

# MARGINALIZING ADOPTION THROUGH THE REGULATION OF ASSISTED REPRODUCTION

RICHARD F. STORROW\*

## INTRODUCTION

At the second annual Wells Conference on Adoption Law, I was asked to comment on Professor Lynn Wardle's treatment of the topic "What does the rest of the world say? How do different nations and states determine when and if adoption doctrine applies to assisted reproduction related transactions?"<sup>1</sup> This was a broad comparative law question about whether the legal treatment of assisted reproduction in other countries relies on adoption law or policy. It was a question about what legal hurdles a vast worldwide population of individuals and couples who seek access to assisted reproduction might face in the course of their quest to create a family.

Lynn Wardle has recently devoted the bulk of his scholarly energy to condemning gay and lesbian parents.<sup>2</sup> Wardle believes they are sexually

---

Copyright © 2006, Richard F. Storrow.

\* Professor of Law, Pennsylvania State University. J.D. 1993, Columbia; M.A. 1989, Columbia; B.A. 1987, Miami University. I thank Pennsylvania State University for the research support that made the preparation of this Article possible, the editorial staff of the Capital University Law Review, and Carlos Ball for helpful comments on a previous draft.

<sup>1</sup> Capital University Law School Wells Conference on Adoption Law, Defrosting the Debate: Analyzing the Nexus between Adoption & Frozen Pre-Embryos (Apr. 7, 2006) (video on file with the Capital University Law Review).

<sup>2</sup> See Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 178, 193–94 (2005) (implying that gay adoptive parents are irresponsible parents); Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian Adoptions*, 3 AVE MARIA L. REV. 561, 614, 616 (2005) (same); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 292, 294–95 (2004) (implying that gays and lesbians do a poor job of parenting); Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbian" Parenting*, 23 QUINNIAC L. REV. 541, 544–45 (2004) [hereinafter *Considering the Impacts*] (discussing the potential negative effects of lesbian parenting on children); Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J.L. & FAM. STUD. 59, 97–99 (2004) (noting that homosexual parents are less optimal for children); Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 814 (2001) (arguing that same-sex marriage should be outlawed because it does not promote responsible procreation); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 366 (2005) (continued)

unrestrained egoists who break the law and harm children and society.<sup>3</sup> He urges policymakers to block efforts by gays and lesbians to become parents either by adoption or by assisted reproduction.<sup>4</sup> He also advocates severing the relationship between gay and lesbian parents and their children whenever possible, because they are not “true” families.<sup>5</sup> At the Wells Conference, Wardle relied heavily on these views.<sup>6</sup> He largely ignored the broad comparative question he was asked to address to reflect at length on the debate over adoption by gays and lesbians and to make very general statements about the regulation of assisted reproduction in the United States.<sup>7</sup>

He argued that only heterosexual married couples who are able to procreate with their own gametes and intend to raise the resulting children should have access to assisted reproduction.<sup>8</sup> Gays, lesbians, and single individuals, he argued, should not have access to reproductive technology.<sup>9</sup> In support of these propositions, Wardle made numerous misstatements of fact and law, made critical omissions, submitted erroneous quotations, and presented misleading translations of foreign-language documents. More disturbing than those flaws, however, was Wardle’s implication that adoption is a degraded form of parenthood that, in all but the rarest of cases, prevents children from reaching their highest potential.

In this Comment on Wardle’s remarks, I will discuss the flaws and fabrications in his argument. I will also make two major points: (1) the way a society views adoption has a strong influence on the forms of assisted reproduction that the society will permit, and (2) countries with strong commitments to both individual autonomy and child welfare reject the notion that the infertile may not have medical assistance to reproduce unless they satisfy the standards required of adoptive parents. In support of these points, I

---

(claiming that having gay or lesbian parents pose “a host of . . . risk factors for healthy development of children”).

<sup>3</sup> See sources cited *supra* note 2.

<sup>4</sup> See sources cited *supra* note 2.

<sup>5</sup> See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894–98 (1997) (proposing “a rebuttable presumption that ongoing homosexual relations by an adult seeking or exercising parental rights is not in the best interest of a child”).

