"Planned Parenthood": Adoption, Assisted Reproduction, and the New Ideal Family

Susan Frelich Appleton*

The following essay is based on a presentation by Professor Susan Appleton on 10 March 1999 as a part of an interdisciplinary panel discussion of Professor Dorothy Roberts' paper.

According to the conventional wisdom in family law, families formed through adoption are "second best" to those based on biological ties. Even prevailing terminology, by describing biological parents as "real" and "natural,"[1] repeatedly sends this message about the inferiority of the adoptive family. This understanding of the hierarchy of families has received considerable reinforcement in recent years when several courts resolved highly publicized battles between adoptive and birth parents by sending the child home with the birth parents, sometimes despite years of bonding within the adoptive family.[2] These cases appeared to leave no doubt that the law accords greater protection to the biological or genetic parent-child relationship than it accords to the psychological or functional family.

Professor Dorothy Roberts has detected a surprising departure from this conventional wisdom in new federal legislation, specifically

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* Associate Dean of Faculty and Professor of Law, Washington University. A.B. Vassar College; J.D. Boalt Hall, University of California at Berkeley.

1. *See, e.g.*, In re Petrie, 742 P.2d 796, 798-99 (Ariz. 1987); Bush v. State, Dept. of Human Resources , 929 P.2d 940, 941 (Nev. 1996); *id.* at 947-48, 953 (Springer, J., dissenting); Scarpetta v. Spence-Chapin Adoption Service, 269 N.E.2d 787, 791 (N.Y. 1971), *cert. denied sub nom.* DiMartino v. Scarpetta, 404 U.S. 805 (1971).

2. *See, e.g.*, *In re* Petition of John Doe, 638 N.E.2d 181 (Ill.), *cert. denied*, 513 U.S. 994 (1994) ("Baby Richard" case); *In re* Petition of Kirchner, 649 N.E.2d 324 (Ill.), *stay denied sub nom.* O'Connell v. Kirchner, 513 U.S. 1138 (1995); In the Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992) ("Baby Jessica" case).

the Adoption and Safe Families Act (AFSA),[3] which became law in late 1997. This statute and its legislative history stand the usual approach on its head. As Roberts points out, AFSA, which seeks to speed terminations of parental rights for children in foster care and to increase adoptions, portrays adoptive families as "real," safe, and loving.[4] By contrast, AFSA depicts biological families as artificial, risky, and violent.[5] Roberts identifies as the flaw in the statute its failure to address the underlying problems that result in the placement in foster care of an astonishingly large number of children—a group that is disproportionately poor and Black. Proper attention to these underlying problems would, in her view, entail offering necessary support to poor families and affording to many children continuing connections to their birth families. Under Roberts' approach, the fundamental question asks not how we can increase adoptions of children in foster care but rather how we can reduce the number of children who enter foster care in the first place.[6]

While startling at first, the suggestion that AFSA favors adoptive families over biological families, upon reflection, coincides with other developments in family law. The rhetorical preference for the adoptive family that Roberts finds in AFSA forms part of a larger context from which emerges a new vision of the ideal family. The ideal family is a planned family, intentionally created. Ideally, one becomes a parent through carefully made and intentionally pursued plans. For short, I shall borrow a familiar phrase to describe this vision of the ideal family: "planned parenthood."[7] Planned parenthood contrasts with casual, accidental, and thus irresponsible parenthood.

The creation of a family through adoption or foster care always

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3. Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of, inter alia, 42 U.S.C.).

4. Dorothy Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 66 (1999).

5. *See id.*

6. *See id.* at 73.

7. Of course, I have borrowed this phrase from a now well-known organization that promotes family planning and reproductive freedom. For the history of the national Planned Parenthood Federation of America and some of the regional and local affiliates, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE passim* (1994).

entails planned parenthood. In other words, one cannot become a foster or adoptive parent accidentally. In contrast, reproduction through sexual intercourse always suggests at least the possibility of an unintended child who is the accidental byproduct of activity undertaken for its own sake.

