitimate.<sup>137</sup> It also perpetuates

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personal choice in matters of marriage and family life”) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)).

134. All three courts suggested that the agreements would be enforceable against the fertility clinics. See *A.Z.*, 725 N.E.2d at 1058 n.22 (recognizing the “essential” role agreements between users and clinics play in clinic operations and declaring “no impediment to the enforcement of such contracts”); *J.B.*, 783 A.2d at 719 (noting the “need for agreements between the participants and the clinics that perform the procedure”); *Witten*, 672 N.W.2d at 782 (declaring disposition agreements “between a couple on the one side and the medical facility on the other” to be valid).

135. See Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U.J.L. & POL’Y 225, 227 (2011) (noting the reluctance of courts to enforce contracts in an ongoing marriage); Hasday, *supra* note 27, at 499-500 (same); Silbaugh, *supra* note 19, at 71 (noting the differential treatment of monetary and non-monetary terms).

136. See Hasday, *supra* note 27, at 493 (“The legal system also attempts to mark intimate relations as different, in part by claiming that they are separate from the market.”). The fact that the embryo disposition agreements in *A.Z.*, *J.B.*, and *Witten* could not be enforced between intimates, but would be enforceable against the fertility clinics, demonstrates the separation of spheres at work.

137. *Id.* at 494 (discussing the differentiation between wives and prostitutes); see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2009) (observing that “[h]istorically, criminal law and family law have

expectations about gender and family roles that originated at a time when women had markedly less power and when the single authorized sexual relationship was heterosexual marriage.

Scholars have long criticized the role that the separation of market and home spheres has played in perpetuating social inequality<sup>138</sup> and in regulating interactions between intimates.<sup>139</sup> But they have paid less attention to *how* the public policy doctrine has policed the borders of intimate relationships and imposed its normative preferences. Although choices regarding the use of reproductive technologies may seem distinct from agreements regarding spousal duties or creating alternative adult relationships, the regulation of all aspects of intimate behavior, including (a)sexual reproduction, is mutually reinforcing.<sup>140</sup>

In this Part, I will demonstrate that the public policies against enforcement of embryo disposition agreements and other agreements pertaining to assisted reproductive technologies preserve traditional gender and family roles by limiting the power of individuals to control their reproductive destiny. Here, I make two related critiques: first, that seemingly innocuous policies like the policy against compelled procreation actively reinforce traditional family forms and gender roles; and second, that changing public policies obscure the broader project of social regulation that the doctrine performs.

#### *A. Reinforcing Separate Spheres*

Both status<sup>141</sup> and the justifications for status privileges may change over time. But the movements of status and its justifications are not synchronized. When the legitimacy of a particular status regime is successfully contested, lawmakers may find “new rules and reasons to protect such status privileges as they choose to defend” through a process that Reva Siegel has called

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worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as *either* legitimate marital behavior *or* illegitimate criminal behavior”).

138. See, e.g., Halley, *supra* note 27, at 265-67 (summarizing the history of this critique); Siegel, *supra* note 27, at 2181-2206 (charting the development of doctrines rendering agreements between husband and wife unenforceable).

139. See, e.g., Hasday, *supra* note 27, at 492-93 (noting that the law in fact countenances limited types of economic exchange between intimates); Murray, *supra* note 137, at 1256 (challenging the conventional wisdom recognizing criminal law’s exclusion from the home as inaccurate and observing the criminal law’s longstanding role in the regulation of intimacy); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 837 (1985) (arguing that the state takes an active role in the regulation of families); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 5-6 (2006) (observing the entrance of the criminal law into the “quintessentially private space” of the home).

140. Karl Llewellyn recognized this point over eighty years ago when he illustrated the connection between the regulation of sex and other functions of marriage such as possession of both property and persons, legitimacy and inheritance, physical health, and morals. Llewellyn, *supra* note 107, at 1297-1300.

141. By “status,” I mean the position a person holds under the law and in society, as measured by the sum total of his or her legal rights, duties, liabilities, and relations to others. See BLACK’S LAW DICTIONARY 1447 (9th ed. 2009).

“preservation through transformation.”<sup>142</sup> The adoption of less socially controversial rhetoric can enhance the capacity of law to legitimate social inequalities among different groups.<sup>143</sup>

The public policy arguments used in the recent embryo disposition agreement cases, with their focus on protection of choice and individual freedom,<sup>144</sup> provide new rhetorical justifications for policies that maintain a division between the spheres of the family and the market and reify the biological essentialism of motherhood.

The maintenance of separate spheres for the family and the market has been a useful tool to subordinate women<sup>145</sup> in both spheres. Limiting economic exchange between intimates systematically disadvantages women by making domestic labor uncompensable.<sup>146</sup> In the meantime, because women generally make more nonmonetary contributions to the family, they also lose opportunities in the workplace.<sup>147</sup> This separation of the family and the market, and its consequences for women, existed in the nineteenth century in the form of coverture, the legal concept under which the husband and wife were treated as a single unit and the wife lost the legal capacity to enter into contracts, own property or earn income, and sue or be sued, among other things.<sup>148</sup> The need to protect the wife, *feme covert*, from the brutality of commercial and state relations justified her deprivation of legal personhood.<sup>149</sup>

As Reva Siegel has persuasively demonstrated, courts faced with earnings statutes giving women a separate property right in their personal labor refused to interpret those statutes to allow a wife to contract with her husband for her labor, recognizing that such an interpretation would be antithetical to the social

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142. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

143. *Id.* at 2120. Siegel provides a compelling account of how domestic violence against women, once justified by the husband’s prerogative of chastisement, *see id.* at 2122, became shielded from the law through a judicial doctrine that refused to enter the boundaries of the home, *see id.* at 2169-70.

144. *See supra* Part I.B.2.

145. I speak here of women because women historically fell on the domestic side of the divide, and because the division continues to disproportionately burden women today. *See* Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1214 (1994). But the maintenance of separate spheres has the potential to affect men who perform the brunt of domestic labor in their intimate relationships, both gay and straight. *See* Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 770-71 (2012) (discussing the potential replication of traditional gender roles by same-sex couples).

146. Hasday, *supra* note 27, at 517; *see also id.* at 518-19 (noting that women contribute more domestic labor to a marriage, and that nonenforcement of agreements for that labor deprives women of a source of compensation); Silbaugh, *supra* note 19, at 133-34 (noting that nonenforcement of nonmonetary terms in premarital agreements disadvantages women, who, on average, make more nonmonetary contributions to a marital relationship than men do).

147. *See, e.g.*, Widiss, *supra* note 145, at 762-63 (describing the disproportionate share of housework performed by women and its relationship to lower earnings).

148. *See* GROSSMAN & FRIEDMAN, *supra* note 107, at 59; Martha Minow, “*Forming Underneath Everything that Grows*”: *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 828.

149. *See* Minow, *supra* note 148, at 829.

order.<sup>150</sup> But because the language of “property-in-persons” was both antiquated and suspect following the repudiation of slavery, courts had to reach for new rationales to support the separate-spheres ideology.<sup>151</sup> Courts therefore turned to the language of altruism in order to distinguish the family sphere from the market: “It would be contrary to public policy to permit either [husband or wife] to make an enforceable contract with the other to perform such services as are ordinarily imposed upon them by the marital relation, and which should be the *natural prompting of that love and affection which should always exist between a husband and wife.*”<sup>152</sup>

This justification of separate spheres, rooted in the protection of the marital relationship from the debasing influences of the market, lingers on. In *Baby M*, for example, the New Jersey Supreme Court brought anti-market rhetoric into the context of agreements pertaining to reproduction, announcing a public policy against the enforcement of surrogacy agreements calling for payment to the surrogate mother in part because “[t]here are, in a civilized society, some things that money cannot buy.”<sup>153</sup> The court found no inherent evil in a woman serving as a surrogate mother for another family as long as she was not paid for her services and could change her mind about surrendering her parental rights.<sup>154</sup> Altruism, in this sense, elided concerns about commodification otherwise inherent in the arrangement. In *Borelli v. Brusseau*,<sup>155</sup> a California court used similar language when it refused to enforce a promise by a husband who suffered a stroke to convey separate property to his wife in exchange for her providing “round-the-clock” health care rather than sending him to a nursing home.<sup>156</sup> Noting that spouses are obligated by statute to provide support to each other,<sup>157</sup> the court held that the agreement was “antithetical to the institution of marriage as the Legislature has defined it,” stating, “[w]hether or not the modern marriage has become like a business . . . it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.”<sup>158</sup>

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150. Siegel, *supra* note 27, at 2147-48, 2181-96.

151. *Id.* at 2201.

152. *Id.* at 2204 (quoting *Foxworthy v. Adams*, 124 S.W. 381, 383 (Ky. 1910)) (emphasis added).

153. *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

154. *Id.* at 1235. Although the inability of the surrogate mother to change her mind undoubtedly affected the court’s decision, the court was at least equally concerned about the debasing influence of money, if not more so. Calling the agreement one for the “sale of a child, or, at the very least, the sale of a mother’s right to her child,” the court expressed the belief that the decision to become a surrogate depended on the exchange of payment. *Id.* at 1248. It further worried that potential for payment would lead poorer women to become surrogates for the affluent—in other words, that money would corrupt a woman’s decision-making process. *Id.* at 1249-50.

155. 16 Cal. Rptr. 2d 16 (Ct. App. 1993).

156. *Id.* at 17-18.

157. *Id.* at 18.

158. *Id.* at 20. Reva Siegel argues that the court’s “anticontractarian” rationale for nonenforcement “marks it as a modern expression of coverture doctrine.” Siegel, *supra* note 27, at 2200. Although Siegel

The *Borelli* decision exemplifies the anti-market, separate-spheres rhetoric at its most transparent. And as such, it was easy to criticize, including by the dissenting justice on the panel. Observing the rapid changes in modern attitudes toward marriage, Justice Poché concluded that the marital relationship could no longer be regarded as “uniform and unchangeable.”<sup>159</sup> Noting that the court’s rule would mean that “if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her,” he concluded that “public policy should not be equated with coerced altruism.”<sup>160</sup>

Indeed, changes in the marital relationship and in the workforce have left anti-market or altruistic rhetoric sounding a bit passé. In 2007, for example, seventy percent of mothers with children under the age of eighteen participated in the workforce, and only one in five families consisted of the traditional male breadwinner, female homemaker model.<sup>161</sup> With both partners participating in the workforce, rhetoric that harkens back to a gender-segregated world sounds obsolete and does not reflect the experiences of most people. Moreover, the rigid and immutable duties ascribed to marriage are inconsistent with a divorce regime that allows spouses to exit the relationship once their individual needs go unmet.<sup>162</sup> In a world of choice, legally imposed domestic support obligations—what Justice Poché called a “nondelegable duty to clean the bedpans herself”<sup>163</sup>—have lost their appeal.

The public policy objection to intimate agreements based on the rhetoric of personal freedom moves beyond altruism to offer a new rationale for the separate spheres. Although the embryo disposition cases discussed above relied on some of the same outmoded justifications for refusing to enforce the agreements—such as the “hesitancy to become involved in intimate questions inherent in the marriage relationship”<sup>164</sup> and the “delicate and intimate character”<sup>165</sup> of those questions, as well as policies against enforcement of surrogacy agreements like the one articulated in *Baby M*—they downplayed the anti-market rhetoric. Instead, they drew the line at the home’s doorstep in the name of freedom. In its discussion of public policy, the Massachusetts Supreme Judicial Court repeatedly used the words “forced” or “compelled” to describe

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characterizes the public policy doctrine as “anticontractarian” because it sets aside certain transactions that it will not analyze under “normal contract principles.” *id.* at 2200 n.259, the public policy doctrine does not exist outside of contract law but is a central part of it. At its core is the power of the courts to declare a particular agreement against the public good. *See supra* notes 99-102 and accompanying text.

159. *Borelli*, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (internal quotations omitted).

160. *Id.* at 24, 25.

161. *See, e.g.*, Widiss, *supra* note 145, at 757-58 & n.161.

162. Scott & Scott, *supra* note 96, at 1242 (noting the effect of the no-fault divorce regime on the incentives of spouses to defect from the marital relationship, and the systematic harms to women).

163. *Borelli*, 16 Cal. Rptr. 2d at 20 (Poché, J., dissenting).

164. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000).

165. *Id.* at 1059 (quoting *Doe v. Doe*, 314 N.E.2d 128, 130 (1974)); *see also In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003) (expressing “a general reluctance to become involved in intimate questions inherent in personal relationships”).

the contract at issue and invoked “freedom of personal choice,” “respect for liberty and privacy,” and the “freedom to decide whether to enter into a family relationship” in justifying its decision.<sup>166</sup> But while the justifications differ,<sup>167</sup> the result remains the same—when an agreement involves matters thought to pertain to the home, courts will not step in.