<sup>6</sup> See Lynn D. Wardle, *What Does the Rest of the World Say?: How Do Different Nations and States Determine When and If Adoption Doctrine Applies to Assisted Reproduction Related Transactions?* (Apr. 7, 2006) (video on file with Capital University Law Review).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

will in Part I show how adoption plays a role in discussions of what law and policy should govern assisted reproduction. Part II will then explore the role of heterosexuality and marriage in the law of assisted reproduction, and Part III will comment on how Islam's restrictions on assisted reproduction stem not from its disapproval of gay and lesbian parents, but instead from its religious rejection of adoption and its cultural rejection of childless marriages.

Part IV reflects on the law of France, where restrictions on assisted reproduction and adoption enshrine procreative parenthood in a way that effectively casts adoption as a substandard form of parenthood. Part IV also criticizes a recent proposal to codify a marriage preference in the adoption of children from foster care and describes recent developments in the United Kingdom, Australia, and New Zealand that reject the best interests of the child standard as a proper means of restricting access to assisted reproduction.<sup>10</sup>

#### I. ASSISTED REPRODUCTION AND THE ADOPTION MODEL

Because adoption is substantially older than reproduction-assisting technologies, regulation of adoption is much more established.<sup>11</sup> An issue that frequently arises in discussions about whether and how to regulate assisted reproduction, then, is how much of the regulatory framework should be borrowed from already existing and familiar adoption principles. As a general matter, the questions of whether and how adoption principles should apply in the context of assisted reproduction arise at three specific junctures in the course of and subsequent to one's resort to assisted reproduction. The first of these is when an individual or a couple seeks access to reproduction assisted technologies. The second is the moment of the initial legal determination of the child's parentage. The final juncture is when the child asserts her right to know either the identity of or other facts about her biological progenitors. The issues that arise at these three junctures are by no means discrete but may overlap to a certain degree. For example, beliefs about the scope of a child's right to know or to be raised by her genetic progenitors might be used as the basis for legislation restricting access to certain forms of assisted reproduction. Beliefs about the parenting ability of those who resort to assisted reproduction may influence who the law is

---

<sup>10</sup> At the point of passing its legislation, New Zealand decided that the welfare of the child was not the appropriate governing criterion in this context. See Claire Breen, *Poles Apart? The Best Interests of the Child and Assisted Reproduction in the Antipodes and Europe*, 9 INT'L J. CHILD. RTS. 157, 157 (2001).

<sup>11</sup> See MADELYN FREUNDLICH, 4 ADOPTION AND ETHICS 75 (2001).

willing to recognize as a parent. Wardle's treatment of the topic demonstrated how these issues often inform one another. His desire to limit access to assisted reproduction stems directly from the conviction that a child has the right to know and be reared by her biological parents, and that a child's biological progenitors are always the ideal persons to rear her, particularly if they are married to each other.<sup>12</sup>

The discussion in the United States concerning if and how assisted reproduction should be regulated as a socio-legal matter usually arises in disputes over parentage determination and, as in the rest of the world, often invites comparisons with adoption, a nonprocreative quest for parenthood that falls outside the scope of constitutionally protected procreation.<sup>13</sup> Comparisons with adoption are especially salient where the necessary reproductive assistance entails the participation of gamete donors or gestational surrogates. It is argued that as these forms of parenthood involve the legal recognition of intentional parenthood,<sup>14</sup> adoption is the appropriate template for legal determinations of parentage.<sup>15</sup> Other social policy questions triggered by both adoption and heterologous assisted reproduction are the value of secrecy over transparency,<sup>16</sup> the commodification of children,<sup>17</sup> and the exploitation of women.<sup>18</sup> Finally, both surrogacy and adoption trigger deeply ingrained suspicions and fears about mothers who "reject" their children.<sup>19</sup>

---

<sup>12</sup> Wardle, *Parenthood and the Limits of Adult Autonomy*, *supra* note 2, at 193.

<sup>13</sup> See Griffith v. Johnston, 899 F.2d 1427, 1437 (5th Cir. 1990); S.B. v. L.W., 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring).

