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**DEFINING THE FAMILY:
LAW, TECHNOLOGY AND
REPRODUCTION IN AN UNEASY AGE**

Janet L. Dolgin
New York University Press, 1997
\$29.95, xiii + 287 pages
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**NEW WAYS OF MAKING BABIES:
THE CASE OF EGG DONATION**

Cynthia B. Cohen, Editor
Indiana University Press, 1996
\$39.95, 352 pages
ISBN: 0253330580

**Reviewed by
Larry I. Palmer***

**PRIVATE COMMISSIONS, ASSISTED
REPRODUCTION, AND LAWYERING**

Consider what is by now yesterday's news:

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Palmer

- Clinicians at a fertility clinic recently announced that we face new ethical dilemmas because they had helped a sixty-three-year-old woman give birth to a healthy baby.¹
- Within days of the news of the cloning of a single sheep at a private research institute in Scotland, in February 1997,² the President of the United States banned the use of Federal funds in research aimed at perfecting human cloning.³

Do legal institutions have a role to play in resolving these ethical quandaries? To answer this and other questions raised by assisted reproductive technology, the National Advisory Board on Ethics in Reproduction⁴ (NABER) published its report on ovum transfer and a series of essays in *New Ways of Making Babies: The Case of Egg Donation*.⁵ NABER's report recommends removing any legal uncertainty as to whether the sixty-three-year-old "birth mother," rather than the younger ovum provider, is in fact the only mother of the child. Barring the possibility of "two mothers," presumably science and medicine can resolve most ethical issues associated with assisted reproduction.

Why have political leaders in this and other Western countries so quickly proclaimed that any attempts at human cloning threaten basic notions of what it means to be human?⁶ Janet L. Dolgin, an anthropologist and lawyer, purports to answer this question in *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age*.⁷

In Professor Dolgin's view, the legal response to human cloning will likely require choosing between two conflicting conceptions of the family: (1) a traditional view of the family as something organic or "natural"; and (2) the

1. Gina Kolata, *A Record and Big Questions as Woman Gives Birth at 63*, N.Y. TIMES, Apr. 24, 1997, at A1.

2. Gina Kolata, *Scientist Reports First Cloning Ever of Adult Mammal*, N.Y. TIMES, Feb. 23, 1997, at A1. Ian Wilmut et al., *Viable Offspring Derived from Fetal and Adult Mammalian Cells*, 385 NATURE 810 (1997).

3. NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION at 3, 87-90 (June 1997). Several bills were also introduced in the Congress and several states to prohibit human cloning. *Id.* at 88-90.

4. NABER is a private sector panel with members from ethics, theology, law, medicine, and genetics.

5. NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION 3-48 (Cynthia B. Cohen ed., 1996). Cynthia B. Cohen was formerly the executive director of the National Advisory Board of Ethics in Reproduction.

6. At this writing, at least the following countries have taken legislative and political steps to curtail attempts at human cloning: Germany, France, and the United Kingdom. CLONING HUMAN BEINGS, *supra* note 3, at 102.

7. JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997). Janet L. Dolgin is the Maurice A. Deane Distinguished Professor of Law at Hofstra University School of Law.

family as something individuals choose to form. Social and ideological changes prevalent in Western societies since the Industrial Revolution have created an ambivalence in society's and law's approaches to families. These cultural and social forces had already influenced law's responses to families by the 1960s, even while law had maintained traditional notions of the family as part of a social and moral universe. In seeking to prevent human cloning even before it is technically feasible, those against human cloning are simply trying to impose older ideas of the family as an integral and self-contained unit.⁸

Neither Dolgin's book nor Cohen's collection of essays can alone provide an adequate framework for the work lawyers do when they advise physicians, scientists, hospitals, universities, or lay individuals about assisted reproduction. Dolgin provides an excellent analysis of the family as an institution. She fails, however, to deal with law as a complex set of institutions—courts, legislatures, administrative agencies, and biomedical commissions—in defining public policy choices. As a book, *New Ways of Making Babies* is more than simply a publication of NABER's report and its commissioned papers. It is the attempt by a private group to exercise the kind of influence on law previously exercised by publicly appointed bodies. The book attempts to discuss ovum transfer, a matter of great concern to assisted reproduction practitioners, as if the book itself was written by a public entity representing the public interest.