There is reason to believe that the rhetoric of personal freedom embraced in the embryo disposition cases has already begun to extend to other types of intimate agreements. For example, the Massachusetts Supreme Judicial Court declined to enforce an agreement by a woman in a same-sex relationship, B.L., to co-parent a child that was conceived by her partner, T.F.<sup>168</sup> The two women discussed their preferences regarding the child’s gender, baptism, schooling, and the division of labor between the couple should they have a child.<sup>169</sup> Having decided to pursue parenthood through artificial insemination, the partners signed the fertility clinic’s consent form, worked together to select an anonymous sperm donor, and paid for the procedure with their joint funds.<sup>170</sup>

After T.F. became pregnant, the parties’ relationship began to deteriorate, and B.L. moved out of their shared apartment two months before the child’s birth.<sup>171</sup> Even then, B.L. expressed a desire to be the child’s parent, saying that she wanted to adopt the child, and promising financial support.<sup>172</sup> Following the child’s birth, B.L. visited T.F. in the hospital and helped select the baby’s name.<sup>173</sup> She also sent photographs of herself with the child to her friends, accompanied by the message, “I hope you all enjoy the pics of my wonderful, beautiful boy.”<sup>174</sup> But within three months, B.L. notified T.F. that she desired no further contact with the child.<sup>175</sup>

The court concluded that B.L. agreed to share parenting responsibilities, but held that the agreement violated public policy and would not be enforced.<sup>176</sup> It invoked the policy against forced procreation that it recognized in *A.Z.*,<sup>177</sup> reasoning that “in order to protect the ‘freedom of personal choice in matters of marriage and family life, . . . prior agreements to enter into familial

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166. *A.Z.*, 725 N.E.2d at 1058-59.

167. For example, the Iowa Supreme Court cited its decision in *Miller v. Miller*, 42 N.W. 641 (Iowa 1889), in support of its policy against resolving “intimate questions inherent in personal relationships.” *Witten*, 672 N.W.2d at 781. It did not, however, quote the part of the *Miller* decision embracing the rhetoric of altruism: “The marital obligation of husband and wife in the interest of homes, both happy and useful, have a *higher and stronger inducement than mere money consideration*, and they are generally of a character that the judgments or processes of the courts cannot materially aid . . . .” *Miller*, 42 N.W. at 642 (emphasis added).

168. *T.F. v. B.L.*, 813 N.E.2d 1244, 1246 (Mass. 2004).

169. *Id.* at 1247.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1248.

174. *Id.*

175. *Id.*

176. *Id.* at 1250-51.

177. 725 N.E.2d 1051 (Mass. 2000).



relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions.”<sup>178</sup>

The result in this case is surprising not only because the facts suggested that the decision by both partners to have the child involved the discussion of specific parental roles and duties, formalities like meeting with physicians and executing a consent form, and multiple opportunities to change course, but also because it left the child with only one responsible parent, a situation that the law customarily seeks to avoid.<sup>179</sup> So important was the policy protecting B.L.’s freedom to change her mind that the court relieved her of support obligations for a child whose birth she helped to bring about. The court’s invocation of this zone of freedom therefore had the same effect as the older rhetoric of altruism: it created a world—centered around familial relationships—in which the court would not interfere. It also policed the boundaries of the traditional family by thwarting the expansion of parenthood outside its traditional context.

### *B. Naturalizing Motherhood*

The rhetoric of individual freedom has also revitalized public policies emphasizing the importance of motherhood to women and the superiority of biological parenthood to other forms of parenthood. By relegating women to their appropriate place in the home, these policies reinforce the separation of market and the family, with all the consequences that follow. The nonenforcement of agreements for the use of assisted reproductive technologies has also provided courts the opportunity to articulate norms regarding the value of biological parenthood. These norms in turn bolster the importance of biological parenthood in other contexts, such as the debate over whether to extend the right of same-sex marriage to gay couples and the discussion of women’s abortion rights.

The maternal bond has long anchored decisions that invalidate intimate agreements on public policy grounds. For instance, courts have suggested that the specialness of the mother-child relationship interferes with the contracting process by rendering women incapable of making rational or informed commitments regarding reproduction. In *Baby M*,<sup>180</sup> for example, the court voided a surrogacy agreement in part because “the natural mother [was] irrevocably committed” to surrender the infant she carried “before she [knew]

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178. *T.F.*, 813 N.E.2d at 1251 (quoting *A.Z.*, 725 N.E.2d at 1059).

179. *See id.* at 1253 (recognizing that the husband of a woman who undergoes artificial insemination is obligated to pay child support); *see also id.* at 1255-56 (Greaney, J., dissenting) (arguing that the best interests of the child should have been considered, and would weigh in favor of imposing a duty of support).

180. 537 A.2d 1227 (N.J. 1988).

the strength of her bond with her child.”<sup>181</sup> And it worried about “the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child.”<sup>182</sup>

In recent years, the notion of the maternal bond has continued to justify public-policy-based invalidations of surrogacy agreements,<sup>183</sup> but has come under increasing criticism for its tendency to perpetuate negative gender stereotypes.<sup>184</sup> After all, to treat biological motherhood as the paramount role of a woman “exalts a woman’s experience of pregnancy and childbirth over her formation of emotional, intellectual, and interpersonal decisions and expectations.”<sup>185</sup> It is also out of step with changing views about the role of reproduction and childrearing in women’s lives.<sup>186</sup>

And, compellingly for some scholars, this public policy has anchored women-protective rationales for limiting abortion rights.<sup>187</sup> In *Bradwell v. State*,<sup>188</sup> Justice Bradley famously stated that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”<sup>189</sup> Although Justice Ginsburg recently characterized these sentiments as “ancient notions about women’s place in the family . . . that have long since been discredited,”<sup>190</sup> the fact that she had to invoke them in an opinion dissenting from the Supreme Court’s decision to uphold the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*<sup>191</sup> indicates that they are not as discredited as she suggests. In fact, Justice Kennedy’s majority opinion echoed Justice Bradley’s sentiments, stating that “[r]espect for human

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181. *Id.* at 1248.

182. *Id.* at 1250.

183. *See, e.g.,* R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998); A.G.R. v. D.R.H. & S.H., No. FD-09-1838-07 (N.J. Super. Ct. Dec. 23, 2009) (extending the *Baby M* decision to the gestational surrogacy context).

184. *See* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 142 (2009) (discussing the retreat of feminist and women’s groups from the movement against surrogacy); Shultz, *supra* note 92, at 384-85 (criticizing the use of gender stereotypes to reify the essential role of motherhood and to relegate women to the domestic sphere).

185. Shultz, *supra* note 92, at 384.

186. Serial dating among middle-class people in their twenties and thirties is prevalent, *see* ERIC KLINENBERG, GOING SOLO: THE EXTRAORDINARY RISE AND SURPRISING APPEAL OF LIVING ALONE 14 (2012), and one in five women end their childbearing years without giving birth, double the rate from the 1970s, *id.* at 67.

187. *See, e.g.,* Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 291-92 (2011) (arguing that both *Baby M* and the Supreme Court’s most recent abortion decision used a woman’s regret to indicate disapproval of interventions with traditional reproduction); Scott, *supra* note 184, at 142-45 (observing the use of women-protective arguments to curtail reproductive autonomy); Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1688-89 (2008) (contending that the woman-protective antiabortion arguments “restrict[] women’s choices to free them to perform their natural role as mothers”); Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1242-43 (2010).

188. 83 U.S. 130 (1872).

189. *Id.* at 141 (Bradley, J., concurring).

190. *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

191. 550 U.S. 124 (2007).

life finds an *ultimate expression* in the *bond of love* the mother has for her child.”<sup>192</sup> These views about motherhood and the mother-child relationship justified the tightening of restrictions on the use of certain types of abortion procedures.<sup>193</sup> To Reva Siegel, the underlying logic of the decision, based on the imagined needs of the woman who wants to bear a child but cannot provide for her existing family, “is that by restricting all women, government can free women to be the mothers they naturally are.”<sup>194</sup> The women-protective anti-abortion argument “restricts women’s choices to free them to perform their natural role as mothers.”<sup>195</sup>

The rhetoric of individual freedom masks the rhetoric of the maternal bond. The emphasis on individual freedom presents the specialness of the mother-child bond in gender-neutral terms. In *J.B.*,<sup>196</sup> for example, the New Jersey Supreme Court relied heavily on its *Baby M* decision to articulate its policy against enforcement of embryo disposition agreements.<sup>197</sup> But instead of adopting the gender-based reasoning of its prior decision, it reinterpreted its protection of a surrogate mother’s right to change her mind to protect the ability of *either* spouse to “reconsider[] his or her earlier acquiescence . . . to become a biological parent.”<sup>198</sup>

The public policy protecting individual freedom in matters pertaining to the family sounds gender-neutral and seems to avoid the trappings of stereotypical assumptions about motherhood. But assumptions regarding biological parentage lurk beneath the surface. In noting that it would not enforce agreements resulting in unwanted genetic parentage in most instances, the *J.B.* court reserved to itself the power to award the embryos to one of the parties if the party seeking to use the embryos “ha[d] become infertile.”<sup>199</sup> Two justices, concurring, emphasized that in that instance, the balance would shift in favor of the infertile party, and that adoption would not suffice as an alternative means of attaining parenthood.<sup>200</sup> Although couples may turn to IVF due to the infertility of either the woman or the man, the woman is much more likely to

192. *Id.* at 159 (emphasis added).

193. *See id.* at 159-60. This portion of Justice Kennedy’s opinion has been amply criticized for its invocation of the maternal bond and the regret that Justice Kennedy assumes will follow an ill-informed decision by a woman to terminate her pregnancy. *See, e.g.,* Appleton, *supra* note 187, at 261-63 (collecting various criticisms); Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1559, 1619 (2008) (criticizing the misapplication of informed consent principles); Jody Lyneé Madeira, *Woman Scorned?: Resurrecting Infertile Women’s Decision-Making Autonomy*, 71 MD. L. REV. 339, 359-60 (2012) (identifying criticisms of the pathologizing of the abortion decision based on stereotypes of the maternal bond); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1699 (2008) (characterizing Justice Kennedy’s reasoning as “gender-paternalist”).

194. Siegel, *supra* note 187, at 1688.

195. *Id.*

196. *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

197. *Id.* at 718.

198. *Id.*

199. *Id.* at 720 (emphasis added).

200. *See id.* (Verniero, J., concurring); *id.* (Zazzali, J., concurring).

become *more* infertile as she ages.<sup>201</sup> The policy of protecting the interests of the infertile party to bear children would therefore seem to rest on the importance of biological motherhood.

Also recall that, notwithstanding the courts' gender-neutral language regarding reproductive decisionmaking, the states have a poor track record treating men's and women's choices as equally significant. For instance, although Massachusetts's statutory four-day waiting period before a parent can surrender a newborn for adoption covers some classes of fathers as well as mothers,<sup>202</sup> the *A.Z.* court characterized that statutory requirement to provide that "no *mother* may agree to surrender *her* child . . . regardless of any prior agreement."<sup>203</sup> The mother-centric reading of the waiting period coincides with the Massachusetts Supreme Judicial Court's previous statement that the waiting period "should be interpreted as providing that *no mother* may effectively agree to surrender her child for adoption earlier than the fourth day after its birth, by which time *she better knows the strength of her bond with her child.*"<sup>204</sup> New Jersey invalidates "[a] surrender by the birth parent of a child . . . taken within 72 hours of the birth of the child," but allows an alleged father to deny paternity and waive his right to consent to the child's surrender "at *any time including prior to the birth of the child.*"<sup>205</sup> In these states, the decision-making freedom of which the courts speak originates from specific assumptions about the maternal role.

Before the advances in reproductive technologies that form the backdrop of this Article, the mother-child relationship was defined by biology: bearing and birthing a baby established the legal status of motherhood.<sup>206</sup> Determination of paternity was always more complex, allowing a man to establish paternity by acknowledgment, or by presuming paternity based on "the man's relationship to a child's mother."<sup>207</sup> But under this arrangement, a man could be a legal parent of a child regardless of whether he was the child's biological father. When it became possible through genetic testing to establish a man's biological paternity, courts had to decide whether biological paternity could override the presumptions that had traditionally decided the matter.<sup>208</sup> In *Michael H. v. Gerald D.*, the Supreme Court answered that question in favor of status,

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201. See Ruth Colker, *Pregnant Men Revisited or Sperm is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1066 (1996) (arguing that women should be entitled to possession of cryopreserved embryos because their fertility declines over time).

202. See MASS. GEN. LAWS ch. 210, § 2 (2008) (requiring written consent of the child's "lawful parents"). The courts do not appear to have spoken with any clarity on the right of unmarried biological fathers to refuse to consent to the adoption of their children.

203. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (emphasis added).

204. *R.R. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998) (emphasis added).

205. N.J. STAT. ANN. § 9:3-41(e) (West 2012) (emphasis added).

206. See Shultz, *supra* note 92, at 316.

207. See *id.* at 317.

208. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); see also Shultz, *supra* note 92, at 318 (discussing *Michael H.*).

upholding a California statute establishing an irrebuttable presumption that a child born during a marriage was the husband's child.<sup>209</sup>

With advances in reproductive technologies, women too can establish different claims to motherhood as a genetic parent, gestational parent, or legal parent.<sup>210</sup> For example, a gestational surrogate is a gestational mother of the child, but not the child's genetic mother; either may be the child's legal mother, depending on the state in which the birth occurs.<sup>211</sup>

How strange, then, that in the face of these different claims to motherhood, courts have generally privileged biology over status—as in the *Baby M* case—and the genetic mother over the nongenetic. The Massachusetts Supreme Judicial Court, for example, has recognized a public policy against the enforcement of a traditional, paid surrogacy agreement based on concerns about commodification similar to those voiced in *Baby M*.<sup>212</sup> But it has also indicated that a gestational surrogacy agreement would not raise the same concerns because the children “have no genetic relation to the gestational carrier.”<sup>213</sup> The lack of a genetic tie between the gestational carrier and the children she bore led that court to apply a marital presumption in favor of a husband and wife—the providers of the genetic material—even though the surrogate, not the wife, gave birth to the child.<sup>214</sup> It also led the court to ignore its concern in the traditional surrogacy context that “economic pressure will cause a woman to . . . permit her body to be used and her child to be given away.”<sup>215</sup> Even assuming that the absence of a genetic connection means that a gestational carrier would not be giving away “her” child,<sup>216</sup> a court truly concerned with the commodification of women's bodies would not allow its concerns to so easily fall away. The disparate treatment of maternity and paternity suggests that policies protecting the genetic tie uniquely naturalize the importance of genetic motherhood to women.<sup>217</sup>

209. *Michael H.*, 491 U.S. at 129-30.