<sup>14</sup> See PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 119 (1993); FREUNDLICH, *supra* note 11, at xii.

<sup>15</sup> See, e.g., *In re Baby M*, 537 A.2d 1227, 1240–41, 1243–46 (N.J. 1988) (basing determination of surrogacy contract's invalidity on its inconsistency with adoption law); A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000). As a way of underscoring this point, some courts reject the view that intent to parent may be sufficient to determine parentage in surrogacy cases. See, e.g., *Belsito v. Clark*, 644 N.E.2d 760, 766 (Ohio Ct. Com. Pl. 1994).

<sup>16</sup> See Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 398 & n.28 (2004).

<sup>17</sup> See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1929 (1987); Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 352 (1991).

<sup>18</sup> See JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 140–44 (1993).

<sup>19</sup> See, e.g., *In re Baby M*, 537 A.2d at 1238 (stating that the surrogacy contract called for the termination of maternal rights and the adoption by the father's wife "regardless of any evaluation of the best interests of the child").

Not everyone is comfortable situating heterologous assisted reproduction within an adoption framework.<sup>20</sup> Indeed, there is much to distinguish assisted reproduction from adoption.<sup>21</sup> The most salient difference is that adoption begins after a child or fetus already exists; assisted reproduction, however, finds intending parents themselves setting the reproductive process in motion.<sup>22</sup> As a child-focused service, adoption requires the would-be parents to demonstrate parental fitness and the child's best interests to the satisfaction of the court. By contrast, assisted reproduction, an adult-focused service, requires at most a showing of fitness to parent.<sup>23</sup> Finally, adoption and assisted reproduction are not equally valued, given the nearly overwhelming desire for and bias in favor of genetically-related children.<sup>24</sup> Thus, the possibility of a genetic tie to a child born through assisted reproduction may make that choice appear more understandable and legitimate in a society that extols consanguineous relationships and regards nonconsanguineous relationships with suspicion, if not derision.<sup>25</sup> Where genetic contributions of third parties are not required, the argument from adoption is less weighty if one believes that genetic reproduction using one's own gametes is the sum and substance of procreative autonomy.<sup>26</sup> In exercising their procreative liberty, coital progenitors benefit from a presumption of fitness that frees them to exercise the parental prerogatives that stem from their act of procreation.<sup>27</sup> Whether noncoital reproduction is sufficiently procreative to

---

<sup>20</sup> See, e.g., *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1290–91 (D. Utah 2002) (citing *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993)).

<sup>21</sup> See generally JOAN HEIFETZ HOLLINGER ET AL., 3 ADOPTION LAW AND PRACTICE § 14.04 (2005) (emphasizing the differences between the use of ARTs, or assisted reproductive technologies, for collaborative reproduction, where the relationship between the surrogate and the genetic parents is defined before a child exists, and adoption, where the state has a duty to protect the child's best interests and assure parental fitness).

<sup>22</sup> See *Surrogate Parenting Assocs. v. Kentucky*, 704 S.W.2d 209, 211–12 (Ky. 1986).

<sup>23</sup> See FREUNDLICH, *supra* note 11, at 26–29.

<sup>24</sup> See *id.* at 2–3; see also Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, in FAMILIES BY LAW: AN ADOPTION READER 313, 314 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) (discussing the scope of “genetic essentialism”).

<sup>25</sup> See Elizabeth Bartholet, *Adoption and the Parental Screening System*, in FAMILIES BY LAW, *supra* note 24, at 72, 73; Irving Leon, *Nature in Adoptive Parenthood*, in FAMILIES BY LAW, *supra* note 24, at 88 (“[There exists a] prejudice, often subliminal but pervasive, against [nonbiological parenthood] . . .”).

<sup>26</sup> See *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137–38 (Mass. 2001).