I. THE PRIVATE VERSION OF "COMMISSIONING ETHICS"

Cohen divides *New Ways of Making Babies* into three parts. The first part, "Procedures and Policies at Four Oocyte Donation Centers,"¹⁰ contains descriptions by practitioners of how their infertility centers have resolved issues associated with ovum transfer.¹¹ The second part, "Ethics and Policy Issues Raised by Egg Donation," contains papers by bioethics experts.¹² The third and final part contains the NABER report.¹³

The four-section NABER report begins with a discussion of NABER's "values" about procreation, marriage, children, women, and adoption. The report thus asserts that this type of value analysis is the essence of public policy making

8. DOLGIN, *supra* note 7, at 246.

9. David Rothman coined the phrase "commissioning ethics" in his book, *STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION-MAKING* 168 (1991).

10. Oocyte is the biological term for an egg before maturation or fertilization. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

11. *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 3-48.

12. *Id.* at 51-230.

13. This section is titled "Report and Recommendations on Oocyte Donation." *Id.* at 231-302.

about the family, and is the appropriate way of dealing with matters of public policy and law.¹⁴

Sections two and three of the report are organized around the ethical and policy issues physicians encounter with potential ovum providers and recipients.¹⁵ Considering that NABER was funded initially by the American Fertility Society (now the American Society of Reproductive Medicine) and the American College of Obstetricians and Gynecologists,¹⁶ it is not surprising that ethical debate is "physician-centered."¹⁷ The underlying assumption of the report is that resolving the ethical dilemma of the practitioners in the fertility clinic effectively creates public policy and settles legal quandaries associated with assisted reproductive technology.

The final section of the NABER report, "Public Policy and the Use of Oocyte Donation,"¹⁸ argues that we need legislation to clarify parental status following ovum donation. Although this section states that appropriate methods of keeping records must be established, it largely recommends that the medical profession must regulate itself.¹⁹ Since the report's value analysis assumes there is some "fundamental right to procreative liberty" in ethics, and probably also within the Constitution of the United States, Professor John Robertson's theory of "procreative liberty" is featured. Robertson authored the commissioned paper on legal issues.²⁰

Anyone not familiar with Robertson's views of the relationship of the constitutional analysis of liberty to assisted reproduction should read his chapter on legal uncertainty.²¹ For those already familiar with his work, it is important to consider some of the selections by ethicists in the collection who question

14. *Id.* at 237-47. For a critique of this view of the appropriate manner of determining public policy for law, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 4-6 (1994).

15. *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 248-69, 270-92.

16. The group is now funded by several private foundations.

17. After writing *THE PHYSICIAN'S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS* (1983), William F. May wrote *THE PATIENT'S ORDEAL* (1991), which dealt with the ethical dilemmas of the seriously injured, because he felt our public discourse had been skewed by an over-emphasis on the physician's ethical dilemma. I have suggested in another context that a physician-centered view of ethics encourages us to ignore the effect of institutional arrangements on professional behavior. See Larry I. Palmer, *Paying for Suffering: The Problem of Human Experimentation*, 56 *MD. L. REV.* 604 (1997) (suggesting we might learn some institutional lessons from the infamous Tuskegee Study of Syphilis in the Negro Male, viewing the study from the perspective of the fictional African-American public health nurse in David Feldshuh's play *Miss Evers' Boys*).

18. *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 293-302.

19. *Id.* at 299-300, 301-02.

20. John Robertson, *Legal Uncertainties in Human Egg Donation*, in *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 175-87. I provide an extended critique of Professor Robertson's book on assisted reproduction, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994) in Larry I. Palmer, *Life, Death, and Public Policy*, 81 *CORNELL L. REV.* 161, 173-78 (1995).

21. Robertson, *supra* note 20, at 175-88.

Robertson's assumption that the important public policy issue is one of "balancing" the liberty of individuals against those of the majority.²² For instance, Thomas Murray challenges the use of the language of "donation" and questions whether commercialization of ovum transfer by compensating providers undermines basic notions of the family.²³

Although *New Ways of Making Babies* contains diverse perspectives on the ethics of ovum transfer in its commissioned papers,²⁴ there is little explicit discussion of NABER's underlying conceptual framework about the relationship of law and public policy. The best way for lawyers to read this book is to start with the NABER report in order to understand NABER's overall perspective on law and public policy. One or more of the first four chapters on infertility practices gives a sense of the factual patterns envisioned by the commissioners. Finally, the commissioned papers themselves, depending upon the reader's interest²⁵ or prior background in assisted reproduction, become intelligible.²⁶