The rhetoric emerging from the calls for welfare reform just a few years ago presented childbearing in just this way: The 1996 law exhorted welfare recipients to take "personal responsibility" for their sexual activities.[8] It purported to send the message that America's poor should plan their families, choosing to have children only when able to support them. In other words, this law signaled that planned families are good while accidental families are to be discouraged. About half the states have exercised the freedom given to them by Congress to impose so-called "child exclusions" (popularly known as "family caps"[9]), which decline to provide to welfare recipients additional subsidies when they have additional children.[10] According to the theory underlying the family cap, the additional allotments that AFDC previously provided for additional children encouraged additional births. The family cap is supposed to have the opposite effect, creating the financial disincentives that welfare recipients are thought to need to curb their irresponsible reproduction.[11] Under this

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8. Congress' welfare-reform measures formed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of, inter alia, 42 U.S.C.). *See, e.g.*, Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155 (1996); Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996).

9. For examination of the terminology, see Appleton, *supra* note 8, at 159-62. *See also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 210-11 (1999).

10. *See* Appleton, *supra* note 8, at 160; Roberts, *supra* note 9, at 210.

11. The Supreme Court has upheld the constitutionality of governmental efforts to use selective funding for purposes of behavior modification among welfare recipients. The Court's abortion-funding cases stand out as the most prominent examples. *E.g.*, Harris v. McRae, 448 U.S. 297 (1980). *See* Appleton, *supra* note 8, at 162-65. To the surprise (and delight) of critics of the Court's recent welfare jurisprudence, however, a majority of the Justices now have recognized constitutional limits on state attempts to influence the behavior of welfare recipients. *See* Saenz v. Roe, 119 S. Ct. 1518 (1999) (invoking right to travel and Fourteenth Amendment's "privileges or immunities" clause to strike down California's provision to new residents the lower welfare benefits they would have received in state of prior residence, arguably part of an official plan to

theory, when welfare recipients have children in spite of the family cap, I suppose there are two possible explanations: (1) These parents reveal their utter sexual irresponsibility by producing children for whom they lack adequate financial support (in turn, prompting calls to send these children to orphanages as punishment[12]) *or* (2) These children must be wanted for their own sake, despite the financial obstacles—they must be, in a word, "planned."

The notion of planned parenthood as a value the law should promote also emerges in the developing legal rules for assisted reproduction. Modern medical technologies have created new alternatives to adoption and new ways to separate sex and reproduction. To say that children born as the result of new reproductive technologies are always planned and intended is an understatement. Only individuals and couples who are determined to create a pregnancy would be willing to undertake the physical, emotional and financial toll that fertility treatments impose.[13] Moreover, in legal controversies sparked by the use of new reproductive technologies, several courts have turned to "intended parenthood" as the decisive variable.

The California Supreme Court first blazed this trail in 1993, relying largely on the approach advocated by Professor Marjorie McGuire Shultz.[14] The court confronted a parentage contest between the Calverts, a couple who had provided the ovum and sperm, and Johnson, the "gestational surrogate mother" who had carried the pregnancy under contract to them.[15] Finding that existing California statutes would identify as the mother both the woman who provided the genetic material and the woman who gave birth, the court decided to use intent to tip the balance.[16] At the time of the agreement, the

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deter their relocation to California).

12. Orphanages figured prominently in the debates about welfare reform. *See, e.g.*, Tom Morgenthau et al., *The Orphanage*, NEWSWEEK, Dec. 12, 1994, at 28.

13. *See generally, e.g.*, Frontline, Making Babies: A Report on the Science and Ethics of Assisted Reproduction, PBS, June 1, 1999.

14. *See* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

15. Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

16. *Id.* at 781-83.

parties intended for the Calverts to rear any child they hoped would result, and but for the plan of the parties, the child in question never would have been born. Planned parenthood trumped the nurturing and bonding that Johnson could claim based on her pregnancy—to the predictable dismay of some feminists.[17]

Planning and intent again proved decisive in subsequent California litigation. Upon divorce just before the birth of Jaycee, who was conceived in vitro with donor semen and a donor ovum and carried to term by a woman who agreed to serve as "gestational surrogate," the intended father claimed that his absence of biological and formal legal connection to Jaycee relieved him of child support obligations. The appellate court ruled against him.[18] Emphasizing "the intelligence and utility of a rule that looks to intentions,"[19] the court identified Jaycee's parents as the couple who had planned to rear her before they decided to divorce. But for their plans, Jaycee would not exist.[20]

Although the first case uses planned parenthood as a sword against a competing claimant, in the second case planned parenthood works as a shield to protect the child from abandonment. Together the cases and Shultz' analysis on which they rely suggest a new paradigm for family law: Intentionality and planning are significant, even decisive, components of legal parentage. Other jurisdictions have embraced this paradigm.[21]

"Planned parenthood" acquires an even more forceful meaning in the growing number of cases seeking to resolve disputes about the disposition of unused cryopreserved genetic material. In response to the first reported post-divorce custody battle over frozen pre-embryos

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17. *See id.* at 797-98 (Kennard, J., dissenting). *See also* BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 36 (1989); Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275 (1992).