<sup>27</sup> See JOHN A. ROBERTSON, FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 31 (1994).

command similar constitutional protection remains the subject of considerable debate. There has been no pronouncement binding on all states on this issue,<sup>28</sup> and the regulation across and within jurisdictions in the United States is far from uniform or comprehensive.<sup>29</sup>

Whereas the socio-legal regulation of assisted reproduction in the United States is largely limited to parentage determination, some countries have wrestled with whether adoption law should guide the formation of policy on questions of identity disclosure and compensation in assisted reproduction. Canada, for example, chose to ban compensation for gametes or gestation,<sup>30</sup> the United Kingdom chose to ban anonymity.<sup>31</sup> Both stances were informed by understandings of what is best for children, a standard prominent in the law of adoption in both jurisdictions. Although some jurisdictions in the United States have taken this direction in matters of adoption,<sup>32</sup> discussions about children's "right" to know the identities of the contributors of their genetics remains largely academic.<sup>33</sup>

Finally, there is the issue of whether adoption law should guide the question of who should be allowed access to assisted reproduction and under what conditions. The question adoption regulations pose about access to assisted reproduction is whether those who seek medical assistance to reproduce must satisfy the full range of criteria that applicants for adoption

---

<sup>28</sup> See *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992); see also R. Alta Charo, *Cloning: Ethics and Public Policy*, 27 HOFSTRA L. REV. 503, 505 (1999) ("[T]here has never been a clear statement that there is a fundamental right to procreate, especially to procreate by means that require third party assistance.").

<sup>29</sup> See Debora Spar, *Reproductive Tourism and the Regulatory Map*, 352 NEW. ENG. J. MED. 531, 532 (2005) (noting the "patchwork of competing and conflicting regulations").

<sup>30</sup> Assisted Human Reproduction and Related Research Act, 2004 S.C., ch. 2(6), (7) (Can.).

<sup>31</sup> Jacqueline A. Laing & David S. Oderberg, *Artificial Reproduction, the 'Welfare Principle', and the Common Good*, 13 MED. L. REV. 328, 339–40 n.28 (2005).

<sup>32</sup> See E. WAYNE CARP, *ADOPTION POLITICS: BASTARD NATION AND BALLOT INITIATIVE* 58, at 5–24 (2004) (surveying the law of the United States regarding parental identity issues in assisted reproduction); E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 225–26 (1998).

<sup>33</sup> See, e.g., Guido Pennings, *The Right to Privacy and Access to Information About One's Genetic Origins*, 20 MED. & L. 1 (2001). One important exception is the case of *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 872–77 (Cal. Ct. App. 2000). Practice-based insights on confidentiality and disclosure in assisted reproduction are especially prominent in the psychological literature on this question. See, e.g., Marsha H. Levy-Warren, *A Clinical Look at Knowing and Telling: Secrets, Lies, and Disillusionments*, in *COMPLEX ADOPTION AND ASSISTED REPRODUCTIVE TECHNOLOGY: A DEVELOPMENTAL APPROACH TO CLINICAL PRACTICE* 251, 251–75 (2001).

must: that the applicant is fit to be a parent, and that it is in the best interest of the child to be placed with that applicant. The question has been comprehensively addressed publicly only within countries whose systems of socialized medicine include governmental oversight of assisted reproduction.<sup>34</sup> The question has barely arisen in the United States except in the statutory regulation of surrogacy<sup>35</sup> and in certain discrimination cases where infertility clinics have categorically rejected applicants with certain characteristics instead of genuinely performing individualized assessments of their parenting ability.<sup>36</sup> In an unusual recent case in Indiana, an attempt to legislate individualized assessments of married couples and categorical exclusions of all others from access to assisted reproduction failed to win approval.<sup>37</sup>

## II. ASSISTED REPRODUCTION AND THE HETEROSEXUAL FAMILY

Although the question has been debated for almost twenty years,<sup>38</sup> the extent to which assisted reproduction law should track adoption's regulatory model is still far from settled.<sup>39</sup> What we do know is that the more the

---

<sup>34</sup> See Tamara K. Hervey, *Buy Baby: The European Union and Regulation of Human Reproduction*, 18 OXFORD J. LEGAL STUD. 207, 226–28 (1998) (discussing Western Europe's approach to assisted reproduction).