210. See Cohen, *supra* note 122, at 1121-22 (disaggregating the types of parenthood and the parallel rights not to procreate).

211. Compare *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1983) (holding that the intended mother of the child, in this case the genetic mother, would be the child's legal mother), with *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 (N.J. Super. Ct. Dec. 23, 2009) (holding that the gestational mother was the legal mother of the children).

212. *R.R. v. M.H.*, 689 N.E.2d 790, 797 (Mass. 1998) (noting the potentially coercive aspects of offering payment for surrogacy and the need to protect a mother's ability to reconsider the decision to surrender a child for a limited period after its birth).

213. *Culliton v. Beth Israel Deaconness Med. Ctr.*, 756 N.E.2d 1133, 1138 (Mass. 2001).

214. *Id.* at 1137.

215. *Id.* (alterations and emphasis omitted) (quoting *R.R.*, 689 N.E.2d at 796).

216. Many would dispute this assumption. See, e.g., Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1246-47 (1996) (criticizing as patriarchal the notion that gametes, as opposed to gestation, constitute motherhood).

217. Of course, an alternate explanation for this particular result could be a desire on the part of the court to place the resulting child within a marital relationship. Melissa Murray has previously observed the strong tendency of courts to award custody based on the existence of a marital or quasi-marital relationship of the interested adults. See Melissa Murray, *What's So New About the New Illegitimacy*,

Courts also equate biological parenthood with personal fulfillment. In *Reber v. Reiss*,<sup>218</sup> divorcing spouses failed to execute a valid embryo disposition agreement.<sup>219</sup> The husband subsequently began a relationship with another woman and had a biological son with her; meanwhile, the wife, age forty-four, had no children and therefore sought use of the embryos to become a mother.<sup>220</sup> Although the husband contended that adoption or foster parenting were available to the wife, the court distinguished between an interest in procreating and merely becoming a parent.<sup>221</sup> Crediting her testimony that she “always wanted to have children . . . and . . . wanted that experience of being pregnant and that closeness, *that bond*,”<sup>222</sup> the court agreed that “the ability to have a biological child and/or be pregnant is a distinct experience from adoption.”<sup>223</sup> It reasoned that although “[a]doption is a laudable, wonderful, and fulfilling experience for those wishing to experience parenthood, . . . it occupies a *different place* for a woman.”<sup>224</sup> Because adoption could not “be given equal weight” to having a genetically related child, the court awarded the wife the frozen embryos.<sup>225</sup> This decision rejects the notion that adoption and biological motherhood are equivalent, and emphasizes the superiority of biological motherhood over other options.<sup>226</sup>

In addition to essentializing the role of motherhood for women, public policies protecting the genetic tie between mothers and children provide courts with the opportunity to articulate notions of the public good that apply to other areas of state regulation. The policing of groups on the periphery of society articulates social norms intended to govern the majority.<sup>227</sup> Efforts by those

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20 AM. U. J. GENDER SOC. POL’Y & L. 387, 399-400 (2012) (arguing that the Supreme Court’s unmarried father cases can be understood as expressing a preference for the marital family over other alternatives). This alternate explanation would support my larger thesis that these public policy decisions police the boundaries of the traditional family.

218. 42 A.3d 1131 (Pa. Super. Ct. 2012).

219. *Id.* at 1136 (noting that neither spouse signed the part of the consent form related to the disposition of cryopreserved embryos).

220. *Id.* at 1133.

221. *Id.* at 1138.

222. *Id.* (emphasis added).

223. *Id.*

224. *Id.* (emphasis added).

225. *Id.* The court went on to note that adoption would not be a practical option for the wife in any event because of her age and marital status. *See id.* at 1139.

226. This essentialist reasoning arguably benefited the infertile woman in this case by giving her what she wanted: possession of the embryos. But in many cases, the same reasoning disadvantages one woman against another, as in the gestational surrogacy context. On the whole, therefore, policies perpetuating the essentialized view of motherhood harm women broadly by justifying status inequalities, and can also directly deny women the results they seek in a given case.

227. *See, e.g.*, Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 54-60 (2012) (arguing that the same-sex marriage movement has provided courts the opportunity to express views about “proper” marital relationships that they would not have had the occasion to state otherwise); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1646 (2003) (observing that the legal regulation of unmarried women has played a constitutive role in the regulation of marriage).

outside the nuclear family to achieve genetic parenthood through contract have provided the courts with opportunities to articulate public policies emphasizing the specialness of the genetic relationship between parent and child.

These judicial pronouncements promoting the prestige of biological parentage coincide with other attempts to regulate family structures. For example, messages about the importance of genetic parenthood parallel arguments deployed by supporters of traditional marriage against advocates of same-sex marriage. In their merits brief before the Ninth Circuit, the proponents of Proposition 8—the California constitutional amendment limiting marriage to a man and a woman<sup>228</sup>—argued that a central “purpose of marriage, always and everywhere, has been to further society’s interest in increasing the likelihood that children will be born to and raised by the couples who brought them into the world in stable and enduring family units.”<sup>229</sup> Differential treatment of gay and lesbian couples rests on the claim that they cannot “unite the biological, social and legal components of parenthood into one lasting bond.”<sup>230</sup> However, because many different configurations of people can provide emotional support to one another, engage in a panoply of sex acts, and even raise children, the definition of traditional marriage must turn on “a *special* link to children”<sup>231</sup> resulting *only* from the heterosexual sex act: “[I]ndividual adults are naturally incomplete with respect to one biological function: sexual reproduction. In coitus, but not in other forms of sexual contact, a man and a woman’s bodies coordinate by way of their sexual organs for the common biological purpose of reproduction.”<sup>232</sup> To traditional marriage advocates, biology alone provides the special link.

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228. CAL. CONST. art. I, § 7.5 (as of Mar. 29, 2013).

229. Brief of Defendant-Intervenors-Appellants at 77, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 4622581, at \*52-53; *see also id.* at \*80 (arguing that the presence of two biological parents, rather than any two parents, is most likely to generate positive outcomes for children).

230. David Blankenhorn, Op-Ed., *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html>; *see also* Brief of Intervenor-Defendant-Appellant the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 51, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (Nos. 12-15388, 12-15409), 2012 WL 2132484, at \*51 (“Because same-sex relationships are incapable of creating families of mother, father, and biological children, the legitimate state interest in promoting a family structure that facilitates the rearing of children by both biological parents is distinctively served by the traditional definition.”).

231. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 252 (2010) (emphasis added).

232. *Id.* at 254. Several earlier marriage equality cases adopted a variant of this argument in rejecting marriage between same-sex individuals. Because only heterosexuals can procreate, and because “accident[al] or impuls[ive]” heterosexual sexual activity can lead to unintentional parenthood, legislatures, it was thought, could rationally “offer the benefits of marriage to opposite-sex couples only” in order to induce the formation of stable relationships. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *see also* *Anderson v. King County*, 138 P.3d 963, 982 (Wash. 2006) (citing *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (“the ‘institution’ of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly.”)).

The policies emphasizing the importance of biological motherhood and the genetic tie and the argument for excluding from marriage those relationships that cannot result in the birth of genetically related children are mutually reinforcing. They illustrate the role of the public policy doctrine in policing intimate conduct, both by providing new justifications for old status privileges and by articulating social norms that burden marginal groups. It is those burdens that I turn to in the next Part.

### III. THE COSTS OF PUBLIC POLICING

By now it should be clear that courts use the public policy doctrine in an attempt to shape social norms even in situations where the law, in the form of statutes or policies, is formally agnostic.<sup>233</sup> As discussed above, by keeping certain reproductive decisions outside of the realm of legal enforcement, the doctrine has reinforced the border between the market and the family and the controlling image of motherhood despite (or through) the rhetorical shift towards individual freedom. Clothed in the language of truths universally acknowledged, these policies attempt to “persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”<sup>234</sup> This Part first considers the relationship between the policies articulated in the context of agreements for the use of assisted reproductive technologies and the policies articulated in the context of other intimate agreements. It demonstrates how these policies work together to shore up gender stereotypes that perpetuate inequalities between men and women. It then examines the special toll the policies take on nontraditional intimate arrangements and connects those costs to broader forms of social regulation.

#### *A. Contract Doctrine and the Production of Gender*

The production and maintenance of traditional gender relationships through application of the public policy doctrine discussed in the previous Part extend to a wide variety of intimate agreements. Marriage is a gender factory—fostering differentiated gender-role development and legitimating those roles<sup>235</sup>—and the public policy doctrine has had an important supporting role in

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233. See Widiss, *supra* note 145, at 764-67 (noting that family law and employment law are formally sex-neutral, but that gender norms continue to encourage role specialization in marriage).

234. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984).

235. Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 3-4, 22-29 (2010) (proposing that many view marriage as a “purposefully gendered institution” and offering social science data in support of that view). The recent statements made during oral arguments before the Supreme Court in the Proposition 8 case bears this out. Counsel for the Proponents of Proposition 8, Charles Cooper, justified California’s restriction of marriage to opposite-sex couples by twice noting that treating marriage as a “genderless institution” would threaten other marital norms like fidelity,



policing its borders. Here, I discuss the courts' treatment of several types of agreements to illustrate this.

At first blush, the widespread trend of enforcing prenuptial agreements appears to suggest that courts have become less interested in using the public policy doctrine to protect the boundaries of the marital relationship. Although the legal requisites vary somewhat, every state allows future spouses to enter into legally enforceable agreements regarding property distribution,<sup>236</sup> and most states enforce postmarital agreements between separated or divorcing spouses.<sup>237</sup> Indeed, courts have sometimes celebrated these decisions as a triumph of modern notions of gender equality over traditional assumptions regarding a woman's incapacity to look out for her own rights. In *Simeone v. Simeone*,<sup>238</sup> for example, the Pennsylvania Supreme Court observed that "the stereotype that women serve as homemakers while men work as breadwinners is no longer viable," "often today both spouses are income earners," and "women nowadays quite often have substantial education, financial awareness, income, and assets."<sup>239</sup> It relied on these societal changes to ground its treatment of prenuptial agreements like any other contract,<sup>240</sup> even though the husband in the case, a thirty-nine-year-old surgeon at the time of marriage, presented his wife-to-be, a twenty-three-year-old nurse, with the agreement on the eve of their wedding and she signed it without the advice of counsel.<sup>241</sup>

This progress narrative, however, obscures continued refusals by the courts to alter firmly entrenched norms.<sup>242</sup> First, for all their claimed solicitude towards prenuptial agreements, courts avoid enforcing agreements that affect spousal duties. In *Graham v. Graham*,<sup>243</sup> a court refused to enforce an alleged

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monogamy, and procreation. Transcript of Oral Argument at 23, 25, *Hollingsworth v. Perry* (No. 12-144) (argued Mar. 26, 2013).

236. See GROSSMAN & FRIEDMAN, *supra* note 107, at 210; William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1917 & n.142 (2012) (collecting statutes and cases).

237. See, e.g., *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 958 n.1, 961 (Mass. 2010) (recognizing a trend in most states of recognizing the validity of agreements between married spouses pertaining to the legal rights and obligations that would otherwise arise under the laws governing marital dissolution).

238. 581 A.2d 162 (Pa. 1990).

239. *Id.* at 165.

240. See *id.*

241. *Id.* at 163. The agreement limited the husband to a maximum payment of \$200 per week in the event of their separation and a total payment of \$25,000. *Id.* at 164. In a concurring opinion, Justice Papadakos accused the majority opinion of expressing the belief that the passage of a state equal rights amendment eliminated "all vestiges of inequality between the sexes" and identified areas of lingering inequality. *Id.* at 168 (Papadakos, J., concurring). I do not mean to suggest that the differences in their ages and occupations necessarily affected the ability of the parties to reach a fair agreement in this particular case, but merely note the *potential* for those differences to affect the fairness or voluntariness of the bargain.

242. By "progress narrative," I mean a story of legal change in which institutions are modernized and liberal values vindicated. See Laura F. Edwards, *The History in "Critical Legal Histories,"* 37 LAW & SOC. INQUIRY 187, 191-92 (2012) (commenting on Gordon, *supra* note 234). I thank Melissa Murray for helping me to frame this point.