18. *In re Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App.), *rev. denied*, 1998 Cal. LEXIS 3830 (1998).

19. *Id.* at 290.

20. *See id.* at 283, 286-91.

21. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (App. Div. 1994). *See also* Uniform Status of Children of Assisted Conception Act, Alternative A, § 5, 9B U.L.A. 198 (Supp. 1999); Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (Gerber, J., concurring). *But see* Belsito v. Clark, 644 N.E.2d 760 (Ohio Com. Pleas 1994).

created during happier times in a couple's marriage,[22] most assisted reproductive technologies programs now require very specific advance agreements, detailing the progenitors' wishes in the event of various possible future occurrences.[23] The New York Court of Appeals recently relied on a couple's written contract to determine that the pre-embryos they created should be donated to scientific research now that the marriage had ended.[24] In addition, the newly emerging search for a principle with which to approach the question of posthumous reproduction seems to have settled on a rule that makes the progenitor's intent controlling.[25]

The new emphasis on planning and intent that these cases exemplify goes a long way, I suspect, in explaining the generally positive response to the amazing births of sextuplets, then septuplets, and finally octuplets. Despite medical hazards—not to mention emotional and financial burdens—the media for the most part have celebrated these babies and their families and the public has embraced them.[26] Yet in other circumstances, no doubt, parents who find themselves with more children than they can handle without considerable assistance from others would be condemned as "irresponsible."[27] What distinguishes these babies, however, is that their parents went to considerable trouble to have them. News reports detailed, for example, how the mother of the octuplets remained confined almost upside down for weeks to postpone labor and delivery.[28] These parents could have opted for "selective reduction"

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22. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 506 U.S. 911 (1993).

23. *See* John A. Robertson, *Disposition of Frozen Embryos by Divorcing Couples Without Prior Agreement*, 71 FERTILITY AND STERILITY 996, 996 (1999).

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

25. *See* Hecht v. Kane, 20 Cal. Rptr.2d 275 (Ct. App. 1993), *writ of error granted*, 59 Cal. Rptr. 2d 222 (Ct. App. 1996) (not to be published); Lori B. Andrews, *The Sperminator*, N.Y. TIMES, Mar. 28, 1999, § 6 (Magazine), at 62; John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027 (1994); Ann Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901 (1997).

26. *See, e.g.*, Diane Sawyer, Baby, Oh, Baby: The Six-Pack Turns 6, ABC 20/20, May 26, 1999 (largely humorous report celebrating sixth birthday of Dilley sextuplets).

27. See *supra* notes 8-12 and accompanying text.

28. *Born in Texas: First Surviving Set of 8 Babies*, N.Y. TIMES, Dec. 21, 1998, at A16.

but rejected it,[29] so the birth of each of these babies was intended and planned, after thoughtful consideration.[30]

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29. *See id.*

30. *But see* David Finkel, *"What Kind of Choice Is That?"; Science's War on Infertility Can Deliver Painful Decisions*, WASH. POST, Mar. 21, 1999, at A1.

I have long counted myself among the fans of Dorothy Roberts' scholarship. What I like best about her work are both her provocative insights and the clarity with which she is able to "connect the dots" to reveal a larger picture that is greater than the sum of smaller points she has synthesized. Certainly, her book *Killing the Black Body*[31] demonstrates these gifts. Today's paper does so as well with its insight about AFSA's surprising message and the larger critique this message evokes. Professor Roberts has given us much to think about.

I offer the notion of planned parenthood as an additional common thread that ties together developments in adoption law, welfare reform, and also the increasing legal attention focused on assisted reproductive technologies. As for larger issues, for now I shall simply raise two questions that, in time, deserve our consideration as well.

