

PROPERTY RIGHTS IN CHILDREN

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In 1978, Dr. Elisabeth Landes and then-Professor, later-Judge Richard Posner, published The Economics of the Baby Shortage. The article openly discussed how economic analysis can address the allocation of babies available for adoption. The ideas expressed in the article were widely denounced as an inhumane commodification of children, something tolerable only in the twisted minds of academic authors. Despite the backlash, an odd thing happened in the more than four decades since Landes and Posner wrote on this topic: their ideas began to take hold. Today, almost all states in the United States permit, in some form, the contractual assignment of parental rights; that is, almost all states now permit the sale of babies. We suggest an ironic reason for the change: the modern technology of in vitro fertilization has quieted or overcome complaints about the commodification of children by moving surrogacy contracts into a long-accepted, though euphemistically labeled, realm of parental property rights in children.

INTRODUCTION

The Economics of the Baby Shortage,¹ by Elisabeth Landes and Richard Posner, described a suboptimal landscape of child adoption in the United States. Many children went unadopted, raised in foster care at public expense, while potential parents seeking to adopt waited years to complete the adoption process at significant personal expense.² Landes and Posner cited restrictive regulations as the cause of these phenomena, which the authors identified as a market inefficiency.³ In their view, out of legitimate concern for the well-being of children, the government had created a near-monopoly in adoption

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This Essay was written specially for the 2019 *Notre Dame Law Review* Symposium in honor of Margaret Brinig's contributions to the field of family law. Consistent with the theme of the Symposium, our work was inspired by Peg's scholarship, particularly by her 1995 article *A Maternalistic Approach to Surrogacy*. That said, we adhere only loosely to the Symposium's intended focus on empirical study. Our narrative takes off from the observation of a correlation between law and technology, an appropriate enough start, but then delves into a theoretical rather than empirical analysis. The authors beg indulgence for having taken this liberty.

1 Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

2 *See id.* at 324–26.

3 *Id.* at 326.

agencies, which can be easily regulated, as opposed to independent adoptions, which are harder to supervise.⁴ The regulations, in turn, created a “black market” of baby sales, they believed, where babies were sold, unregulated, at an inflated cost to account for the legal risks of engaging in such a market.⁵

To address these conditions, Landes and Posner suggested that all involved parties could benefit from something closer to a free market for baby sales.⁶ In anticipation of concerns about state-sponsored commodification or even slavery, Landes and Posner highlighted already-existing limits: limitations on enforcement of personal-service contracts and laws forbidding child abuse and neglect.⁷

Whatever the merits of the analysis in *Baby Shortage*, critics were dissatisfied with the cold and (sometimes literally) calculated way in which Landes and Posner discussed the economics of the baby market.⁸ At times, such critics conflated the manner of the article’s presentation with its message. And while Posner later responded to critics with an explanation that “we did not advocate a free market in babies,”⁹ discomfort remains with any suggestion that children are anything like alienable property.

In at least one corner of the baby markets, however, such discomfort has not impeded an advance of the law toward the ideals promoted by Landes and Posner. Almost every state now enforces surrogacy contracts, under which a gestational mother promises to relinquish a child to be raised by others.¹⁰ And while it is possible to avoid calling such a promise a transaction, or the surrogate a seller, or the recipient of the child a buyer, the substance of the arrangement is easily and properly characterized by these market terms.

The question arises, then, why a professed distaste for the treatment of children as a commodity has not prevented the law from endorsing precisely such treatment, however genially described. The answer we propose here is that the advent of in vitro fertilization has moved surrogacy contracts into a realm of family law that has *always* recognized a property right in children, however uncomfortable that observation may be for our society to confess.

4 See *id.* at 326–28.

5 See *id.* at 340–41.

6 See *id.* at 340.

7 See *id.* at 341, 344.

8 See, e.g., Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99, 102 (1987) (discussing potential negative outcomes of the article’s suggestions such as racial inequity and a belief in the fungibility of children); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 688 n.51 (1979) (calling the article “irrational and immoral”); J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 352 (1984) (highlighting a concern that commodifying children will result in a degradation of dignity).

9 Richard A. Posner, *Mischaracterized Views*, 69 JUDICATURE 321, 321 (1986).

10 *Gestational Surrogacy Law Across the United States*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Sept. 23, 2019).