243. 33 F. Supp. 936 (E.D. Mich. 1940).

written agreement requiring Margrethe Graham to pay her husband Sidney \$300 per month during their marriage.<sup>244</sup> In his complaint, Sidney alleged that Margrethe agreed to pay him the monthly stipend to induce him to quit his job at a hotel and accompany her on her travels.<sup>245</sup> Setting aside the parties' factual dispute—Margrethe called Sidney's "abandonment of work and continued reliance upon her for support" "*distasteful*"<sup>246</sup>—the court held that the alleged agreement could not be enforced on public policy grounds.<sup>247</sup> Noting that marriage "creates a status . . . under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties," the court observed that marriage required "the husband to support . . . his wife and the wife . . . to . . . *follow him* in his choice of domicile."<sup>248</sup> That the agreement subjected Sidney to his wife's travel whims and contemplated her providing the couple's financial support rendered it contrary to the public good.<sup>249</sup>

Although *Graham* is an old decision, more recent cases demonstrate that courts continue to resist enforcing contracts that adjust traditional spousal duties. In *Borelli v. Brusseau*,<sup>250</sup> discussed in Section II.A above, a California court refused to enforce a promise by a husband who suffered a stroke to convey separate property to his wife in exchange for her providing "round-the-clock" health care, noting that the care fell within the wife's spousal support obligations that she was required to "personally" discharge.<sup>251</sup> In *Boudreaux v. Boudreaux*,<sup>252</sup> a husband agreed to pay his wife \$1500 per month in alimony "if he filed for divorce for any reason, including adultery" in order to prevent his wife from divorcing him.<sup>253</sup> When he filed for divorce four years later, the husband sought to invalidate the agreement.<sup>254</sup> The court agreed that the agreement violated public policy, noting that the "agreement to pay alimony, regardless of fault—even adultery . . . would undermine the sanctity of marriage, and would encourage the parties to approve adulterous conduct for a price" in contravention of the duty of "fidelity" owed by spouses.<sup>255</sup> And in *Favrot v. Barnes*,<sup>256</sup> a court refused to enforce an agreement between a husband

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244. *Id.* at 936.

245. *Id.* at 936-37.

246. *Id.* at 937 (emphasis added). Margrethe's choice of words here appears intentionally designed to invoke an emotional response to both the content and manner of her husband's assertions.

247. *Id.* at 938.

248. *Id.* at 938 (emphasis added).

249. *Id.* at 939.

250. 16 Cal. Rptr. 2d 16 (Ct. App. 1993).

251. *Id.* at 17-20 (citing cases indicating that "support in a marriage means more than the physical care someone could be hired to provide").

252. 745 So. 2d 61 (La. Ct. App. 1999).

253. *Id.* at 62.

254. *Id.*

255. *Id.* at 63. *But see* *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 495-96 (Cal. Ct. App. 2002) (invalidating a contractual provision penalizing infidelity between spouses on the ground that it conflicted with the state's policy protecting the right to divorce regardless of fault).

256. 332 So. 2d 873 (La. Ct. App. 1976), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976).

and wife limiting sexual intercourse to about once a week.<sup>257</sup> The husband sought to prove that his wife was at fault for the divorce by seeking coitus “thrice daily,” but the court held that such an agreement—attempting to modify the spousal obligation to “fulfill ‘the reasonable and normal sex desires of each other,’”—would not be enforceable.<sup>258</sup>

Although courts routinely enforce agreements for the disposition of property,<sup>259</sup> they treat sexual obligations and nonfinancial support as nonnegotiable. By striking down agreements altering the husband’s support obligations, the wife’s domestic care obligations, and monogamous and healthy sexuality, these cases offer anecdotal evidence suggesting that agreements transgressing traditional gender roles fare particularly poorly in the courts. Admittedly, not enough data exist to draw a firm conclusion. But, at the very least, the differential treatment of spousal agreements for property and other marital duties appears to reinforce the separation between the market and the home, recognizing agreements that benefit the spouse with economic power—usually the husband<sup>260</sup>—while disadvantaging the spouse providing the caregiving services.

Courts further protect traditional gender norms by refusing to enforce agreements in ongoing marriages, preserving the status quo until the time when the relationship is already at an end.<sup>261</sup> Indeed, a great majority of cases involving contracts between spouses come to the court’s attention either during divorce proceedings or after the death of a spouse. And courts prefer it that way. In *In re Estate of Hollett*,<sup>262</sup> for example, a surviving wife attempted to invalidate a prenuptial agreement negotiated on the eve of her wedding under circumstances suggesting duress.<sup>263</sup> In upholding the agreement, the trial court observed that at no time during the parties’ ten years of marriage did the wife attempt to rescind the agreement.<sup>264</sup> But the appellate court held that public policy prohibited consideration of that evidence: “The law frowns upon litigation between husband and wife. Where their relations are friendly and affectionate, it takes account of the fact that she would be loath to institute legal proceedings against him.”<sup>265</sup> The court reasoned that to hold otherwise would “penalize [the wife] for choosing not to disrupt her marriage, which the trial

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257. *Id.* at 875.

258. *Id.*

259. See Silbaugh, *supra* note 19, at 70-71.

260. *Id.* at 98 (pointing out that men “bring more wages to a marriage and women bring more unpaid labor”).

261. See Case, *supra* note 135, at 225 (citing Saul Levmore’s observation that married couples must normally resort to self-help to resolve disputes short of taking the extreme step of dissolution).

262. 834 A.2d 348 (N.H. 2003).

263. *Id.* at 349-50 (describing the husband and wife’s age and income differences, the fact that she was asked to negotiate the agreement with a recent law school graduate as her counsel on the eve of the wedding, and the fact that she was disconsolate throughout most of the negotiating process).

264. *Id.* at 353.

265. *Id.* (quoting *In re Flannery’s Estate*, 173 A. 303, 304 (Pa. 1934)).

court characterized as ‘close,’ ‘loving’ and ‘*traditional*,’ with a lawsuit against her husband.”<sup>266</sup> One cannot be certain what facts led the court to consider their relationship traditional, although the fact that the husband was thirty years older, was far more financially successful and sophisticated, and encouraged his wife to quit her “low level jobs” to stay at home likely contributed to its conclusion.<sup>267</sup> The awareness that the relationship reflected traditional gender roles clearly contributed to the court’s desire to protect it from disturbance.

The combined effect of creating a realm impervious to contract and imposing standard marital duties is the reinforcement of whatever gender norms those standard duties express. As with public policy decisions in the context of reproductive agreements, the selective public-policy-based disapproval of marital agreements often endorses traditional gender relationships.

Much has been said about the role of traditional gender stereotypes in maintaining inequality between men and women, so I only briefly discuss the implications of contract law’s public policing here. The public policy doctrine joins the various other legal structures that promote gender role differentiation along traditional lines.<sup>268</sup> Katherine Baker has recently observed the extent to which married people internalize these roles notwithstanding income level or education: for example, despite a widespread belief that both parents should be equally involved in caregiving, “belief in gender egalitarianism” is in fact correlated with “gendered work patterns.”<sup>269</sup> The stickiness of these roles has preserved the division of domestic labor along traditional gender lines notwithstanding the gradual elimination of most formal sex-based classifications.<sup>270</sup> Efforts to eliminate structural inequalities based on equal access to opportunities both in and out of the home may therefore depend on the loosening of these norms.<sup>271</sup>

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266. *Id.* (emphasis added).

267. *Id.* at 349, 352-53.

268. Deborah Widiss has identified examples of legal regimes that, while formally sex-neutral, continue to encourage role specialization among married couples, including social security, the federal “marriage penalty” for couples earning relatively comparable amounts, and public benefits work requirements. *See* Widiss, *supra* note 145, at 748-51. Widiss notes that despite the formal neutrality of these regimes, opposite-sex-couple specialization breaks down along traditionally gendered lines. *Id.* at 757-65.

269. *See* Baker, *supra* note 235, at 25. She notes that “[e]ducation level is highly correlated with belief in gender equality, as is income level. Yet, the more wealth a married couple has, the more profound their gender specialization tends to be.” *Id.* at 25-26.

270. *See* Widiss, *supra* note 145, at 763, 765 (noting that even women who earn higher incomes outside the home perform more domestic work than their husbands, and that studies suggest that many people prefer adherence to traditional roles); *see also* Siegel, *supra* note 145, at 1214 (“Today, as in the nineteenth century, it is women who perform the work of the family, women who seek to escape the work, and women who eke out a living performing the work—for other women.”).

271. *See* Widiss, *supra* note 145, at 793 (noting the existence of two approaches to “address[ing] the imbalance in caretaking functions provided by men and women,” one focused on countering gender norms, and the other focused on accommodating them); *see also* Dubler, *supra* note 34 (criticizing the

However, the public policy doctrine shores up these norms by articulating them as public goods even as it denies legal recognition to attempts to alter them. Discussions of the doctrine even enter the public's mind from time to time outside the context of a particular lawsuit. When Facebook founder Mark Zuckerberg married Priscilla Chan in May 2012, several news outlets reported on an agreement that he and Chan made several years earlier when she decided to move to California to be with him:

The couple agreed that they would not live together, but that Mr. Zuckerberg would spend at least 100 minutes of private time with Ms. Chan a week, as well as take her on at least one date . . . . The couple also agreed to vacation for two weeks yearly overseas . . . .<sup>272</sup>

Around this time, the *New York Times* ran a story on “relationship agreements”—agreements between couples “delineating the idiosyncratic needs of their relationship”—reporting that “most lawyers think that such agreements generally are legally unenforceable.”<sup>273</sup> Although the article touted the potential benefits of such agreements, the examples used to illustrate what the agreements could entail appeared to trivialize them and created the impression that attempts at customization would be unenforceable at any rate.<sup>274</sup> This encapsulation of popular attitudes toward intimate contracting suggests that the public policy doctrine's role in keeping contract logic outside of the intimate realm.

### *B. Marginalizing Sexual Minorities*

The previous section demonstrated the role of the public policy doctrine in perpetuating what many consider to be problematic social inequalities. In this section, my focus narrows to those who fall outside of the traditional marital relationship. By placing decisions regarding assisted reproductive technologies outside the reach of contract law, courts impose obstacles to the use of those technologies by a range of sexual minorities, including gay men and lesbians.<sup>275</sup> Women seeking to bring a genetically related child into a same-sex

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role of gender norms in imposing caregiving responsibilities on women, and calling for “our leaders . . . to abandon their antiquated assumptions about men's and women's roles at work and at home”).

272. Laura M. Holson & Nick Bilton, *Facebook's Royal Wedding*, N.Y. TIMES, May 25, 2012, <http://www.nytimes.com/2012/05/27/fashion/who-is-priscilla-chan.html>.

273. Jan Hoffman, *Just Call It a Pre-Prenup*, N.Y. TIMES, May 25, 2012, <http://www.nytimes.com/2012/05/27/fashion/the-background-on-relationship-agreements.html>.

274. *See id.* (discussing agreements to feed the fish or to allow a partner to take one cruise-ship vacation per year alone).

275. The arguments I make in this section would apply with equal force to those with non-typical sexual orientations or gender identities, like transgender, intersex, and genderqueer individuals. *See generally* Michael Shulman, *Generation LGBTQIA*, NY TIMES, Jan. 9, 2013, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html> (providing an overview of the

relationship must, at a minimum, use sperm from a donor, whether anonymous or otherwise.<sup>276</sup> Gay men seeking to have a genetically related child depend on the involvement of an egg donor and a gestational surrogate.<sup>277</sup> The gamete donation, IVF, and surrogacy processes all involve legal risks and therefore typically trigger contracting behavior.<sup>278</sup>

Policies against enforcing agreements involving reproductive technologies can make those technologies less readily available,<sup>279</sup> thereby encouraging traditional reproduction or adoption. Although not every court to address agreements regarding reproductive technologies has invalidated them on public policy grounds,<sup>280</sup> those that do adhere to a model in which the conception of children occurs between one man and one woman. Compare the case of *T.F. v. B.L.*,<sup>281</sup> in which the court refused to enforce an agreement by a lesbian cohabitant to co-parent a child,<sup>282</sup> with *Kesler v. Weniger*,<sup>283</sup> a case in which the court refused to enforce an agreement by a woman not to seek child support from her longtime heterosexual paramour.<sup>284</sup> In the former, the court declined to hold the defendant to her agreement notwithstanding the fact that she discussed various aspects of the parenting relationship with the plaintiff, accompanied her to doctor appointments, signed consent forms at the medical clinic, selected the child's sperm donor, selected the child's name, and initially provided financial support.<sup>285</sup> In the latter, a woman in a long-term extramarital affair, whose husband had since died, allegedly promised her lover that he would not be held responsible for the financial support of their child if he

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broad spectrum of gender and sexual identities as expressed by current college students). My arguments would also apply to individuals who, for whatever reason, are culturally or biologically infertile. And, of course, the arguments would apply to those who do not consider themselves sexual minorities but nevertheless must rely on assisted reproductive technologies to attain genetic parenthood.

276. Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law*, 65 VAND. L. REV. EN BANC 11, 18 (2012) (responding to Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353 (2009)); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 349 (2004).

277. Abramowicz, *supra* note 276, at 18; Robertson, *supra* note 276, at 350-51.

278. See Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1768-69 (2007).

279. In addition to any deterrent effects that may result from legal uncertainty, see *infra* note 301, public policies may literally have the effect of preventing reproduction, see, e.g., *In re Marriage of Witten*, 672 N.W. 2d 768, 783 (Iowa 2003) (preventing the use of a couple's cryopreserved embryos without the consent of both ex-spouses).

280. See, e.g., *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (enforcing an embryo disposition agreement); *Roman v. Roman*, 193 S.W.3d 40 (Tex. Ct. App. 2006) (same); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (en banc) (same).

281. 813 N.E.2d 1244 (Mass. 2004).

282. See *id.* at 1252.

283. 744 A.2d 794 (Pa. Super. 2000).