First, might the emerging ideal of planned parenthood reinvigorate legal attacks against some of the more extreme anti-abortion selective funding schemes? As we are discussing these important issues, the Missouri legislature is attempting to withdraw *all* public funding from Planned Parenthood affiliates throughout the state because these organizations also provide abortion services.[32] This state action goes well beyond judicially approved governmental refusals to subsidize abortion and instead seeks to eliminate all support for the myriad of other services—family planning, health care, and education—provided by Planned Parenthood. The dispute continues, with the focus now on the question whether Planned Parenthood has achieved sufficient separation between its abortion services and its other services to be entitled to state funds for the latter.[33] If the anti-abortion legislators prevail, however, they will put at risk not just Planned Parenthood

31. *See* Roberts, *supra* note 9.

32. See H.B. 10, section 10.705, 90th Leg., 1st Sess. (Mo. 1999) (legislation passed by General Assembly specifying separation requirements "for an organization that receives these [family planning] funds and its independent affiliate that performs abortion services").

33. *See* Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458, 462-63 (8th Cir. 1999) (finding earlier funding legislation's restrictions "facially ambiguous" with respect to whether it "constitutionally restricts the use of funds within the State family-planning program or unconstitutionally restricts grantee activities outside the program"); Bill Bell, Nixon OKs Request for Lawsuit against Planned Parenthood, St. Louis Post-Dispatch, July 30, 1999, at B3.

affiliates, but also the ability of many families to practice planned parenthood—notwithstanding the various legal developments we have seen coalesce in support of this ideal. Can we use the law's emerging preference for planned parenthood to defeat the increasingly aggressive efforts to have anti-abortion "value judgments"[34] eviscerate the entire project of family planning?

The second, larger question rests on a very different observation: The purposes of adoption as an institution have come full circle. Historical studies teach us that in ancient times the practice served the interests of the adopter.[35] In American adoption statutes, however, this objective gave way to a more humanitarian goal, providing for the welfare of dependent children,[36] with the "best interests of the child" serving as the guiding principle.[37] Yet today, the social and legal context of adoption once again emphasizes adopters' interests. In this era of planned parenthood, adoption has become simply one of several avenues for the infertile to pursue in their quest to create a family.[38] In other words, once again adoptive children primarily serve the needs of adoptive parents, with any advancement of child welfare an incidental benefit. We would do well to ask: What can we do to revive the child-centered focus of adoption law? At the very least we

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34. *See* Maher v. Roe, 432 U.S. 464, 474 (1977) (invoking official "value judgment favoring childbirth over abortion" to justify governmental subsidy for childbirth but not abortion); Harris v. McRae, 448 U.S. 297, 314 (1980) (same).

35. *See* Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745 (1956); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 446 (1971).

36. *See* Presser, *supra* note 35, at 465-89. *See also* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN AMERICA (1994); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038 (1979).

37. For modern applications of the best-interests test, *see, e.g.*, Michaud v. Wawruck, 551 A.2d 738, 741-42 (Conn. 1988) (supporting "open adoption" arrangement); Adoption of Tammy, 619 N.E.2d 315, 319 (Mass. 1993) (supporting second-parent adoption by lesbian partner of biological mother).

38. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (observing that woman who loses opportunity to have her frozen embryos implanted not gravely burdened because "she could still achieve the child-rearing aspects of parenthood through adoption"), *cert. denied sub nom.* Stowe v. Davis, 506 U.S. 911 (1993). *See also RESOLVE Fact Sheet Abstracts* (visited June 4, 1999) <http://www.resolve.org/publicat.htm> (website for Resolve, The National Infertility Association, lists, inter alia, publications on assisted reproductive technologies as well as adoption).

might ask what the law can do to make the interests of children needing adoption[39] and those of adults planning parenthood coincide.[40]

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39. Of course, Roberts has given us good reason to question any facile conclusions about precisely which children "need" adoption. *See* Roberts, *supra* note 4, at 64.

40. Some scholarly criticism of assisted reproductive technologies focuses on the need of many already existing children for adoption. *See, e.g.*, ELIZABETH BARHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993); Rothman, *supra* note 17. Roberts emphasizes the racial element that leads couples to attempt assisted reproduction instead of choosing adoption. Roberts, *supra* note 9, at 246-93.