To be clear, our contribution here is not the observation that reproductive technology may have transformed the law of surrogacy arrangements; this is commonly accepted. Rather we hope to demonstrate that an acceptance of property rights in children—however disguised—is the *reason* reproductive technology may have motivated such transformation.

This short Essay proceeds in four parts. In Part I, we describe the changes over the years in the law and technology of surrogacy arrangements, and we introduce parental property rights in children as a basis for the current surrogacy environment. In Part II, we offer definitions of property rights and compare these to definitions of privacy and liberty rights. In Part III, we look at various ways in which the law addresses the parent-child relationship and, to the extent applicable, we recharacterize as property interests the euphemistic terminology of privacy and liberty. In Part IV, we revisit the surrogacy question in light of the more general property rights parents have in children and conclude that perhaps what is needed is a reexamination of these general rights including, but not limited to, a specific examination of surrogacy contracts.

I. CHANGES IN LAW AND TECHNOLOGY AROUND SURROGACY

Early cases on surrogacy, *Baby M* the best known,¹¹ sided with those who were appalled by the prospect of coercing women or commodifying children and disallowed enforcement of surrogacy contracts, in part, on precisely such distaste for commerce in so intimate a setting. Importantly, in *Baby M*, the surrogate was both the gestational and genetic mother of the child.

Since *Baby M* was decided in 1988, reproductive technology has advanced, making it easier for a surrogate to be a gestational but not a genetic mother to the child through the process of in vitro fertilization. The first instance of successful “gestational surrogacy” occurred in 1986,¹² and most surrogacies today are gestational.¹³ The change in reproductive technology coincided with, and perhaps caused, a shift in the legal approach to surrogacy contracts. Beginning in the late 1980s and continuing on into the '90s and 2000s, the “moral panic” around *Baby M* died down within a couple years after an initial wave of laws banning surrogacy.¹⁴ Surrogacy contracts

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

12 Bonnie Johnson, *And Baby Makes Four: For the First Time a Surrogate Bears a Child Genetically Not Her Own*, PEOPLE (May 4, 1987), <https://people.com/archive/and-baby-makes-four-for-the-first-time-a-surrogate-bears-a-child-genetically-not-her-own-vol-27-no-18/>.

13 Elizabeth Chuck, *The Long Wait for Legalized Surrogacy May Soon End in New York*, NBC NEWS (Feb. 7, 2019), <https://www.nbcnews.com/news/us-news/long-wait-legalized-surrogacy-may-soon-end-new-york-n968541>.

14 See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109, 117, 125–26.

then became enforceable through a series of judicial decisions and statutory enactments.¹⁵

For example, in *Johnson*,¹⁶ the court was asked to determine the mother of a child born from a surrogate who was implanted with an embryo of a husband and wife under a surrogacy agreement. The surrogate sought to keep the child after difficulties arose between the parties during surrogacy, and the mother sought a declaration that she was the child's mother because of her genetic relation to the child.¹⁷ Emphasizing the wife's intention to be a mother and the fact that the surrogate could not have gestated the child but for the couple's agreement to implant the embryo, the court held that "the husband and wife are the child's natural parents, and that this result does not offend the state or federal Constitution or public policy."¹⁸

The *Johnson* court dismissed concerns about coercion or commodification inherent in their tacit approval of a paid surrogacy arrangement:

[There is] no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.¹⁹

By virtue of common law or legislation, *Johnson* expresses the now-prevailing legal sentiment as surrogacy contracts, in one form or another, are enforced in forty-seven out of the fifty states.²⁰

One might dismiss any puzzle in the permissibility of surrogacy contracts with the facile explanation that in vitro technology converts what was once a contract for the sale of a child—when the surrogate was a genetic parent—into a contract merely for the surrogate's services. But there remains the question of *why* surrogacy is now characterized as a mere service or of *why* such characterization changes anything. After all, it remains a fact that, in the enforcement of a surrogacy contract, we permit those hopeful of becoming parents to pay for a service that produces a child. This is still the sale of what might be described as a commodity just as a carpenter can be said to sell a cabinet even if her customer provides the lumber. Moreover, the description of a surrogate as a provider of a mere service is not quite apt, even where the buyers provide an embryo. A child so born to a surrogate has been created in the surrogate's womb and is in a literal sense composed of and part of her body. She supplies all but the DNA and so the minimum role played by a

15 See ALEX FINKELSTEIN ET AL., COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 9, 55–63 (2016).

16 *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

17 *Id.* at 778.