284. See *id.* at 796.

285. See *T.F.*, 813 N.E.2d at 1247-48.

helped her to conceive.<sup>286</sup> The court refused to enforce this agreement, citing a public policy against bargaining away a child's right to support.<sup>287</sup>

Taken together, these cases demonstrate that an intended lesbian co-parent cannot be bound to support a child whose birth she induces, while a heterosexual man cannot avoid legal parentage of a child he was promised he would not have to support.<sup>288</sup> The public policies plainly function to reinforce the value of a child having one mother and one father, and discount the value of two same-sex parents.

Decisions adopting public policies against the enforcement of surrogacy agreements—either traditional or gestational—also reveal a preference for family arrangements involving two (and only two) heterosexual parents.<sup>289</sup> Surrogacy agreements usually involve reproduction by more than two participants. In the *Baby M* case, for example, a married husband and wife sought the assistance of another woman to provide an egg and to carry the pregnancy to term.<sup>290</sup> The purpose of such an agreement was to allow the husband and wife to become parents of the child and to terminate the surrogate mother's parental status: this termination and substitution is what the court found most problematic and what public policy would not allow.<sup>291</sup> By invalidating the agreement on public policy grounds, the court “restore[d] the ‘surrogate’ as the mother of the child,”<sup>292</sup> thus ensuring that the child had only one father and one mother. In a recent decision, a New Jersey court extended this result to gestational surrogacy.<sup>293</sup> In that case, two gay men signed an agreement with one man's sister providing that she would carry embryos created using donated eggs to term and then surrender her parental rights so that the men could adopt the children.<sup>294</sup> Considering itself bound by the *Baby M* decision, the court held that the agreement was unenforceable on public policy grounds and declared the sister and her brother's partner the children's legal parents.<sup>295</sup> As in *Baby M*, the public policy doctrine served to frustrate the

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286. *Kesler*, 744 A.2d at 795.

287. *Id.* at 796. The court decided this issue notwithstanding the lower court's factual finding questioning the existence of the agreement. *See id.* at 795.

288. Admittedly, these cases arise in different states, so they do not preclude the possibility that either state would arrive at a more consistent result.

289. Scholars have long criticized the courts' insistence on the two-parent model of parenthood outside of the contract law context. *See, e.g.*, Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 401-02 (2012) (describing the “multiple-parent” literature and its critique of the courts' protection of the parental rights of only two parents); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 442-43 (2008) (describing the two-parent model and noting exceptions to the rule).

290. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

291. *See id.* at 1250 (declaring the agreement void because it “guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; . . . it takes the child from the mother regardless of her wishes”).

292. *Id.* at 1234.

293. *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

294. *Id.*, slip op. at 2.

295. *Id.* at 6.

plans of the intended parents and to restore one man and one woman as the sole legal parents.<sup>296</sup>

Moreover, the public policy doctrine amounts to a judicial articulation that the parties' ex ante preferences do not matter even though those preferences induce conduct by the parties. As the use of reproductive technologies such as IVF involves significant cost and effort, parties intending to rely on them engage in at least some deliberation that results in decisions expressing personal preferences. Agreements providing for the disposition of embryos at the occurrence of various contingencies—such as the death of one or both partners, divorce, prior successful fertilization, et cetera—allow the parties to crystalize their intentions before the IVF process, both for themselves and for the other party or parties.<sup>297</sup> These intentions in turn “set in motion others’ expectations and induce their irreversible reliance.”<sup>298</sup> Because the participants must submit to time-intensive and invasive procedures and cannot be restored to their precontracting selves if the agreement is not enforced, the ability to secure specific commitments from each other might be necessary to enjoy the benefit of the procedure in the first instance.<sup>299</sup> Coupling the ability to choose one’s reproductive outcome with assurances that the consequences of those choices will follow would better promote individual autonomy.<sup>300</sup>

It follows that the refusal to enforce these agreements creates legal uncertainty. Scholars have speculated that uncertainty about the legality of assisted reproductive technologies may deter their use.<sup>301</sup> A recent empirical study has found that gay and lesbian adults had diminished confidence about

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296. See also *A.L.S. v. E.A.G.*, No. A10-443, 2010 WL 4181449 (Minn. Ct. App. Jan. 18, 2011) (preventing a gay male couple from establishing parentage by contract and declaring the surrogate mother to be the legal mother of the child).

297. See Sara D. Petersen, Comment, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 *UCLA L. REV.* 1065, 1088 (2003); Shultz, *supra* note 92, at 347; see also *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (noting that enforcement of embryo disposition agreements encourage parties to think about contingencies and make informed decisions before beginning the process).

298. Shultz, *supra* note 92, at 366-67.

299. See John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 *EMORY L.J.* 989, 1017 (2001); see also Scott & Scott, *supra* note 96, at 1232 (“A legal regime that constrains the freedom to commit actually limits individual freedom.”).

300. See Shultz, *supra* note 92, at 302-03.

301. Commentators and courts believe that nonenforcement of certain categories of agreements will deter their formation. See *supra* note 104; see also *In re Baby M*, 537 A.2d 1227, 1248-49 (N.J. 1988) (predicting that surrogacy would not survive without payment to surrogates, and then articulating a public policy against enforcing agreements involving payment); Carbone, *supra* note 28, at 610 (suggesting that the *Baby M* decision would deter genetic fathers from pursuing surrogacy arrangements because of uncertainty as to the outcome). Whether or not this assumption is true in this context as an empirical matter is beyond the scope of my inquiry here; Robertson, *supra* note 276, at 355 (noting the importance of uncertainty as an obstacle to use of ARTs by gays and lesbians). For an in-depth analysis of whether the subsidization of ARTs affects adoption rates, see I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should it Matter?*, 95 *MINN. L. REV.* 485 (2010).



their ability to become parents.<sup>302</sup> Indeed, the practical result of the New Jersey court's invalidation of the gestational surrogacy agreement discussed above was a protracted custody trial that only placed the children with the intended parents after several years of litigation.<sup>303</sup> For gay men seeking to have biological children, the burden imposed by the doctrine is particularly acute, since they are dependent on IVF agreements *and* surrogates in order to become biological parents. Through the public policy doctrine, courts emphasize the importance of biological parenthood to individual fulfillment, yet express disapproval of the practices necessary to achieve it.<sup>304</sup> The public policy doctrine functions here to trap gay and lesbian family units in a double bind, encouraged to pursue a social good but denied the legal mechanisms to do so, at least without difficulty or uncertainty.

Interestingly, single women seeking to bear a genetically related child may escape regulation by the public policies articulated in the decisions discussed throughout this Article. Unlike their married or coupled counterparts, they can mostly avoid the participation of other intimates in decisions concerning reproduction as long as they can carry the child themselves. The courts that articulated public policies against the enforcement of embryo disposition agreements between intimates discussed in Part I suggested that those same documents would bind patients and their fertility clinics.<sup>305</sup> Moreover, although single women must rely on donated sperm, sperm donation statutes in several jurisdictions terminate the donor's parental rights, allowing a single woman to be the sole legal parent of the resulting child.<sup>306</sup> Statutes based on the 1973 Uniform Parentage Act in other jurisdictions relieve donors of parental obligations when the sperm is used by a married woman in a clinical setting,<sup>307</sup>

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302. Rachel G. Riskind, Charlotte J. Patterson & Brian A. Nosek, *Childless Lesbian and Gay Adults' Self-Efficacy About Achieving Parenthood*, COUPLE & FAM. PSYCHOL. 19-20 (forthcoming), available at <http://ssrn.com/abstract=2095376>.

303. See *Lowenstein Sandler Wins Custody Case for Same Sex Couple*, PR NEWswire, Dec. 19, 2011, <http://www.prnewswire.com/news-releases/lowenstein-sandler-wins-custody-case-for-same-sex-couple-135861603.html> (describing the trial as “span[ning] more than one year and includ[ing] more than 30 days in court”).

304. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996) (discussing the significance of the expressive function of the law in changing social norms); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 906, 949-52 (1996) (summarizing the various tools possessed by the government to influence the development of social norms).

305. See *supra* note 134.

306. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 847 & n.52 (2000) (noting that a few states expressly terminate the parental rights of a sperm donor notwithstanding the marital status of the intended recipient); Uniform Parentage Act § 702 (2002) (providing that a sperm donor is not the parent of a child conceived through means of assisted reproduction, and eliminating any reference to the marital status of the intended user of donated sperm).

307. The Uniform Parentage Act of 1973 provides that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.” NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM PARENTAGE ACT § 5(b) (1973) (emphasis added). In a recent, headline-making case, the State of Kansas has sued a donor who personally delivered his sperm

but they do not expressly restrict the use of donated sperm by single women, raising at least the possibility that courts could terminate the parental status of donors regardless of the recipient's marital status or the participation of a physician.<sup>308</sup> In short, women who seek to rely on intrauterine insemination to bear a genetically related child in many cases possess the option to do so unilaterally without the uncertainty imposed by the public policy doctrine.<sup>309</sup>

But this loophole in the law, like the public-policy-based decisions discussed above that sometimes benefit individual female litigants, cannot be characterized as woman-friendly. Both are based on views about the relative value of male and female contributions to parenthood that essentialize motherhood and strengthen the separation between the family and the market.

Although the public policy doctrine affects anyone seeking to enter into an agreement regarding the use of assisted reproductive technologies, its impact on gay and lesbian people, in particular, demonstrates how the policies tend to reinforce traditional family structures at the expense of marginalized ones.

### C. *Interfering with Innovation*

Use of the public policy doctrine to inhibit the development of novel family structures and interpersonal duties deprives society of potentially beneficial innovations. In doing so, it lessens the individual freedom of all its members.

The value of the "traditional family" has been subject to a longstanding debate<sup>310</sup> I do not seek to recapitulate here. Rather, I take as my point of departure the notion, developed above, that the traditional family has maintained status hierarchies that have systematically disadvantaged women

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to a lesbian couple for recoupment of public benefits paid on the child's behalf when the lesbian parents split up. See Lizzie Crocker, *The Sperm Donor Trap*, THE DAILY BEAST, Jan. 10, 2013, <http://www.thedailybeast.com/articles/2013/01/10/the-sperm-donor-trap-should-your-dna-follow-you-for-life.html>. The relevant Kansas statute uses language derived from the 1973 version of the Uniform Parentage Act. See KAN. STAT. ANN. § 23-2208(f) (West 2012). It remains to be seen what effect the Kansas courts will give to the statutory language requiring the participation of a physician in the insemination process.

308. Although state statutes differ, several courts have had to decide whether and in what circumstances their state regimes allowed single women to avoid paternity claims by known sperm donors. See, e.g., *Brown v. D'Alleva*, No. FA064004782S, 2007 WL 4636692, at \*8-11 (Conn. Super. Ct. Dec. 7, 2007) (collecting cases). In a short article commenting on the Kansas case discussed in the previous footnote, Judith Daar suggests that California's domestic partnership laws, second-parent adoption for same-sex parents, and recognition of de facto parenthood could all operate to relieve a sperm donor from parental responsibilities notwithstanding that the state's statutes maintain the licensed physician requirement. Judith Daar, *Is Sperm Donation a Risky Business in California?*, DAILY J., Jan. 16, 2013, at 4. Of course, these doctrines would not necessarily benefit a single woman.

309. I do not mean to suggest that these women would not face different challenges, either economic or social, as a result of their decision.

310. The arguments on both sides of this issue are too numerous to catalogue. For a summary of the debate, see ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 57-140 (2007).

and marginalized sexual minorities,<sup>311</sup> and that the public policy doctrine has been complicit in their maintenance and propagation. I therefore seek to contribute to the recent wave of scholarship critically evaluating the centralizing role marriage plays in distributing benefits—pertaining to health care, pensions, immigration status, or tax<sup>312</sup>—and regulating sexual behavior.<sup>313</sup>

Kerry Abrams, for example, has demonstrated through her analysis of the wide array of doctrines addressing marriage fraud that the law asks marriage to do a tremendous amount of work to distribute economic and legal benefits, many of which are not necessarily linked to the institution of marriage.<sup>314</sup> The distribution of benefits in this way fails at times to reach the intended recipients and tends to disadvantage women and the poor.<sup>315</sup> She has therefore called for the disaggregation of benefits currently associated with marriage into various functional categories, some of which could be distributed to individuals directly or on the basis of other types of relationships.<sup>316</sup>

Alice Ristroph and Melissa Murray offer another rationale in support of decentralizing marriage and the regulation of intimacy: that “families are worthwhile in part because they make totalitarianism less likely.”<sup>317</sup> Ristroph and Murray observe the intended role of disestablishment of religion in preserving “the limits in a system of limited government.”<sup>318</sup> The development of a “plurality of authoritative institutions”—including churches, but also political parties and business and civic associations—supplies the citizenry with competing claims of authority.<sup>319</sup> These competing claims enable people to reflect on, and perhaps even reject, claims of authority in a way that would be less likely if the political and ecclesiastical authorities were intertwined.<sup>320</sup>

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311. See Ertman, *supra* note 30, at 80, 84 (criticizing the “naturalized model of family” as a “socially constructed norm” that “is often inadequate because it cannot respond to changing forms of intimate relationships” which in turn perpetuates the “pernicious pattern in law and life that those with more get more”); Hasday, *supra* note 27, at 494 (arguing that “legal efforts to denote the sanctity of intimate relationships by regulating and restricting the exchange of economic resources within them appear to systematically perpetuate and exacerbate distributive inequality for women and poorer people”).

312. See, e.g., Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 3, 14-15 (2012) (identifying the various subjects of public benefits fraud via marriage).

313. See, e.g., Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2688-89 (2008); Murray, *supra* note 115, at 5-6 (discussing marriage as a remedy for the crime of seduction); Rosenbury, *supra* note 18, at 199.