This book is unlikely to become a reference book for legislators or other public officials because its framework is so court-centered. Further, the private commissioners fail to acknowledge that the effectiveness of most public commissions on medicine and science depends on political events and

22. If Professor Robertson's theory is ultimately rejected by the United States Supreme Court or, perhaps more important for lawyers, ignored by legislatures or state courts, the public policy and legal framework constructed by this private commission may indeed prove less useful to legislatures, courts, or lawyers trying to advise clients than the commissioners might want. In the United States Supreme Court's recent opinion upholding the constitutionality of laws against assisted suicide, the majority opinion by Chief Rehnquist analyzed the meaning of "fundamental rights" in constitutional methodology. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267-68 (1997). Such consideration does not undermine the importance of family privacy in constitutional interpretation or legislative consideration of assisted reproduction, but it might lead a lawyer to ask questions or structure transactions differently in what may remain an ethically and legally uncertain environment.

23. Thomas H. Murray is a professor of Biomedical Ethics and Director of the Center for Biomedical Ethics in the School of Medicine, Case Western Reserve University. He is a member of President Clinton's National Bioethics Advisory Commission.

24. *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 3-230.

25. In reading some of the commissioned papers, one should be aware that several of the papers are written by members or staff members of NABER. For example, Cynthia Cohen (who wrote *Parents Anonymous*, in *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 88-105) and Ruth Macklin (who wrote *What Is Wrong with Commodification?*, in *NEW WAYS OF MAKING BABIES*, *supra* note 5, at 106-21) are respectively the vice-chair and executive director of NABER.

26. NABER's members and goals initially appear similar to those of other national commissions appointed by Congress or the President. Its members, which include two prominent law professors, come from a variety of disciplines. It published its commissioned papers and report to assist "the body of policy makers on the national and state level who must risk addressing this politically explosive topic" of ovum transfer. *NEW WAYS OF MAKING BABIES*, *supra* note 5, at xix. The papers are divided into those that are "pro" or "con" on the issue of ovum transfer, stances that vary with changing contexts: paying women for their ova, anonymity of participants, the age of recipients, insurance payment for assisted reproduction, or the effect on children born of this particular process of assisted reproduction.

leadership.²⁷ The fundamental problem ovum transfer presents—the relationship of biology to the social and legal meaning of family—is only alluded to in some of the commissioned papers.²⁸

II. ASSISTED REPRODUCTION AND FAMILIES-THROUGH-CHOICE

Dolgin's *Defining the Family* addresses these issues through a careful analysis of constitutional cases dealing with marriage, sexual privacy, and unwed fathers, as well as state cases dealing with assisted reproduction.²⁹ *Defining the Family* seeks to raise questions rather than provide answers to the quandaries occasioned by the advent of reproductive technology.³⁰ Professor Dolgin traces the long-term transformation of the family from its hierarchical feudal origins to a more modern notion of family as a group of individuals who choose to be relatives. She develops her thesis that "families-through-choice" was an ideology underlying the law's response to family dynamics by the 1960s, and that, at least in the minds of judges, this ideology continues to co-exist with an earlier organic ideology of the family.

Dolgin's book shares the tendency with Cohen's to be court-centered in its analysis of law. Dolgin assumes that the policy choice is between an ideology of status or hierarchy, on one hand, and an ideology of family formed though

27. At the state level, the New York State Task Force on Life and the Law has been influential in shaping that state's law regarding the ethical issues associated with medicine. THE REPORT OF THE NEW YORK TASK FORCE ON LIFE, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994), not only recommended no change in New York statutes regarding assisted suicide, but was relied upon by the United States Supreme Court in upholding the constitutionality of those statutes. See *Quill v. Vacco*, 117 S. Ct. 2293 (1997). At the national level over the past twenty-five years, we have grown accustomed to legal bodies or officials asking blue ribbon panels to make recommendations about ethical dilemmas in science and medicine. In 1972 for instance, public outcry over the revelations of a forty-year study of untreated syphilis among rural African-American males in Tuskegee precipitated Congress's establishment of the National Commission for Protection of Human Subjects of Biomedical and Behavioral Research. Since then, several prominent commissions at both the federal and state levels have made recommendations on policy and legal matters. The most recent example of what Professor David Rothman has labeled "Commissioning Ethics" is President Clinton's appointment of a National Bioethics Advisory Commission, chaired by the President of Princeton University, Harold T. Shapiro, a distinguished economist.

