Assisted Reproduction: Historical and Theoretical Background

Early Timeline

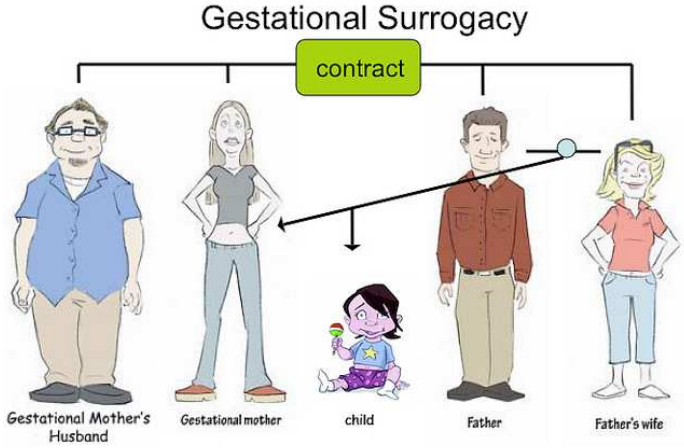
- 1785: First reported birth by artificial insemination
- 1978: In England, Baby Louise Brown born as a result of in vitro fertilization.
- 1985: First reported gestational surrogacy


Evening News

Meet Louise, the world's first test-tube arrival

SUPERBABE

Wide-eyed Louise Brown pictured in hospital 18 hours after she was born. Today she's doing well. See Page Three



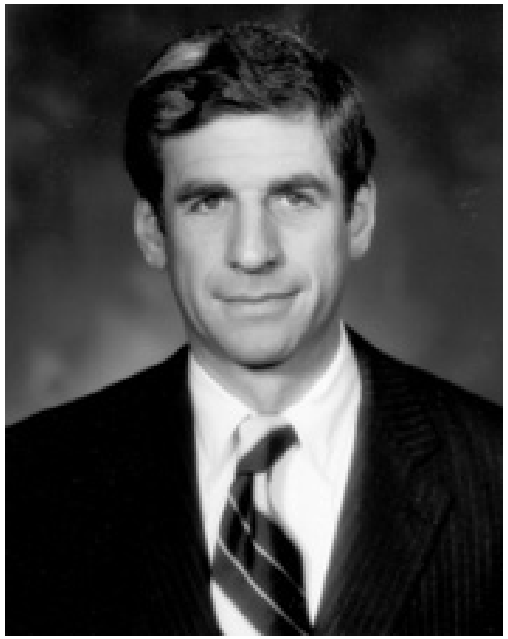
- 1986: *Baby M.* case provokes controversy about most forms of surrogacy.
- 1992: First appellate case to deal with issue of embryo disposition and divorce

An agonizing scene is played out once again when police take the child called **"BABY M"** away from JoBeth Williams (who stars as Mary Beth Whitehead), while Robin Strasser and John Shea (as Elizabeth and William Stern, who contracted for Whitehead's surrogate motherhood) look on. The docu-drama airs in two parts on the ABC Television Network, **SUNDAY, MAY 22** and **MONDAY, MAY 23** (both times 9:00-11:00 p.m., ET).

JP 5/3/88 25852A-31-36

ABC Visual Communication 1330 Avenue of the Americas, New York, New York 10019 (212) 887-7777

Have We Seen This Debate Before?



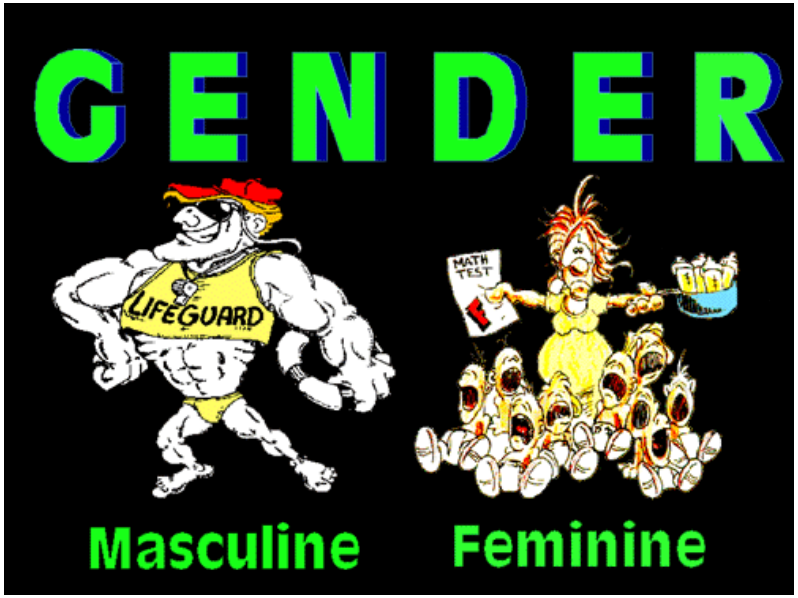
- In the past, those on opposing sides of the abortion question debated who had parental rights and why in the context of spousal consultation laws.