314. See Abrams, *supra* note 312, at 55.

315. See *id.* at 55-60.

316. See *id.* at 64-66. Nancy Polikoff, Martha Fineman, and others have made similar arguments. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-30 (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 123, 126 (2008).

317. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1238 (2010).

318. *Id.* at 1242-43.

319. *Id.* (relying on Alexis de Tocqueville’s observations that this institutional pluralism contributed to the success of America’s democracy).

320. *Id.* at 1243.

Ristroph and Murray suggest that although families, too, are sites of value creation and moral development, the state has not similarly promoted disestablishment of the family from the state; instead, it has promoted a “model legal family . . . more ideologically specific than a set of general principles easily acceptable to all members of a democratic society.”<sup>321</sup> Ristroph and Murray therefore call for the disestablishment of the family, including an extension of exemptions and accommodations to a broader variety of family forms parallel to religious exemptions and accommodations from generally applicable laws,<sup>322</sup> although they leave for another day the resolution of “the many practical issues that disestablishment entails.”<sup>323</sup>

I offer here a third, and more controversial, perspective on decentralization: Elizabeth Emens’s challenge to compulsory monogamy.<sup>324</sup> As Emens has pointed out, monogamy—although traditionally (at least nominally) compelled by the institution of marriage and the criminal laws prohibiting sexual conduct outside of it<sup>325</sup>—is more of an aspiration than a reality. People are likely to have multiple sexual partners during the course of their lives due to the failure of marriages and high rates of re-marriage, and many will have multiple partners even within the course of a single marriage.<sup>326</sup> Moreover, there may be some beneficial aspects to polyamorous relationships in terms of self-knowledge, honesty, consent, self-possession, and sexual and intimate expression.<sup>327</sup> Yet polyamory—defined loosely as a relationship in which an adult intimately loves more than one adult<sup>328</sup>—has faced widespread societal resistance.<sup>329</sup> In her theoretically rich account, Emens describes the many ways in which the law contributes to the norm of compulsory monogamy, from marriage restrictions to the lack of protection for nonmonogamous relationships in the form of antidiscrimination laws and the criminalization of certain types of sexual conduct.<sup>330</sup> Although she does not mention contract law’s complicity in establishing the norm of monogamy, it seems fairly certain that the public policy doctrine would impose barriers to the legally enforceable structuring of at least certain aspects of polyamorous relationships.

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321. *Id.* at 1251.

322. *See id.* at 1277.

323. *Id.* at 1278.

324. Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

325. *See, e.g.*, Llewellyn, *supra* note 107, at 1297-98; Murray, *supra* note 137, at 1268.

326. *See* Emens, *supra* note 324, at 297-98 (noting that 40% of marriages end in divorce and 70% of divorcees remarry); *id.* at 299 (citing studies estimating that between 20% and 75% of married spouses commit adultery).

327. *See id.* at 321 (identifying principles associated by polyamorists with the polyamorous community).

328. *Id.* at 303-05 (providing multiple definitions that differ over their inclusion of nonsexual relationships and sexual relationships between more than two people).

329. *Id.* at 283.

330. *Id.* at 361-62.

Although Ristroph and Murray identify several concerns about relying too heavily on contract doctrine to perform the act of disestablishment,<sup>331</sup> many contracts scholars have shared their goal of creating a plurality of family forms and obligations through the enforcement of private agreements. Writing several years after California's famous palimony case, *Marvin v. Marvin*,<sup>332</sup> and several years before the first municipal governments began recognizing domestic partnerships for same-sex couples,<sup>333</sup> Marjorie Maguire Shultz, one of the early proponents of this approach, argued that the increasing diversity of intimate relationships, both as stages on the way to marriage or as accepted alternatives to it, necessitated "some form of private ordering of conduct and values," and that "[c]ontract offers a rich and developed tradition whose principal strength is precisely the accommodation of diverse relationships."<sup>334</sup> To Shultz, contract law's regulation of "those arenas of human interaction in which the state recognizes and defers to divergent values, needs, preferences, and resources" makes it ideally suited to legitimize the "pluralistic choices" of parties to a relationship.<sup>335</sup>

Although I personally favor recognizing additional forms of intimate relationships and a more flexible spectrum of intimate duties through the expansion of status regimes,<sup>336</sup> I worry that leaving this project to the majoritarian process will only continue the process of regulation and marginalization that has defined American family law since its outset. Thus, whatever our suspicions about contract law, it must play a role in disestablishment.

By preventing enforcement of agreements between intimates both inside and outside of marriage, the public policy doctrine interferes with the creation and ordering of relationships outside the traditional family model and the

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331. Ristroph and Murray identify several distinct dangers in relying too heavily upon the use of private agreements to create alternative family forms. First, they worry that contracting would invite state interference in the form of judicial enforcement. *See* Ristroph & Murray, *supra* note 317, at 1273-74. Second, they warn of the danger that the contract paradigm may inculcate norms of economic privatization and contradict public financial support for caregiving within families. *Id.* at 1275. Third, they note that some familial associations (especially the parent-child and sibling relationships) are not strictly voluntary, making contract law ill-suited to governing those relationships. *Id.* at 1275-76. Although some of these concerns could arise if the state mandated private ordering of all family relationships, none of them, in my view, justifies nonenforcement of private agreements initiated between competent adults.

332. 557 P.2d 106 (Cal. 1976).

333. Several California municipalities began recognizing domestic partnerships between people of the same sex in the mid-1980s. *See* Kaiponanea T. Matsumura, Comment, *Reaching Backward While Looking Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act*, 54 UCLA L. REV. 185, 188 n.7 (2006).

334. Shultz, *supra* note 30, at 246, 248.

335. *Id.*; *see also* Ertman, *supra* note 30, at 90 (arguing that enforcement of agreements between intimates would "provide[] a way around majoritarian morality").

336. Recognition of marriage between same-sex individuals is one such example. Caregiving relationships between mutually dependent adults are another. *See, e.g.*, POLIKOFF, *supra* note 316, at 141-42, 149-52.

accrual of benefits that disestablishmentarians and contractarians identify. In so doing, the doctrine foregoes a low-cost opportunity to encourage gentrification of family law through the creation of plural structures; because courts normally enforce the private choices of contracting parties, the enforcement of intimate agreements would not necessarily lend specific contractual terms the imprimatur of state approval any more so than terms in any other type of contract.<sup>337</sup> Consider for a moment what would happen if courts allowed two adults to agree to co-parent a child that one of them carried to term.<sup>338</sup> The benefits to that child, who would otherwise not have existed, and the benefits to the parents from the parent-child relationship would likely exceed any harms to those involved<sup>339</sup> and might allow for the eventual redefinition of what characteristics of a parent-child relationship society values and protects.<sup>340</sup>

To the extent that a plurality of family forms and intimate arrangements leads to beneficial innovations and serves as a bulwark against unnecessary governmental intrusions into people's private lives, the public policy doctrine frustrates these aims. But in addition to imposing these obstacles, the use of public policy doctrine in the intimate context also reveals strains within the underlying contract doctrine, problems that I will explore in the next Part.

#### IV. REVISITING THE PUBLIC POLICY DOCTRINE IN THE INTIMATE AGREEMENT CONTEXT

##### *A. Shortcomings of the Public Policy Doctrine*

The previous Parts identify harms to individual choice and pluralism caused by the use of the public policy doctrine to invalidate embryo disposition agreements and other types of intimate agreements. In this section, I summarize my critiques of the public policy doctrine in the intimate context and offer reasons for its abandonment.

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337. See Ertman, *supra* note 30, at 91 ("Generally courts will enforce private agreements even when moral considerations suggest that they should not.")

338. Cf. T.F. v. B.L., 813 N.E.2d 1244, 1246-47 (Mass. 2004) (involving the formation of an implied agreement between a lesbian couple to co-parent a future child carried by one of the women).

339. This situation poses what some have called the nonidentity problem—the notion that the net benefit to a child that otherwise would not have been born exceeds any harms brought about by his or her birth. See I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437-38 (2011) (describing the theory of the nonidentity problem and providing examples).

340. President Obama, for example, commented on how his daughters' interactions with children of same-sex couples emphasized to him the inherent equality of same-sex relationships and led to his evolution on the issue of marriage equality. Josh Earnest, *President Obama Supports Same-Sex Marriage*, THE WHITE HOUSE BLOG (May 10, 2012, 7:31 PM), <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>.

**Indeterminacy.** As the cases examined throughout this Article illustrate, use of the public policy doctrine is often unpredictable and indeterminate.<sup>341</sup> That fact is even more glaringly demonstrated by cases *not* discussed at length in this Article: those in which different state courts enforce similar agreements arising in factual contexts that raise similar concerns, sometimes over express public policy objections.<sup>342</sup>

Rarely do parties seek to enforce an agreement violating an expression of positive law in court. Courts considering whether the public policy doctrine applies therefore face two distinct challenges. First, they must identify the policy or policies that dictate the result in the case.<sup>343</sup> When no one statute or judicially crafted policy from the quiver of available options directly applies to the agreement, this task can become quite complex.<sup>344</sup> Practically speaking, courts often find themselves discerning pronouncements of policy from narrow or inapt statutes.<sup>345</sup> For example, the *Baby M* court based its holding that New Jersey public policy forbade paid surrogacy agreements on a *repealed* statutory provision governing adoption that expressed a desire “to protect the child from unnecessary separation from his natural parents”<sup>346</sup> and a statutory provision treating the rights of parents as equal “regardless of the marital status of the parents.”<sup>347</sup> Although the sentiments expressed in the two statutory provisions arguably relate to the issue of surrogacy, they did not speak to it directly, nor did they confront the true purpose of the surrogacy agreement (at least to Mr. Stern, the intended father): for the Sterns to have a child genetically related to Mr. Stern.<sup>348</sup>

341. *See, e.g.*, *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (“The meaning of the phrase ‘public policy’ is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it.”).

342. For instance, several state supreme courts have upheld consent forms as valid embryo disposition agreements, *see, e.g.*, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (en banc). Others have upheld gestational surrogacy agreements over public policy objections, *see, e.g.*, *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993).

343. RESTATEMENT (SECOND) OF CONTRACTS §§ 178 cmt. a, 179 cmt. a (1981) (noting the broad range of legislation—including statutes, ordinances, and administrative regulations—and judicially created policies that can serve as the basis for a public policy against enforcement).

344. Allan Farnsworth observed that where an agreement involves neither the “commission of a serious crime or tort” nor a “trivial contravention of policy,” the court must perform “a delicate balancing of factors for and against enforcement of the particular agreement.” FARNSWORTH, *supra* note 99, § 5.1. These factors are set forth in section 178 of the Restatement (Second) of Contracts. The challenge of discerning the applicable policy has led to the criticism that courts “have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing . . . .” Richardson v. Mellish, (1824) 130 Eng. Rep. 294 (C.P.) 299; 2 Bing. 229, 242 (Lord Best, C.J.).

345. RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b (1981) (recognizing that “even though a field is the subject of legislation, a court may decide that the legislature has not entirely occupied the field and may refuse to enforce a term on grounds of a judicially developed public policy even though there is no contravention of the legislation”).

346. *In re Baby M*, 537 A.2d 1227, 1247 (N.J. 1988) (quoting repealed statutory provision).

347. *Id.* (quoting N.J. STAT. ANN. § 9:17-40).

348. *See id.* at 1235. *Cf.* Carbone, *supra* note 28, at 604-09 (criticizing the proffered policy rationales of the *Baby M* court as internally inconsistent). The *Baby M* court also devoted a section of its

The process of deriving policies from statutes not on all fours with the agreement at issue is fraught with danger in the context of intimate agreements because the assumptions upon which public policy decisions rest are highly contested and subject to change.<sup>349</sup> The policies imposed may not enjoy broad support, or may burden a party with judgments based on latent stereotypes or prejudices about groups to which the party belongs.<sup>350</sup> Even at the time of the *Baby M* decision, for example, several polls found the public evenly divided on the legality of surrogacy contracts, or the morality of surrogacy.<sup>351</sup>

The second challenge courts face is determining the relationship of the agreement to the policy invoked. Although the agreement might involve conduct that directly offends a policy, like the commission of a tort, the relationship between the conduct and policy might instead be quite attenuated.<sup>352</sup> Twenty years after *Baby M*, for example, a New Jersey trial court considered the validity of a gestational surrogacy agreement under which a woman agreed to surrender twins to whom she gave birth but was not genetically related.<sup>353</sup> *Baby M* voided a traditional surrogacy agreement because “[i]t guarantees the separation of a child from *its mother*; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the *mother* regardless of her wishes and her maternal fitness; and it does all of this . . . through the use of money.”<sup>354</sup> These policy justifications arguably apply to a gestational surrogacy arrangement just as they applied to the traditional surrogacy arrangement in *Baby M* but for one fact, considered determinative by other state courts:<sup>355</sup> here, the surrogate was not necessarily

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opinion to discuss the ways in which the surrogacy agreement conflicted with statutory provisions regulating (1) the use of money in connection with adoptions, (2) termination of parental rights, and (3) surrender of custody in private-placement adoptions. *Baby M*, 537 A.2d at 1240. Although the court kept its discussion of these statutes separate from its discussion of New Jersey public policy, these statutory provisions also do not directly implicate a surrogacy arrangement and therefore had to be interpreted broadly to apply to the agreement at issue. See Shultz, *supra* note 92, at 376 (“The court’s decision to apply and even to stretch existing statutory schema to govern the *Baby M* case assumed or adopted conventional family design and past procreational experience as models for resolution of disputes that actually rest on quite different facts.”).