28. See, e.g., Lisa Sowle Cahill, *Moral Concerns about Institutionalized Gamete Donation*, in NEW WAYS OF MAKING BABIES, *supra* note 5, at 74-77.

29. DOLGIN, *supra* note 7, at 32-62.

30. She points out in her conclusion:

In the late 1970s and 1980s, the responses of the law and of society more generally to the changing family were challenged dramatically by the advent of the new reproductive technologies and the appearance of surrogacy arrangements. Whether these phenomena, especially those that depended on developments in science, appeared coincidentally with broad changes in the family, or appeared only after society was ready, however fitfully, to accept them, is a question for historians of science.

Id. at 248-49.

individual choice or "intent,"³¹ on the other. She fails to consider that the public policy choice for law is to determine which legal institution, *if any*, should attempt to resolve a particular problem of assisted reproduction. Once the institutional choice is seen as the public policy choice, the ideological differences about the conception of the family Dolgin so astutely describes would become important in recognizing the questions and analyzing those particular resolutions. Thus her analysis reduces itself to elucidating courts' responses to the broader ideological changes affecting the family.³²

For example, Dolgin analyzes *McDonald v. McDonald*,³³ a New York divorce case involving a dispute over the custody of twins born through the process of ovum transfer. At a preliminary stage of their divorce proceedings, the husband attempted to obtain sole custody of the twin girls who were born shortly before the couple separated. The parties were respectively a medical doctor (the wife) and a podiatrist (the husband).

Dolgin provides the reader with a rich sense of how this particular case illustrates the tensions between various conceptions of parenthood. The husband emphasized that his genetic link, and by implication his wife's lack of genetic link, to the twins meant he was the only "natural parent" of the twins. The wife focused on her gestational role in bringing the children into the world, and by implication the difference in female and male roles in reproduction. For Dolgin, the trial court and the appellate court sided with the wife on the theory that she was the "natural mother" and cast her claim within a traditional notion of the family.³⁴

Dolgin's analysis makes for a compelling story, particularly for her hero, the husband; but I will retell the story from the perspective of judges dealing with a litigated divorce matter. In this version, I will emphasize the factors important in marital dissolution and argue that courts should not resolve conflicting conceptions of the family within the context of divorce.

First, the husband filed suit for divorce and sought sole custody of the twins prior to their birth.³⁵ The wife opposed this motion and sought temporary custody with visitation for the husband pending a resolution at trial. On the basis of the affidavits filed by both parties, the trial judge denied the husband's motion for

31. Chapter 3, *States and Contract in Surrogate Motherhood*, DOLGIN, *supra* note 7, at 63-93, is an example of how Dolgin sees policy choice.

32. Dolgin indicates that "the term ideology may include, but does not primarily refer to, a set of political beliefs. Rather, the term refers to the pervasive forms in terms of which people understand what it means to be human." *Id.* at 255 n.1.

33. *McDonald v. McDonald*, 608 N.Y.S.2d 477 (1994). Dolgin discusses other surrogate cases such as *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), and *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), in Chapter 5, *Social Implications of Biological Transformation*, DOLGIN, *supra* note 7, at 134-75.

34. DOLGIN, *supra* note 7, at 156.

35. *Id.* at 150. The twins were born on February 3, 1991.

sole custody, granted the wife's motion for temporary custody, and increased the amount of visitation for the husband.³⁶

The trial court's reasoning was somewhat straightforward for a divorce case. The wife was undisputedly the "birth mother" of the four-month-old twins who had been living with her. Additionally, New York, like many states, has a statute that presumes that a child born during a marriage is the "legitimate" child of the marriage.³⁷ At this preliminary stage of the proceeding, the legislative presumption was fully operative for a trial judge.

Second, the trial and appellate courts treated the husband's two other related requests pragmatically with the objective of minimizing the amount of court time spent on resolving the disputes between the parties and their lawyers. The trial court denied the husband's request for an order compelling the fertility center to disclose his wife's medical records.³⁸ The appellate court approved this denial by narrowly interpreting the waiver of the physician-patient privilege in custody disputes. On the other hand, the appellate court reversed the trial judge's denial of an order to change the twins' birth certificates so that their last names were the husband's rather than his wife's maiden name on the theory that this order tended to support the legitimacy of the children.³⁹

Neither the published reports of the case nor Dolgin's analysis tell us how the issue of post-divorce custody or visitation was resolved. Moreover, visitation and custody arrangements tend to change over time. The judges, without any explicit legislative authority on *in vitro* fertilization in New York, correctly applied the existing institutional framework of divorce to the dispute. This included the legislative presumption governing the paternity of children born during a marriage.⁴⁰

36. The initial visitation award for the father was four hours per week of visitation supervised by the child's maternal grandmother. *McDonald v. McDonald*, 627 N.Y.S.2d 758 (1995).