18 *Id.*

19 *Id.* at 785.

20 See *Gestational Surrogacy Law Across the United States*, *supra* note 10.

surrogate can be analogized to a carpenter who sells a cabinet created from her own labor *and* lumber but according to her customer's plans.

Yet these carpenter analogies will strike many as inapt, and this would certainly be the case for those who would generally oppose a market for babies but who nonetheless accept the enforcement of gestation-only surrogacy contracts. Perhaps a better analogy is to a restorer, one who no one would imagine sells the customer's furniture he repairs. In this case, the surrogate could be no more considered the seller of a person than could a cook who is hired to feed a child.

We do not dispute these last analogies, to a restorer or a cook. Once again, our objective is to identify *why* a less objectionable analogy may be the right one. Ironically, it may be that we generally accept gestation-only surrogacy contracts without concern for commodification because our society is generally comfortable with treating parents as owners of their children.²¹ Put another way, the reason a gestation-only surrogate is not deemed to have sold a child is that the embryo she gestates is already property of its genetic parents at the time the surrogate receives it,²² thus negating the possibility that she is selling the developed child back to the parents with whom she has contracted. It may be said, then, that a surrogate is not deemed to sell a child because the child already belongs to the would-be buyer. In fact, gestational surrogates themselves view their role as performing a valuable service for others, further supporting this idea.²³ Children are thus readily understood as property (not alienable property, perhaps, but property nonetheless).

II. CHARACTERISTICS OF PROPERTY RIGHTS AS OPPOSED TO PRIVACY OR LIBERTY INTERESTS

To assess our conjecture on the reason for society's acceptance of gestation-only surrogacy contracts, we next examine the characteristics of property rights. We also explore the characteristics of privacy or liberty rights because, as we will discuss, courts often use privacy or liberty language when addressing parents' rights over children. While we cannot attempt a thorough

21 Professor Elizabeth Scott identified a similar implication of the acceptance of gestational surrogacy:

The relatively positive response to gestational surrogacy suggests that gestational motherhood is devalued when it is separated from genetic parenthood This widespread reaction . . . has some troubling implications. . . . [It] recalls a long-rejected notion that parents have a property-like interest in their children based on biology.

Scott, *supra* note 14, at 141. We merely disagree that the notion of parental property rights over children is long rejected.

22 Our use of "it" here is not intended as an indication of our views on whether an embryo is a person. We express no such view, one way or the other, and neither of us has expressed to the other her or his individual view on this matter, which is irrelevant to the analysis in this Essay.

23 Scott, *supra* note 14, at 138–39, 142 (noting further that gestational surrogacy increased women's willingness to serve as surrogates as compared to traditional surrogacy, since gestational surrogacy does not involve "giving up their biological children").

restatement of property and privacy or liberty law in this Essay, we highlight relevant principles. We then analyze examples of cases in which parents have rights to control the lives of their children to identify features of the parent-child relationship that more closely match the features of property rights than those of privacy or liberty interests.

A. *Property as a Bundle of Rights*

A widely accepted conception of property interests is the “bundle of rights” approach, which likens property to a bundle of multiple interests, such as rights of alienation, exclusion, possession, and use, which may be divided among multiple owners.²⁴ These rights also impose corollary duties on the rest of the world to not interfere with the interests of the owner, for example by stealing, trespassing, damaging, etc.²⁵ With this conception in mind, the Supreme Court has described the right to exclude as “one of the most essential sticks in the bundle of rights.”²⁶

It is readily apparent that some aspects of these property-right conceptions are inapplicable or only partially applicable to children. For example, children are not freely alienable, and children cannot be used in whatever way parents see fit, as demonstrated by laws prohibiting abuse, neglect, and the like. So, if children are property of their parents, the parental property right is qualified and not absolute, as suggested by the bundle of rights approach. However, as discussed below, parents’ rights over children do in many respects fit within this traditional framework.