<sup>35</sup> See UNIF. PARENTAGE ACT § 803(b)(2) (amended 2002), 9B U.L.A. 58 (Supp. 2006) (requiring “the intended parents [to] meet the standards of suitability applicable to adoptive parents”). The Uniform Parentage Act only partially employs an adoption framework for surrogacy. Post-birth assessments of a child's best interests do not occur in surrogacy arrangements as they do post-placement in adoption. See Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 661 n.446 (2002).

<sup>36</sup> See, e.g., *N. Coast Women's Care Med. Group v. Superior Court*, 40 Cal. Rptr. 3d 636, 641–42 (Cal. Ct. App. 2006), *cert. granted*, 46 Cal. Rptr. 3d 605 (Cal. 2006); see also Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 87–90 (2006) (discussing access to assisted reproduction in the United States generally, without noting any eligibility requirements akin to those of adoption, at least during the pre-birth phase of the procedure).

<sup>37</sup> See Associated Press, *Indiana Bill to Ban Lesbian Pregnancies Dropped* (Oct. 6, 2005), <http://www.365gay.com/newscon05/10/100605indiana.htm>.

<sup>38</sup> See, e.g., *Surrogate Parenting Assocs., Inc. v. Kentucky*, 704 S.W.2d 209, 212–13 (Ky. 1986).

<sup>39</sup> See also Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, in *FAMILIES BY LAW*, *supra* note 24, at 299, 302; see also UNIF. PARENTAGE ACT § 201 (amended 2002), 9B U.L.A. 15 (Supp. 2006) (requiring adoption-like home study to assess fitness of prospective parents).

regulation of access to assisted reproduction resembles the regulation of access to adoption, the more the state will be permitted to pass judgment on the desirability of one's becoming a parent. It is thus unsurprising that the issue is prominent in the debate about what legal recognition should extend to families created and headed by single individuals and gay and lesbian couples.

In his remarks, Wardle made the inaccurate statement that marriage is the "fault line" explaining the major differences in the regulation of assisted reproductive technology by the nations of the world.<sup>40</sup> He suggested that countries that permit only married couples "to produce desired children of or for the marriage" express appropriate concern for the best interests of unconceived children.<sup>41</sup> Countries that allow more expansive access do not.<sup>42</sup> In truth, marriage is virtually insignificant in the regulation of assisted reproduction. Perhaps Wardle's view that heterosexual marriage should be supported and subsidized by any available means informs his preference that marriage should guide and shape the regulation of assisted reproduction. His aspirations got the better of him at the Wells Conference, though, leading him to attribute fabricated quotations to the Doha Declaration of the 2004 Doha International Conference for the Family (Declaration). Wardle claimed the document makes the following important statements: "the natural family based on the union of husband and wife is the fundamental group unit of society," and "strong stable marriages provide a safety net for all age groups and societies."<sup>43</sup> The Declaration does not contain these statements. It nowhere mentions "natural family" or describes the union of a husband and wife as anything fundamentally important to society. The Declaration's most specific statements about marriage express concern about the inequality and abuse that marks so many marriages.<sup>44</sup> The United Nations, which recognized the Doha Declaration in a General Assembly resolution, has instructed its Commission for Social Development (charged with studying and reporting on

---

<sup>40</sup> See Wardle, *supra* note 6 ("We will find that this distinction explains the major differences in the regulation of ART by the nations of the world."), ("The fault line noted above between married and unmarried persons is much brighter in most of the world outside of North America and Europe.").

<sup>41</sup> *Id.* (describing the Hague Convention and the U.N. Convention).

<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

<sup>44</sup> Doha Int'l Conference for the Family, Nov. 29–30, 2004, *Doha Declaration*, U.N. Doc. A/59/592 (Dec. 3, 2004), available at <http://worldfamilypolicy.org/UN%20Publication%20--%20Official%20version%20of%20the%20Doha%20Declaration.pdf> [hereinafter *Doha Declaration*].

families throughout the world), to “bear[] in mind that, in different cultural, political and social systems, various forms of the family exist.”<sup>45</sup> This admonition extends from the language of Article Sixteen of the Universal Declaration of Human Rights asserting that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>46</sup> If the Doha Declaration contained the statements Wardle claimed it does, I do not believe that the United Nations would have extended it recognition.