349. This fact distinguishes between use of the public policy doctrine in the intimate context and its use in other contexts in which notions of public good are more stable, such as the rule against price-fixing agreements.

350. Cf. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 236 (1973) (contending that “when a court justifies a common law (as distinguished from a statutory or a constitutional) rule with a policy, it is proceeding in a fashion recognized as legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral”).

351. SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 22 (2007) (citing polls conducted by *CBS/The New York Times* and *U.S. News and World Report*).

352. FARNSWORTH, *supra* note 99, § 5.1; Note, *Law and Economics*, *supra* note 104, at 1458 (noting that some agreements, like those to manufacture a product similar to one protected by a patent, involve uncertain relationships to relevant policies).

353. *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 at 2 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

354. *In re Baby M*, 537 A.2d 1227, 1250 (N.J. 1988) (emphasis added).

355. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1983) (holding that the intended mother of the child, in this case the genetic mother, would be the child’s legal mother); *Culliton v. Beth Israel*



the twins' mother.<sup>356</sup> The trial court followed *Baby M* and held that gestational surrogacy agreements violated public policy,<sup>357</sup> but that result was by no means preordained.

***Unresponsiveness to Rapid Change.*** Moreover, ideas about the public good necessarily change over time.<sup>358</sup> This fact theoretically requires courts to recognize new policies and to disregard obsolete ones.<sup>359</sup> For example, recognizing the “radical[]” change in the “mores of society” regarding cohabitation, demonstrated by the “prevalence of nonmarital relationships in modern society and the social acceptance of them,” the California Supreme Court abandoned the public policy against enforcing agreements between unmarried cohabitants in meretricious relationships, paving the way for an expanded range of permissible agreements between cohabitants.<sup>360</sup> But critics have long bemoaned the fact that outdated policies can overstay their welcome and ossify into rules of law.<sup>361</sup> New Jersey's policy against the enforcement of surrogacy agreements involving the exchange of money, articulated in the *Baby M* decision,<sup>362</sup> is arguably one such example of the courts' inability to calibrate their response to society's changing conditions. As Elizabeth Scott has demonstrated, the fervor over the potentially coercive aspects of surrogacy agreements resulted in a moral panic that prompted a flurry of judicial and legislative condemnation of the practice.<sup>363</sup> But after the dust settled, little evidence to support the fears of exploitative baby-selling emerged, and people became more familiar with and accepting of surrogacy.<sup>364</sup> It is therefore unclear that the *Baby M* court correctly assessed the public good when it decided the

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Deaconess Med. Ctr., 756 N.E.2d 1133, 1138-39 (Mass. 2001) (approving gestational surrogacy arrangements).

356. *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

357. *Id.*

358. Criticizing the nonenforcement of contracts of heirs expectant and reversioner based on public policy over a century ago, Thomas Breeze argued that “the social fabric may so change that the acts of individuals which once threatened its well-being may cease to affect it in any particular, and hence the public policy of the eighteenth may not be the policy of the twentieth century; nor the public policy of England the policy of America.” Breeze, *supra* note 101, at 228.

359. See FARNSWORTH, *supra* note 99, § 5.2; Ruggero J. Aldisert, *Judicial Declaration of Public Policy*, 10 J. APP. PRAC. & PROCESS 229, 239 (2009) (opining that courts should apply public policies when there is a consensus and “squeeze out old policies that have lost the consensus they once held”).

360. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (holding that express agreements of cohabitants could be enforced). The *Marvin* decision itself paved the way for similar decisions by several other states. See GROSSMAN & FRIEDMAN, *supra* note 107, at 132-35 (noting that “[i]n the decades that followed *Marvin*, courts in most states ruled that agreements between cohabiting partners with respect to property or finances were enforceable,” but that states placed different limits on such agreements).

361. See Breeze, *supra* note 101, at 243 (arguing that “[t]he policy of our people and our times should control the law of [inheritance] contracts in this country—not the policy of mediaeval and feudal England”); Note, *Marriage, Contracts*, *supra* note 107, at 482 (“The crystallization of a doctrine allegedly based on ‘public policy’ into an unyielding rule of law seems unfortunate.”).

362. *In re Baby M*, 537 A.2d 1227, 1250, 1264 (N.J. 1988).

363. See Scott, *supra* note 184, at 117-18.

364. See *id.* at 138-39 (noting the existence of little evidence that surrogacy causes harm, and many positive examples of successful surrogacy arrangements).

case, and it is even less clear that the policy against surrogacy agreements should persist.

Yet persist it does. Over twenty years after the *Baby M* decision, the extension of the policy to invalidate gestational surrogacy agreements<sup>365</sup> has prompted the New Jersey legislature to take up a bill allowing gestational surrogacy agreements to be enforced in certain circumstances.<sup>366</sup> Anecdotal evidence suggests that attitudes about surrogacy have shifted since the *Baby M* decision. For example, although news coverage of issues pertaining to surrogacy peaked in 1987, when *Baby M* captured the nation's attention, it had drastically declined by 1990.<sup>367</sup> Similarly, although the state legislative response in the few years following *Baby M* was primarily restrictive, by the 1990s, states were taking a more permissive regulatory approach.<sup>368</sup> High-profile births involving surrogates have also become relatively common: celebrities such as Robert De Niro, Nicole Kidman, Sarah Jessica Parker, and Elton John, to name just a few, have become parents within the last few years through the assistance of surrogate mothers.<sup>369</sup>

The responsiveness of policy to societal changes has been deemed "essential" to the public policy doctrine, characterized as "a stone in the edifice of the doctrine, and not a missile to be flung at it."<sup>370</sup> But even assuming for the sake of argument that courts could be perfectly sensitive to the current needs of the community, that characteristic of the doctrine would raise its own set of concerns. "[V]arying notions of public expediency" make it difficult to predict whether certain policies will resolve a particular case,<sup>371</sup> and the lack of predictability interferes with the law's ability to guide conduct<sup>372</sup> and people's ability to arrange their affairs accordingly.<sup>373</sup> It follows that in a world of little change, the public policy doctrine can remain responsive to the interests of the public *and* simultaneously guide contracting parties' conduct. In a world of rapid change, the doctrine will either fail to adapt to changing circumstances, fail to guide conduct, or both. Especially in areas involving decisions about

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365. See, e.g., *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07 (N.J. Super. Ct. Dec. 23, 2009); see also Stephanie Saul, *New Jersey Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES, Dec. 30, 2009, <http://www.nytimes.com/2009/12/31/us/31surrogate.html>.

366. S. 1599, 215th Leg. (N.J. 2012); see also Susan K. Livio, *Bill that Relaxes N.J.'s Surrogate Parenting Laws Passes State Senate*, N.J. STAR-LEDGER, May 31, 2012, [http://www.nj.com/news/index.ssf/2012/05/bill\\_that\\_relaxing\\_njs\\_surroga.html](http://www.nj.com/news/index.ssf/2012/05/bill_that_relaxing_njs_surroga.html).

367. See MARKENS, *supra* note 351, at 20 (demonstrating a drop from 271 articles in three major newspapers to forty-one).

368. See *id.*

369. See Sheila Marikar & Luchina Fisher, *Five Recent Celebrity Couples Opt for Surrogacy*, ABC NEWS, Dec. 27, 2011, <http://abcnews.go.com/Entertainment/top-couples-kids-surrogate/story?id=15235078#>.

370. Winfield, *supra* note 100, at 95.

371. See *id.* at 89.

372. See LON L. FULLER, *THE MORALITY OF THE LAW* 54 (1964).

373. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 799-802 (2001) (identifying the role of in personam contract rights in the ability to structure one's affairs with others).

matters thought to be personal and on which public opinion is divided and subject to change—intimate relationships, reproduction, and the like—the use of the public policy doctrine is inadvisable.

**Problems with Accountability.** These characteristics of the public policy doctrine—the determinacy or indeterminacy of the relevant policies, the strength of the agreement's relationship to them, and the extent to which the public good sought to be protected has changed—have led to longstanding concerns about its use.<sup>374</sup> Uncertainty with respect to any one of these characteristics can undermine the doctrine's legitimacy.

Under the traditional view, courts will often turn to the public policy doctrine as a last resort in order to avoid some of these complications and to protect their legitimacy.<sup>375</sup> In theory, if there is some other basis for declining to enforce an agreement or to arrive at that result, courts will favor that approach. But the public policy decisions cited throughout this Article suggest that this assumption is misplaced, at least in the intimate agreement context. In *Baby M*, for example, the court chose to articulate a broad policy against paid surrogacy agreements instead of holding that the agreement had fallen afoul of the available adoption and custody statutes.<sup>376</sup> In *A.G.R.*, the court refused to enforce a gestational surrogacy agreement based on the policy articulated in *Baby M* without addressing the surrogate mother's arguments about coercion or lack of bargaining power.<sup>377</sup> Both the New Jersey Supreme Court and the Massachusetts Supreme Judicial Court announced public policies against the enforcement of embryo disposition agreements even after each had held that the parties in those cases had not executed a binding agreement.<sup>378</sup> Similarly,

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374. As discussed in Part II.A. above, the use of the public policy doctrine to invalidate a private agreement represents a court's determination that its conception of the public good outweighs the parties' allocation of private goods. It therefore involves a certain amount of legislating from the bench, even if courts don't always admit to it. For example, Justice Cordy, the author of the Massachusetts Supreme Judicial Court opinion in *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004), in which the court identified a public policy against enforcement of an agreement by a woman to co-parent a child carried by her partner, *see id.* at 1249, accused the court of engaging in judicial activism just a year earlier when it extended the right of marriage to same-sex couples. Justice Cordy stated in dissent that such a decision "must be made by the Legislature, not a court." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J., dissenting). Absent from his opinion in *T.F.* was any recognition that the court was, in fact, creating a policy preventing parties from agreeing to share parenting responsibilities in the absence of any statutory prohibition.

375. *See* Winfield, *supra* note 100, at 98 (observing that courts' "apprehens[ion] of the dangers into which the ill-defined boundaries of public policy may lead them" to "regard public policy as a last resort for molding the law"); *see also* 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 12:3 (4th ed. 1990) ("Courts are increasingly sensitive to the need to balance their views concerning what public policy demands with the need to fix their own limitations, and generally, whenever it is possible, the courts will interpret a contract so as to uphold it.").

376. *See In re Baby M*, 537 A.2d 1227, 1240-50 (N.J. 1988). Of course, a more likely reason the court could not rely on these statutes is that, as discussed above, they did not directly proscribe the conduct called for by the agreement.

377. *A.G.R. v. D.R.H. & S.H.*, No. FD-09-1838-07, slip op. at 2-3 (N.J. Super. Ct. Dec. 23, 2009).

378. *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057, 1059 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 714, 720 (N.J. 2001).

the Iowa Supreme Court chose to articulate a public policy requiring contemporaneous mutual consent in the disposition of cryopreserved embryos *even though the contract itself required that exact outcome*.<sup>379</sup> Despite a factual determination by the trial court that a woman did not promise her former lover that he would not have to support any child they were to conceive, a Pennsylvania court nonetheless held that such an arrangement would violate a public policy against bargaining away a child's support.<sup>380</sup>

Beyond the expressive harms caused by a judicial articulation that the parties' bargained-for conduct harms the public good,<sup>381</sup> the use of the public policy doctrine in the intimate context may create uncertainty regarding the legality of intimate choices and prevent citizens from challenging the constitutionality of impositions on their rights. If it is true that people have a right to use assisted reproductive technologies to achieve genetic parenthood, a position advanced by a prominent scholar,<sup>382</sup> then a law passed by a state legislature burdening the use of those technologies would be an obvious target for a constitutional challenge. Although statutes regulating the use of IVF are relatively rare,<sup>383</sup> Louisiana has banned the destruction of embryos created through the IVF process and imposed upon the donors of genetic material a duty of care towards the resultant embryos.<sup>384</sup> The statute arguably burdens reproductive decisionmaking by requiring that any person using IVF become a genetic parent even if she subsequently reconsiders her decision. A person seeking to use IVF to become a genetic parent but not wanting to implant all the embryos created through the process or donate the remaining embryos to other couples, which would result in unwanted births of genetically related

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379. *In re Marriage of Witten*, 672 N.W.2d 768, 773, 783 (Iowa 2003) (stating that "the present predicament falls within the general provision governing 'release of embryos,' in which the parties agreed that the embryos would not be transferred, released, or discarded without 'the signed approval' of [both spouses,]" but holding that public policy would prevent enforcement of the agreement even as it mandated the same result).

380. *Kesler v. Weniger*, 744 A.2d 794, 795-96 (Pa. Super. Ct. 2000).

381. *See supra* note 304 and accompanying text.

382. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 415 & *passim* (1983) (looking at the Supreme Court's substantive due process precedents and concluding "that the principles and doctrines espoused . . . necessarily protect some measure of autonomy in bringing children into the world"); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 957-67 (1986) (applying procreative liberty principles to IVF); *but see* Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1626 & n.23 (2008) (concluding that courts are highly unlikely to adopt Robertson's interpretation of procreative liberty, and collecting similar critiques); Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008) (arguing that there is no general right to use assisted reproductive technologies, but that measures to limit such use cannot target disfavored groups). This question is certainly an interesting one, but one that rests outside the scope of this Article.