B. *Property by Reference to Personhood*

An alternative perspective on property law has been expounded by Margaret Radin, who emphasizes a conception of property by reference to what she describes as personhood.²⁷ In this conception, the strength of property rights would depend on where that property falls on the continuum of “fungible to personal,” with fungible property the most loosely connected to personhood, and personal property—she uses a wedding ring as an exemplar—the most intimately connected to personhood.²⁸ “Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”²⁹

24 For a thorough analysis of the strengths and limitations of the bundle of rights conception of property, see generally, J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996).

25 See *id.* at 712.

26 *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

27 See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

28 *Id.* at 986.

29 *Id.*

Radin identifies “the sanctity of the home” as a further illustration of property based on personhood.³⁰ She examines the Supreme Court’s reasoning in *Stanley v. Georgia*, a case holding that a state may not engage in obscenity prosecutions for possession of materials in one’s home.³¹ While the *Stanley* Court based its holding on conceptions of privacy and liberty, and the relation of those rights to the First Amendment,³² Radin reads the majority opinion as one “influenced by an appreciation of our society’s traditional connection between one’s home and one’s sense of autonomy and personhood.”³³

Autonomy is an element common to property, privacy, and liberty. Radin’s concept of property as personhood thus bridges the gap between the colder academic view of property and the more humanitarian judicial principles of privacy and liberty rights. Radin has been praised for this conception, which, according to Stephen Schnably, “constitutes a continuing effort to develop a self-consciously pragmatic understanding of the law,” one that “explore[s] the limits of rule-like notions . . . without fully embracing the erasure of the separation of law and politics.”³⁴ In Schnably’s view, Radin’s approach reflects “a concern that grand, sweeping theories may blind us to the actual significance and impact of legal rules that are imposed in a ‘nonideal’ world marked by poverty, racism, and sexism.”³⁵

In terms of its application to the parent-child relationship, Radin’s approach may make it more palatable to treat children as property, but the personhood perspective has not received explicit acknowledgement as the correct conception of the parent-child relationship in legal decisions in this area. And while it may be easy to acknowledge in the abstract that parental rights flow from the intimate relationship between parents and their children, as we suggest below, the exercise of such rights may not be softened in fact by the labels used to describe them.

C. *Privacy and Liberty*

Where the courts have had to put a name on the rights at play in the parent-child relationship, they generally have referred to privacy and liberty

30 *Id.* at 991.

31 *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“[W]e think that mere categorization of these films as ‘obscene’ is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”).

32 *Id.*

33 Radin, *supra* note 27, at 992.

34 Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347, 348–49 (1993).

35 *Id.* at 349.

rights and interests (hereinafter referred to as “privacy rights”).³⁶ These privacy rights flow from the U.S. Constitution’s Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”³⁷ In *Troxel v. Granville*, the Supreme Court traced the development of parental rights over children and observed that “there will normally be no reason for the State to inject itself into the private realm of the family,”³⁸ concluding “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”³⁹

Although we have no desire, or need, to enter a debate on the terminology of constitutional jurisprudence, we do wish to observe that, labels aside, the parental rights described by *Troxel* (and echoed in other family-law cases discussed below) seem more akin to property rights than privacy rights (which should come as no shock inasmuch as the Fourteenth Amendment basis of those rights expressly protects “property” but not privacy). In support of this claim, we share an observation by Radhika Rao, who has described privacy as “a purely negative entitlement that guarantees security from governmental interference, whereas property possesses an affirmative dimension that enables purposive activity.”⁴⁰ On this dimension, a parental right to control a child seems to extend beyond the negative to a positive and, thus, beyond privacy and liberty to property.

III. THE NATURE OF PARENTAL RIGHTS

With an eye toward a distinction between property and privacy, we now explore several illustrations of parental rights in settings other than surrogacy contracts. We begin with a discussion about conflict between genetic and spousal fathers, then address the law’s presumption of fit parenting, and finally consider the parental option to have a child donate an organ.