37. "Where the action for divorce is brought by the husband, the legitimacy of a child born or begotten before the commission of the offense charged is not affected by a judgment dissolving their marriage; but the legitimacy of any other child of the wife may be determined as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children begotten before the commencement of the action must be presumed." N.Y. DOM. REL. LAW § 175(2) (McKinney 1988).

38. The husband had filed an action against the fertility center claiming fraud. As Dolgin points out in her notes, the husband claimed he was first told that the children were produced with donor sperm because his sperm were inadequate to fertilize the ovum. In addition, he claimed his wife had originally told him that the pregnancy resulted from fertilization of her own ovum. As late as 1994, the husband was still seeking to determine the identity of the ovum donor. DOLGIN, *supra* note 7, at 265-66 n.35. One might wonder about the "ethics" of a clinic dealing with a married couple in such a manner. At least the NABER recommends that the clinic clearly inform the couple about the nature of the process. NEW WAYS OF MAKING BABIES, *supra* note 5, at 251.

39. *McDonald*, 608 N.Y.S.2d at 480-81.

40. Of course, litigated cases represent a very skewed distribution of the actual experiences of children and couples going through the divorce process. For analysis of the effect of skewed distribution, see KOMESAR, *supra* note 14, at 76-79.

From an institutionalist's perspective, the real question is whether a court should abandon the legislative framework for resolving custody disputes in the context of divorce because assisted reproductive technology was used to produce the children. Whether the use of *in vitro* fertilization should make a difference in how the custody dispute is framed is a legislative rather than a judicial decision.⁴¹ If both courts and legislatures have limited capacity to shape the institution of the family in a complex society,⁴² then the judges in the *McDonald* case used legal intervention to provide an incentive for the parties and their lawyers to resolve the dispute themselves prior to a full litigated trial. By reaching a result on narrow grounds, the *McDonald* court left it to the legislature to consider changing the framework. In other words, it may not be appropriate for courts in *divorce actions* to determine if a "gestational" or "genetic" mother is the "natural mother for all purposes" as Dolgin implies. But what Dolgin and most other legal scholars fail to recognize is that legislation is difficult to pass in our process, and what emerges is not necessarily comprehensive. It usually takes some change in the political equilibrium for legislation to pass.⁴³

For a number of reasons, the prospect of "human cloning" might just be such an equilibrium-shifting event in the public perception of assisted reproduction. As President Clinton announced a ban on the use of federal funds to support research on human cloning, he asked his recently appointed National Bioethics Advisory Commission to report within ninety days on the issues raised by the sheep cloning.⁴⁴

The recommendations of this commission illustrate how our political processes do not result in grand ideological resolution about the nature of family and human relationships. Even though the commission recommended legislation to ban human cloning, only the attempt at what is called somatic cell infusion would be prohibited under the commission's recommendations. This means that many things called "human cloning" (such as splitting an embryo) would not be prohibited by the recommendations. Nor would the practice of ovum donation be prohibited, or many aspects of laboratory research on animal embryos.

41. There had been some discussion in New York about proposed legislation that would have made the *McDonald*'s result clearly correct. At one point, the Special Committee on Biotechnology and the Law of the New York State Bar Association proposed an amendment that would clearly have made the wife in *McDonald* a parent for the purposes of divorce. That amendment was never enacted into law. See Larry I. Palmer, *Who Are the Parents of Biotechnological Children?*, 35 JURIMETRICS J. 17, 19-22 (1994). Some states have statutes that specifically recognize the married couples' intentions as legally determinative of rearing rights and duties in offspring. OKLA. STAT. tit. 10, § 554 (Supp. 1998); N.D. CENT. CODE §§ 14-18-01 to -07 (1991); VA. CODE ANN. § 20-158 (Mich. 1995 & Supp. 1997).