383. A few states have passed legislation governing embryo donation, *see, e.g.*, FLA. STAT. ANN. § 742.11 (West 2010); OHIO REV. CODE ANN. § 3111.97 (West 2008); OKLA. STAT. ANN. tit. 10, § 556 (West 2009), and others have imposed requirements for contracts involving IVF, *see, e.g.*, FLA. STAT. ANN. § 742.17 (West 2010); N.H. REV. STAT. ANN. § 168-B:13-15 (West 2012).

384. LA. REV. STAT. ANN. §§ 9:129, 9:130 (1986).

children, can therefore bring a lawsuit challenging the law, although that has not yet been done.

In contrast, a challenge to a state public policy would raise novel issues. Suppose for purposes of illustration that an Iowa wife wants control of all embryos created through the IVF process, and her husband, acknowledging her greater desire to become a parent and her greater sacrifice in participating in the IVF process, agrees that she should be entitled to possession of the embryos for all purposes. Aware of the public policy articulated in *In re Marriage of Witten*, which says that they cannot agree to such an enforceable arrangement,<sup>385</sup> they are unsure about using IVF in the state, and they think that this uncertainty infringes their right to procreative liberty. A challenge to this public policy raises weighty, unresolved questions: would they be able to bring a collateral challenge as opposed to a direct appeal? Even assuming a collateral challenge could be brought, additional questions would inevitably arise. To what extent would the public policy have to be established in the state? Who would be the proper defendants?<sup>386</sup>

The foregoing example rests on the assumption that citizens or their agents are even aware of policies articulated in the case law and will challenge their validity.<sup>387</sup> But it is likely that the establishment of these public policies might lead to uncertainty about what is or is not permitted, discouraging individuals from making decisions that would maximize their fulfillment.<sup>388</sup> People in intimate relationships may not attempt to define their rights and obligations with respect to each other because of perceptions, perhaps correct, that their agreements will not be enforced.<sup>389</sup> The public policy doctrine therefore casts a shadow of deterrence larger than the policies themselves; people face

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385. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003).

386. Frederic Bloom and Christopher Serkin have recently examined the mechanics of suing a court based on judicial rulings that change the law in the context of judicial takings, but they did not consider this type of lawsuit. See Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553 (2012).

387. Several critics have called this assumption into question. See Kostritsky, *supra* note 104, at 119 n.9 (noting that the assumption that parties are responsive to the legal system “is open to serious question”). The fact that New Jersey is home to at least twenty-two clinics that report data to the Centers for Disease Control and Prevention suggests that the state’s public policies against enforcement of surrogacy agreements and embryo disposition agreements have not had an overwhelming deterrent effect. See Nat’l Ctr for Chronic Disease Prevention & Health Promotion, *2009 Assisted Reproductive Technology Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION 335-56 (Nov. 2011), [http://www.cdc.gov/art/ART2009/PDF/ART\\_2009\\_Full.pdf](http://www.cdc.gov/art/ART2009/PDF/ART_2009_Full.pdf).

388. As John Calfee and Richard Craswell have observed, uncertainty about legal standards, including the inability to predict where a legal standard will be set, can cause parties “to ‘overcomply’ or to ‘undercomply’—that is, to modify their behavior to a greater or lesser extent than a legal rule requires.” John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 965 (1984). Although their analysis focuses primarily on economic activity—which reproductive and other decisions arguably are not—decisions of a personal nature can affect the happiness and satisfaction of parties to that decision.

389. See, e.g., Hoffman, *supra* note 273 (quoting several relationship therapists discussing the benefits of negotiating expectations between intimate partners, but also reporting the view of “most lawyers” that such agreements would be unenforceable in court).

uncertainty not only in assessing the scope of policies adopted by their state courts, but also in predicting whether their choices may be given effect based on yet-unannounced policies. In an area where liberty should theoretically be maximized, this type of regulation is troubling.

*B. Addressing Concerns About Offensive Agreements*

By arguing that the public policy doctrine should be abandoned in all but a few situations that I will discuss below, I do not mean to suggest that any and all agreements between intimates should be enforced, or that states cannot adopt measures to protect the public welfare. What I suggest is that the public policy doctrine is rarely a good tool to achieve otherwise laudable aims.

Through the years, scholars have contended that intimate agreements, especially pertaining to reproduction, harm women. Margaret Jane Radin, a leading proponent of this view, has criticized the assumption that “[u]nrestricted choice about what goods to trade represents individual freedom” as an implicit endorsement of a market ideology that ultimately diminishes women’s human flourishing.<sup>390</sup> In particular, some scholars have argued that reproductive technologies and agreements for their use oppress women by objectifying their reproductive capacities and appropriating them for the use of others.<sup>391</sup> Even women who willingly enter such agreements may have been made victims of preferences imposed by society.<sup>392</sup> This argument won the day in *Baby M*, in which the court held that the consent of the surrogate mother was “irrelevant” because of the feared long-term effects of surrogacy contracts, such as

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390. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1861 (1987). Scholars have continued to question at what point commodification—which exists in virtually all economic exchange—becomes too serious a problem to allow a particular practice to continue. See, e.g., Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003) (calling for a fuller account of commodification theory that recognizes different valences of commodification in the particular contexts in which issues may arise); Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 8 (Martha M. Ertman & Joan C. Williams ed., 2005) (summarizing the positions of various scholars writing on the subject of commodification). Although the scope and depth of the commodification debate places it outside of the scope of this Article, I tend to agree with those scholars who suggest that commodification is not an all-or-nothing proposition and that not all agreements for the use of reproductive technologies are inherently suspect on this basis.

391. See, e.g., FINEMAN, *supra* note 316, at 218-19; Judith Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741, 1750-51 (1988) (accepting the comparison between surrogacy and prostitution, bribery, and simony); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 212 n.10 (1995) (collecting examples of “an extensive feminist literature criticizing new reproductive technologies for objectifying women and diminishing women’s power by appropriating reproductive control”).

392. See Polikoff, *supra* note 95, at 175; Robin L. West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 398-99 (2005) (summarizing the feminist/Marxist critique that the preferences of the subordinated self will reflect the interests of those in the dominant position).

the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; [and] the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child.<sup>393</sup>

An additional, gender-neutral critique of intimate agreements is that they involve promises about matters that people cannot predict. Becoming a parent, entering or exiting a relationship, and raising children are so “personal” and “delicate”<sup>394</sup> that changes of mind about previous promises must be honored.

Finally, intimate agreements could theoretically contain outrageous terms or call for performance that courts would be loathe to order or supervise, for instance, “to do what is necessary to conceive a child or prevent conception.”<sup>395</sup>

These are serious concerns, and intimate agreements may indeed involve coercion, exploitation, or changes of mind. But use of the public policy doctrine in this context implies that such agreements *generally* involve those aspects, such that arrangements free from coercion are still disallowed and people can never make rational or valid decisions regarding these matters. In many instances, these assumptions rest on a flimsy empirical basis; in the surrogacy context, for example, a vast majority of surrogate mothers do not in fact experience regret or feel exploited by the relationship.<sup>396</sup> Broadly proclaiming that all such agreements are against the public good therefore invites the instantiation of gender stereotypes rather than the eradication of serious process deficiencies.

Although ample literature exists suggesting that people’s preferences may be less than fully rational,<sup>397</sup> to suggest that these deficiencies apply with special force in the intimate context conflicts with the broad judicial consensus that these matters are for individuals rather than courts to decide.<sup>398</sup> In the reproductive context, it also moves the law out of step with the medical field, in

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393. *In re Baby M*, 537 A.2d 1227, 1249-50 (N.J. 1988).

394. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2001).

395. *Doe v. Doe*, 314 N.E.2d 128, 132 (Mass. 1974) (denying a husband’s request for an injunction preventing his wife from obtaining an abortion).

396. See Appleton, *supra* note 187, at 292 (noting that most surrogates do not change their minds).

397. See, e.g., Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 172-77 (2005) (discussing the limitations of affective forecasting); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (calling on behavioral science research to question the rational choice theory); Amos Tversky & Itamar Simonson, *Context-Dependent Preferences*, in CHOICES, VALUES, AND FRAMES 518 (Daniel Kahneman & Amos Tversky eds., 2000) (discussing the impact of context on decisionmaking).

398. I leave open the possibility that certain types of agreements are more susceptible to forecasting deficiencies than others. As Glenn Cohen has pointed out, though, none of the studies cited by opponents of intimate agreements pertaining to the use of reproductive technologies suggest that those decisions are any more susceptible to error than in other areas in which contracts are enforced. See Cohen, *supra* note 122, at 1172-79.

which doctors perform irreversible medical procedures despite the possibility of later regret.<sup>399</sup>

Moreover, arguments based on the assumption that women share essential traits contribute to the very patriarchy that these arguments purport to resist. Over two decades ago, Marjorie Maguire Shultz worried that if gender differences could justify differential treatment of a man's and woman's reproductive decisions, "one unfortunate cost of such differentiation would be its reinforcement of the sexist stereotype that women are ruled by unpredictable emotion."<sup>400</sup> Others have observed that the women-protective anti-abortion arguments in *Gonzales v. Carhart*<sup>401</sup> have a distinct, emotional valence.<sup>402</sup> Justice Kennedy justified the abortion restrictions in that case by pointing to the "regret," "depression," "loss of esteem," "anguish[,] and sorrow" experienced by women making ill-informed abortion decisions.<sup>403</sup> As Courtney Cahill has recently argued, the disgust that many people feel towards abortion comes from the challenge the act poses to "widely-held assumptions about the 'essential nature' of women."<sup>404</sup> Our growing awareness of the negative consequences of gender stereotypes should counsel caution against the convenient use of a doctrine that promotes those stereotypes.

I therefore suggest that we turn to legislation or existing contract doctrines to address problematic intimate agreements. The precise contours of such proposals deserve far more treatment than I am able to give them here, but I envision two areas of future inquiry. The first would involve the study of measures to improve the quality of contracting in the intimate context—such as informational requirements, representation by separate legal counsel, writing requirements, fiduciary duties, and more—many of which already exist in the prenuptial agreement context.<sup>405</sup> The second would look at the way in which

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399. For example, female sterilization, a prevalent method of contraception by women, see WILLIAM D. MOSHER ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, USE OF CONTRACEPTION AND USE OF FAMILY PLANNING SERVICES IN THE UNITED STATES: 1982-2002 (2004), may result in rates of self-reported regret exceeding twenty percent depending on various characteristics. Susan D. Hillis et al., *Poststerilization Regret: Findings From the United States Collaborative Review of Sterilization*, 93 OBSTETRICS & GYNECOLOGY 889, 892-93 (1999). Nonetheless, ninety-one percent of physicians reported that they would perform the procedure after informing patients of their concerns. R.E. Lawrence et al., *Factors Influencing Physicians' Advice About Female Sterilization in USA: A National Survey*, 26 HUM. REPROD. 106, 109 (2011).

400. Shultz, *supra* note 92, at 351-52.

401. 550 U.S. 124 (2007).

402. See, e.g., Appleton, *supra* note 187, at 257 (noting the role of regret in the *Gonzales* decision and situating it within a discussion of regret in other reproductive contexts); Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. (forthcoming 2013) (arguing that opposition to abortion in *Gonzales* signaled the beginning of a disgust-based rationale for abortion restrictions); Suk, *supra* note 187, at 1194-95 (discussing the role of "emotional pain" in the decision).

403. Suk, *supra* note 187, at 1195, 1198 (internal quotations omitted).

404. Cahill, *supra* note 402, at 10.

405. See, e.g., Hasday, *supra* note 27.



existing doctrines, such as unconscionability<sup>406</sup> or the mutual assent requirement,<sup>407</sup> could encourage both procedurally and substantively fair outcomes and avoid the imposition of ambiguous or unintentional agreements.

#### CONCLUSION

As this Article recounts, courts have refused to enforce a wide variety of agreements between intimates. In each instance of nonenforcement, courts prevent individuals from securing mutual commitments on matters of great personal importance, introducing uncertainty into those relationships. These burdens fall hardest on people outside of traditional social norms: gay and lesbian couples, divorced people, and the polyamorous. They also threaten the values of autonomy and pluralism that the law has otherwise sought to protect for us all.

These cases at the intersection of contract law and family law call on family law scholars to remain vigilant about the ways in which public policies promoting traditional family structures continue to develop and extend to new types of family arrangements. And they call on contracts scholars to question whether the public policy doctrine has broken free from its ideological moorings.

Decisions relying on the public policy doctrine can sometimes obscure the courts' endorsement of specific normative positions in neutral-sounding rhetoric, like the rhetoric of individual freedom. In a classic case of "protest[ing] too much,"<sup>408</sup> the Iowa Supreme Court cautioned against "substitut[ing] the courts as decisionmakers in this highly emotional and personal area,"<sup>409</sup> even as it prevented parties from entering into enforceable agreements regarding their frozen embryos and substituted a default rule virtually guaranteeing their destruction. Revealing the doctrine for what it is represents the first step towards rolling it back. Courts should be increasingly hard-pressed to justify encroachment on individual choice through policies that should have lapsed into desuetude. And as policing of intimate agreements recedes, new arrangements can teach us what we value about intimacy and intimate relationships.

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406. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. a, c (1981) (looking to the "setting, purpose and effect" of an agreement to root out "weaknesses in the contracting process" or "gross disparity in the values exchanged").

407. *See id.* § 17 (stating that with few exceptions, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent").

408. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2. ("The lady doth protest too much, methinks.").

409. *In re Marriage of Witten*, 672 N.W.2d 768, 779 (Iowa 2003).