A. *Conflict Between Genetic and Spousal Fathers*

In *Michael H. v. Gerald D.*⁴¹ the U.S. Supreme Court addressed the rights of a nonspousal genetic father. The case assessed a California law that created a presumption of fatherhood to the husband when a child is born to a wife living with her husband.⁴² A man outside of the marriage, Michael, who

36 See, e.g., cases cited throughout this Essay.

37 U.S. CONST. amend. XIV, § 1.

38 *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion).

39 *Id.* at 66; see also, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

40 Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 432–33 (2000) (footnote omitted).

41 491 U.S. 110 (1989).

42 See *id.* at 113.

wanted visitation rights, challenged the statute as infringing upon his due process rights to establish his paternity.⁴³

The Court upheld the statute, but in the process described the nature of parental rights as including “the right to the child’s services and earnings; the right to direct the child’s activities; the right to make decisions regarding the control, education, and health of the child”⁴⁴ These are the rights within the traditional property bundle described above and, under Rao’s distinction between privacy and property, these rights extend beyond protection from government interference to enable purposive activity of an owner (the parent) with dominion over his property (the child).

Moreover, in its conclusion that Michael had no substantive due process right to assert parental rights over a child born into an existing marriage,⁴⁵ the Court recognized that, in other settings—such as a genetic father’s opposition to adoption by a spousal father—the genetic father could have a superior claim.⁴⁶ The Court ruled in favor of the spouse here, however, because to protect Michael’s rights would necessarily limit the spousal father’s legislatively granted and historically rooted interest in the child, since it is not possible to “expand a ‘liberty’ of sorts without contracting an equivalent ‘liberty’ on the other side.”⁴⁷

Though framed in the language of “liberty,” the Court’s formulation invokes classic property conceptions: just as the owner of property has a right to use, there is an equivalent right to exclude others and a duty for others not to interfere with the owner’s right. It appears that Michael’s claim failed not because the child would have been ill served by the requested visitation, but because Michael’s interest in the child was of a lower priority than that of the spouse or, put simply, because the child already had an owner in the spousal father.⁴⁸ It seems, then, that the Supreme Court has implicitly endorsed a property right in children.

B. *Presumption of Fit Parenting*

To explore the concept of *parens patriae* and the presumption of fit parenting, we return to the Supreme Court case of *Troxel v. Granville*.⁴⁹ *Troxel*, like *Michael H.*, is litigation over visitation rights as governed by a state

43 *See id.*

44 *Id.* at 118–19 (plurality opinion).

45 *See id.* at 127.

46 *See id.* at 128–29 (discussing *Lehr v. Robertson*, 463 U.S. 248 (1983), a decision that “assumed that the Constitution might require some protection of” the right of a genetic father to prevent adoption by a spousal father).

47 *Id.* at 130.

48 Those who have read DONNA TARTT, *THE GOLDFINCH* (2013), will recall the sense of impending doom when the protagonist’s ne’er-do-well and previously absent father arrives to remove him from a stable (if imperfect) home. It did not occur to the author to explain why the child had to go, though neither he nor his hosts wanted this; it was simply assumed that readers would understand a parent’s right of possession.

49 530 U.S. 57 (2000).

statute. In *Troxel*, a Washington statute allowed any person to petition a court for visitation rights to a child and authorized courts to grant visitation whenever it “may serve the best interest of the child.”⁵⁰ Under this statute, the paternal grandparents of two children petitioned a court for visitation over the objection of the parent.⁵¹

In analyzing the constitutionality of the Washington statute, the Court recognized that because the composition of families varies, a number of states have decided, not irrationally, that there are benefits in allowing a child to form a relationship with nonparental parties such as grandparents.⁵² The Court concluded, however, that “[t]he extension of statutory rights in this area to persons other than a child’s parents . . . can place a substantial burden on the traditional parent-child relationship.”⁵³ For this reason, the Court held that the statute unconstitutionally infringed on a parent’s fundamental rights over the child as protected by the Fourteenth Amendment.⁵⁴

The Court’s plurality took pains to position its decision as mere deference to the “presumption that fit parents act in the best interests of their children.”⁵⁵ The Court quoted *Parham v. J.R.* at length:

[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right . . . to recognize and prepare [their children] for additional obligations. . . . The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.⁵⁶

According to the Court, parents’ rights trump even those of the sovereign in situations where the parents are fit, a situation that is presumed.