- Feminists argued that because women played a unique role in child-bearing and child-rearing, women should have the ultimate say over the outcome of a pregnancy.

- Abortion opponents insisted that as a matter of equality, men should have equal say in abortion. The central issue, they argued, was who did day-to-day parenting tasks.

- The United States Supreme Court mostly agreed with feminists that women were uniquely situated vis-à-vis pregnancy.

- But with unintended consequences…
  - The Court's jurisprudence predicates reproductive rights for women on the idea that women act as child-rearers and caretakers.



ART: Redrawing the Boundaries of Parental Rights

- Artificial Insemination and Egg Donation—Do Donors Have Rights?
- In Vitro Fertilization and Surrogacy—Who Counts as a Parent?
- Embryo Disposition—Who Decides What Happens in the Event of Divorce?

Embryo Disposition Law

- Some courts follow *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) in enforcing any agreement the parties signed at the clinic.

- In *In re Witten*, 672 N.E.2d 768 (Iowa 2003), the court held that the status quo—usually storage—will continue until the parties reached mutual contemporaneous agreement.

- Finally, in *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992), the court found no binding agreement and instead balanced the parties' competing interests in seeking and avoiding genetic parenthood.

An Uncertain Future

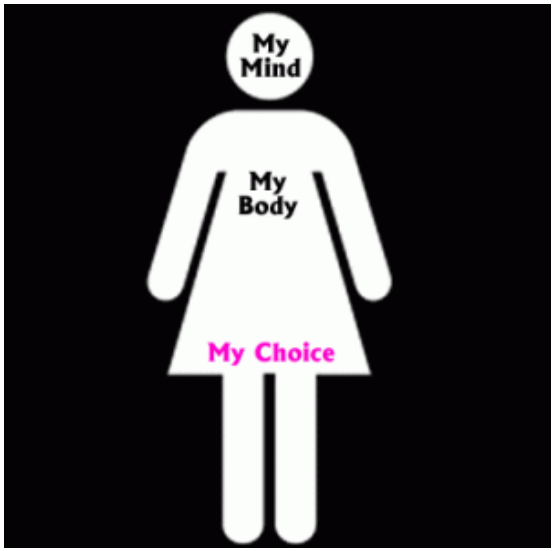
- Does the US Constitution protect any rights to use assisted reproductive technologies?
- Does one have a right to avoid becoming a genetic parent, as opposed to avoiding child-rearing tasks or gestational?
- Can more than two people have parental rights?

A Broad Liberty-Based Approach

- Some argue that the reproductive liberty recognized by the Supreme Court in decisions on contraception and abortion extends to many decisions that lead up to becoming (or not becoming) a genetic parent.

A Woman-Centered Approach

- Judith Daar, among others, argues that women should have the final say in decisions about in vitro reproduction and embryo disposition—as a matter of equality, fertile and infertile women should have the same rights.



Equal Access

- Still others argue that the Constitution requires only equal access to ART.

Constitution-Free Zone

- Still other scholars argue that ART does not touch on constitutional rights.
- In this view, existing protections of abortion and contraception turn on gestational and functional—rather than genetic—parenthood.

- Underlying each of these approaches is a single question: should we apply an existing constitutional framework to ART or take the opportunity to create a new one?

The Parade of Horribles

- The polarization of abortion politics could infect ART.
- ART could become overregulated.
- The gender paternalism that has shaped American constitutional law could creep into ART jurisprudence.

The Virtues

- Looking to abortion politics may offer perspective on what we can do better—or differently—in reproductive health law and politics.