42. Larry I. Palmer, *A Rejoinder*, 35 JURIMETRICS J. 51, 52-53 (1994).

43. Palmer, *supra* note 17, at 616-22.

44. It is worth noting that people are opposed to something that is not at present a technological reality (in contrast to something such as ovum transfer).

This highly diverse commission's main justification for its prohibition against human cloning is concern with the safety of the process for humans. Given its respect for science, this group recommended that the prohibition be time-limited, recognizing that future scientific research might undermine the commission's concern for safety. Thus, if and when the ratio of success of animal cloning moves to something less than the one in 278 tries it took to create one adult sheep called Dolly, the debate can theoretically reopen. At present, there appears to be a political consensus that any specialists who attempt human cloning by using somatic cell transfer would be involved in an experiment that should be considered too dangerous to undertake.⁴⁵ In effect, basic scientific research on all forms of cloning—the institution of science—was protected in the Commission's process, but the attempts to transfer this knowledge to the human realm—medicine—were temporarily halted.⁴⁶

But, if the cloning of one sheep represents something "new" or novel in scientific understanding, rather than simply a technological innovation, the influence of science on other institutions may be long-range rather than the imposition of some dramatic new law. If mammalian cloning represents a new understanding of how cells operate, the current concern with human cloning may pale in significance as the implications for the understanding of human disease and the aging process begin to affect medicine and perhaps even our legal concepts of the family.⁴⁷

Finally, there is no clear winner in the ideological battle between those who believe the family must be grounded in some shared basic biological understanding and those who believe in the ideology of choice. This lack of definitive resolution means the lawyer must act under the circumstances of a dynamic uncertainty, caused by the institutional power of science.

While Dolgin's analysis forces lawyers to consider the interaction of law and the family, her analysis does not consider science as a major institutional player in which assisted reproductive technologies are eventually offered to prospective patients. Thus the alliance of science and medicine as institutions is submerged under an otherwise engaging social and historical analysis of the family and recent judicial responses to issues related to the family.⁴⁸ Professor Dolgin

45. CLONING HUMAN BEINGS, *supra* note 3, at 107.

46. Science rather than medicine provides the institutional dynamics for the "human cloning" debate. The assisted reproduction practitioner is close to the image of the healer, but the scientist is both magician and Frankenstein. In other words, we might trust the doctor, but fear the "mad scientist."

47. Since the cloning of a sheep, the scientists in Scotland have created a transience sheep, one with a human gene. Gina Kolata, *Lab Yields Lamb with Human Gene*, N.Y. TIMES, Jul. 25, 1997, at A18. The implications of third discovery for human medicine are enormous. This second cloned sheep produces milk containing a human protein, Factor X, which could help hemophiliacs. Currently, hemophiliacs are healed with Factor X taken from human blood donations or cell cultures. *Cloned Sheep May Help Human Hemophiliacs*, N.Y. TIMES, Dec. 19, 1997, at A25.

48. Dolgin does not deal extensively with an economic analysis of the family. She makes only

provides an important part of the framework (particularly a perspective on the family as an institution) that a lawyer needs in dealing with clients, fertility clinics, and even law students concerned with assisted reproduction.

The lawyer undertaking to define legal issues raised by egg transfer must be able to analyze more than the relevant legislation, cases, or administrative rulings. The lawyer needs some grasp of the larger social framework. Lawyers must learn to ask the kinds of questions legislative or judicial bodies might be asking.⁴⁹

Pursuing this line of logic, the political response to animal cloning in recent months should remind lawyers that there might be "paradigm" shifts occurring in science. A major shift in science should alert lawyers to the possibility that there could be a shift in the political equilibrium concerning the practice of ovum transfer. Legislatures might then alter the institutional arrangement in which the "market," the institutions of medicine and science, defines the ethics of assisted reproduction.

Let's return to our opening inquiry and contemplate again the geriatric (or "post-menopausal") mother. An institutional analysis of assisted reproduction helps to distinguish between that which disturbs us as citizens, parents, and lawyers and those important social problems calling for institutional response.