As Justice Stevens observed in dissent, however, the Court seems to have overstated the presumption of parental fitness,⁵⁷ which, it seems, should be relevant only to a corresponding presumption that a questioned decision is in a child’s best interest. Just as a state, presumably, has the authority to determine whether a general presumption of fitness is overcome, it should, presumably, have the authority, on the question of visitation rights, to disregard such a presumption and decide directly what a fit parent would do on behalf of her child. And while a right of privacy or liberty might nevertheless protect a parent’s autonomy over her *own* affairs, there seems no basis in privacy or liberty for one individual to limit the state-given privileges of

50 *Id.* at 60 (plurality opinion) (quoting WASH. REV. CODE § 26.10.160(3) (1996) (amended 2018)).

51 *Id.*

52 *See id.* at 63–64.

53 *Id.* at 64.

54 *Id.* at 67.

55 *Id.* at 68.

56 *Id.* (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (alteration in original)).

57 *Id.* at 86 (Stevens, J., dissenting).

another. That is, no matter how ardently the Court tried to avoid this characterization, a parent's right to countermand a decision of the state on behalf of her child must rest on the notion that the state cannot interfere with the *parent's* interest to control the child.

As discussed above, however labeled, a parent's interest in control of a child is functionally a property interest. As Justice Stevens put it, echoing the commodification critiques of Landes and Posner, the plurality opinion treats a child "like a mere possession."⁵⁸

The presumption of fit parenting, moreover, reflects a parental property interest even when such interest is granted or accepted *by* a state as opposed to constitutionally protected *from* the state. For example, there is an overwhelming scientific consensus that childhood vaccines are safe and effective in the prevention of disease. And states possess the constitutional authority to mandate vaccination.⁵⁹ Yet states do not so mandate such vaccinations (though they at times deny the unvaccinated access to public places such as schools).⁶⁰ It seems unlikely, at least to us, that legislators truly believe that parents are making the best decision for their children in leaving them unvaccinated. The reluctance to mandate vaccination, in adults or children, may well be motivated by a determination to honor the privacy and liberty interests of an unvaccinated adult and a determination to honor the *property* interest of a parent in an unvaccinated child.

C. Organ Donation

Historically, courts have been unwilling to characterize the human body, adult or child, as property.⁶¹ Instead, courts recognize a strong privacy interest in "being free from nonconsensual invasion[s] of . . . bodily integrity."⁶²

When applied to child organ donation, though, the rights to grant invasion of a child's bodily integrity decidedly take on the characteristics of property rights. Situations exist where parents will create a child at least partially for the purpose of serving as an organ donor to an older, ailing child.⁶³ This may be uncontroversial when a procedure is noninvasive, such as the removal of stem cells from a newborn's umbilical cord, but serious ethical concerns

58 *Id.*

59 See *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) ("We now decide . . . that nothing clearly appears that would justify this court in holding [a compulsory vaccination statute] to be unconstitutional and inoperative in its application . . .").

60 See *State Vaccination Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION (NOV. 15, 2016), <https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html>.

61 Teena-Ann V. Sankoorikal, *Using Scientific Advances to Conceive the "Perfect" Donor: The Pandora's Box of Creating Child Donors for the Purpose of Saving Ailing Family Members*, 32 SETON HALL L. REV. 583, 595 (2002).

62 *Id.* at 598 (alteration in original) (quoting Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977)).

63 See Marcy Darnovsky, *A Real-Life Version of "My Sister's Keeper": "Savior Siblings" and One Family's Battle to Heal Their Daughter*, PSYCHOL. TODAY (May 14, 2010), <https://www.psychoLOGYtoday.com/us/blog/genetic-crossroads/201005/real-life-version-my-sisters-keeper>.

accompany an invasive procedure such as a kidney removal. It stretches credulity to believe that a parent's consent to such a procedure on behalf of a donor child reliably reflects the parent's judgment of what is best for that child. Rather the parent has decided what is best for the family, and any right a *parent* has to serve his family with the use of a *child* can thus properly be characterized as a property interest in that child.

To be sure, the parental right in a child's body parts is not unlimited. And where there is a conflict of interest, such as where a parent wants to use one child's organ to save another, courts can get involved to review, and perhaps disregard, a parent's consent on behalf of her child.⁶⁴ However, there is a systematic deference to parental wishes as courts will become involved only if a parent or doctor affirmatively seeks a court's input into the matter; court oversight is not a prerequisite to child organ donations.⁶⁵ In any case, for reasons now well rehearsed, whatever deference is owed to a parental decision here properly can be characterized only as deference to the parent's property interest.

IV. SURROGACY REVISITED AND POLICY IMPLICATIONS

Returning to where this Essay started, we now have an explanation for why the vehement objections to surrogacy contracts abated, or were crowded out, when surrogacy became largely gestation only. There seems to be a generally accepted, if seldom confessed, belief that parents own their genetic offspring. And while the rights of ownership are not unlimited—a parent cannot, for example, starve, physically abuse, or sell a child—a parent's right to control or use his child is broad. Parents can decide who a child gets to see, and whether the child will be vaccinated, and even whether parts of her body may be used for the benefit of others, all even in the face of concerns that the parent's decision may not be in the best interest of the child. The reason for such deference, though we are apparently ashamed to admit it, is that parents are not merely agents for their children, they can also to some extent exercise dominion over them. Thus, when a gestation-only surrogate is implanted with an embryo, she becomes, in essence, a bailee of the embryo and not a mother. And so if she is contractually obligated to relinquish the child, once born, she is merely obligated to return property not her own, which does not violate the antialienation norm that prevents parents from selling their children.

This explanation of surrogacy's acceptance is not, however, a *justification*. Indeed, one of our purposes in writing this Essay is to encourage a reexamination of property rights in children. Consider, for example, that part of the opinion in *Baby M*, discussed above, is a reflection on the wisdom of New Jersey's invalidation of any prebirth promise by a mother to give up her baby for adoption. The reason for this rule is that, at least until a baby is born, a mother may not have the information she needs to know whether a

64 See Sankoorikal, *supra* note 61, at 604.

65 See *id.* at 613–14.

child she has carried is one she is emotionally prepared to relinquish.⁶⁶ At the time of *Baby M*, a gestational mother who agreed to give up her baby was also the genetic mother. But it is not obvious to us that this should matter, or that it should matter enough to be determinative. If a genetic mother should be entitled to renege on a promise given the intimacy of the subject matter, it is not obvious that a mere gestational mother should not be similarly entitled. At least it is not obvious to us that the basis for any difference in treatment should be general notions of property interest as applied to strands of DNA. So while we are here agnostic about whether gestation-only (or any) surrogacy contracts should be enforceable, we hope that the basis of any such enforcement is reasoned—perhaps for the reasons that Landes and Posner suggest—and not based on an unexamined adherence to rules developed by reference to sticks in a bundle.⁶⁷

Finally, and more generally, we want to broaden Justice Stevens's critique of the plurality opinion in *Troxel*. Respect for the privacy and liberty of an individual may seem unobjectionable until it is recognized that a proclaimed privacy or liberty interest of a parent may be little more than a euphemism for the parent's property interest in another human being, his child. We do not deny that such property interest may stand on stronger policy footing than chattel slavery. But the comparison is apt enough to justify a perhaps more searching inquiry than may seem required by the conclusions of existing precedent.⁶⁸ It would be unfortunate if we discovered, years from now, that we have endured inadequately nurtured children—including for lack of loving guardians or of proper healthcare—based on legal formulations chosen by our judges.

66 For an impassioned explanation of this point, see Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377 (1995).

67 Cf. Carter Dillard, *Future Children as Property*, 17 DUKE J. GENDER L. & POL'Y 47 (2010).

68 Although we express no definitive position, it can be argued that the current state of the law does

not lend [itself] to a child-centered theory of custody or parenthood. . . . The incentives [the law creates] are skewed to overvalue procreation and undervalue nurture [Parental rights] disserves the individual child by treating her as a movable chattel rather than a person who has put down her own roots and formed her own attachments.

Barbara B. Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1114 (1992). For more on this topic, Professors Scott and Huntington, in a forthcoming article, explore a "Child Wellbeing" framework which they claim better unifies the reach of parents' rights, children's rights, and state intervention in a way that is grounded in empiricism and better serves the interests of children. See Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, MICH. L. REV. (forthcoming).