First, is the sixty-three-year-old, first-time mother really an important social problem requiring legislation or regulation to govern the age a woman can be a recipient of egg transfer? My answer is "no." My reasoning starts with the proposition that there is no general line a court or a legislature could draw when a woman is too old to be a mother other than something about what is reasonable under the circumstances. The clientele for ovum transfer are generally already "old" for first-time mothers and therefore already at greater medical risks to their health than, say, twenty-five-year-old, first-time mothers. Trying to set the outer limits through a regulatory or legislative process on the maximum age at which birth may occur, assuming some reasonable amount of medical screening by the clinic, is virtually impossible or meaningless.⁵⁰

implicit references to child support issues in her discussion of issues arising because of artificial insemination. DOLGIN, *supra* note 7, at 196-97. A more complete institutional analysis of the family might look at support actions as the remaining area of "status" in our notions of family and should be studied as such. For instance, a lower court in New York held a woman who had undergone a sex change liable for support for children born through the process of artificial insemination on the premise she had misrepresented herself to the physician as the husband of the woman for whom the physician performed artificial insemination, and therefore undertook a duty to support the children. *Karin T. v. Michael T.*, 127 Misc.2d 14, 484 N.Y.2d 780 (Family Court, Monroe Co. 1985).

49. See Palmer, *supra* note 20.

50. NEW WAYS OF MAKING BABIES, *supra* note 5, at 5. Some of the centers described in Cohen's book, for instance, set the age limit at 50, while others had no absolute age limit.

At a pragmatic level, I see no compelling reason to put the problem of the post-menopausal mother on the political agenda. In my view of family as a private institution, there are some dilemmas that properly belong only to the members of the family. The sixty-three-year-old mother and her sixty-year-old husband-father who had the resources to come from London to Los Angeles for the ovum transfer might be trusted to think through the social and legal risks of their decisions to have a child at this stage of their lives. I hardly believe this is a child who might end up in foster care if the mother and father died prior to its reaching maturity. Surely this couple can find lawyers who can use existing legal instruments to protect the child as much as possible from its parents' deaths or disabilities.

Given that political resources, like everything else in society are limited,⁵¹ the best response from legislatures may be no or very little response to deep ethical issues raised by ovum transfer. The best response from courts to cases that come before them is to resolve them narrowly, and on non-constitutional grounds, since legislatures rather than courts are the least detrimental legal means of changing the nature of family. In the end, the social and cultural forces analyzed by Dolgin have as much influence on the nature of family as do judicial rulings and legislative enactments.

For the moment, the NABER report is correct—assisted reproduction practitioners must struggle with the sixty-three-year-old, first-time mothers. Cohen's collection represents what might be called the "best practices" for ovum transfer and provides recommendations as to resolving some of the issues. The collection provides lawyers with a good sense of current thinking among practitioners of assisted reproduction. But the book does not provide a framework for dealing with issues on the frontier, such as human cloning.

Defining the Family represents the best book for lawyers to read on the problems of assisted reproduction. The important insight for lawyers in Dolgin's book is that the law's response to the family reflects the broader cultural, social, and economic functions of the family. Consequently, she presents a view of the family as a social institution. In other words, our high rates of divorce and single parenting are not new statistically, but rather continuations of trends begun during the Industrial Revolution.⁵²

What is lacking in these multidisciplinary approaches to assisted reproduction is "comparative institutional analysis."⁵³ In a comparative institutional approach to law, the correct public policy choice is sometimes to allow non-legal

51. Positive political theory helps us understand that court resources are limited, but few legal scholars consider political resources limited. In our court-centered view of the world, we have a kind of rigid legal process view that delegates to legislatures tasks that are often beyond their institutional competence. Arriving at a uniform commercial code might be an easier task than redefining parent for a legislature. See Palmer, *supra* note 41, at 52-54.

52. DOLGIN, *supra* note 7, at 28-29.

53. See KOMESAR, *supra* note 40.

institutions such as "science" or "medicine" to be the primary forum for policy debate and resolution. Such an approach would consider science and medicine as institutions with certain limitations, just as all institutions have limited competencies. When considering these limitations, the important point of legal analysis is to determine which legal institution—if any—is the corrective for the social malfunctioning of science or medicine.

In general, legislatures rather than courts are the correctives for science or medicine. The "law" of assisted reproduction technology may be made in incremental steps in legislative and administrative bodies and in lawyers' offices because family is in fact a private institution, difficult to regulate, and thus constitutionally protected.⁵⁴

54. A complete analysis of the role of the distinction between public and private institutions is beyond the scope of this review. See PALMER, *supra* note 20, at 171 n.67. One task of such an undertaking would be to distinguish between marriage—which is a public institution—and family—which is a private institution—in constitutional analysis. The recent case of *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1997), in which the Court held that the state must furnish an indigent divorcee with a transcript for an appeal from the termination of her parental status, might be the starting point for such an analysis.