A more accurate statement about existing regulation of assisted reproduction is that the need for third-party gametes or surrogacy demarcates the line of access. In many parts of the world, even married couples are excluded from assisted reproduction if they cannot procreate using their own gametes and gestation.<sup>47</sup> Married couples who fail this test must travel abroad to build their families.<sup>48</sup> The articulated policy behind this restriction is that children are harmed if they are not raised by their biological parents because nonbiological parents are insufficiently committed to childrearing.<sup>49</sup> Wardle failed to note this important fault line in the regulation of access to assisted reproduction, preferring to assume a position that marriage somehow drives the establishment of policies governing assisted reproduction. Even a cursory study of the relevant regulation reveals that it does not.

This is not to say that heterosexuality is insignificant in decisions about who will be allowed access to assisted reproduction. The most recent International Federation of Fertility Societies’ worldwide survey of legislation and regulation of assisted reproduction indicates that in a majority of countries, access to assisted reproduction requires not marriage but being in a

---

<sup>45</sup> G.A. Res. 54/124, ¶ 6, U.N. Doc. A/RES/54/124 (Jan. 20, 2000).

<sup>46</sup> Universal Declaration of Human Rights art. 16, G.A. Res. 217A, at 71, 74, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc A/810 (Dec. 12, 1948).

<sup>47</sup> See Rachel Anne Fenton, *Catholic Doctrine Versus Women’s Rights: The New Italian Law on Assisted Reproduction*, 14 MED. L. REV. 73, 73 (2006).

<sup>48</sup> Wardle stated in his remarks that gays and lesbians have become fertility tourists, “most prominently, recently, at least in the newspapers,” to flout the laws of their own countries. Wardle, *supra* note 6. The vast majority of fertility tourists, however, are married heterosexual couples seeking to circumvent the law or find low-cost infertility treatment. See, e.g., Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 303 (2005).

<sup>49</sup> See Lynn D. Wardle, *Procreation and Parentage by Assisted Reproduction: Global Perspectives* 34 (Apr. 7, 2006) (rough draft distributed at the 2006 Wells Conference, on file with author).

stable heterosexual relationship.<sup>50</sup> In these countries, the use of donor gametes or surrogacy is largely discouraged.<sup>51</sup> Although heterosexuality is a significant feature of the legislation surveyed, a significant minority of countries allow single women and lesbian couples to have access to assisted reproduction.<sup>52</sup> Other countries are considering or have very recently relaxed restrictions on access to assisted reproduction.<sup>53</sup> The few countries that make marriage a requirement for access are societies where religious doctrine either is the law or assumes an important role in its formation.<sup>54</sup> However, the marriage requirement in these countries has nothing to do with the best interests of the child. It exists because marriage in those cultures has no value or purpose in the absence of procreation.<sup>55</sup> It is unsurprising, then, that in these countries, as in countries requiring heterosexual relationships, third-party gamete donation and surrogacy are prohibited, and adoption is either against the law or is considered a substandard form of parenting.<sup>56</sup>

### III. ASSISTED REPRODUCTION AND ADOPTION IN THE ISLAMIC WORLD

Unable to show that marriage is an important factor in the regulation of assisted reproduction around the world, Wardle argues that gays and lesbians should be denied access to assisted reproduction.<sup>57</sup> To support his argument, Wardle cited Islamic opposition to gay and lesbian parenthood.<sup>58</sup> This statement is extraordinarily misleading, primarily because Islam does not even begin to recognize gay or lesbian identity; the notion of homosexual sexual

---

<sup>50</sup> See Am. Soc’y for Reprod. Med., *Marital Status in ART*, 81 FERTILITY & STERILITY S19 (May 2004).

<sup>51</sup> See *id.*

<sup>52</sup> See, e.g., *Swedish Lesbians Win Right to Obtain Fertility Services*, ADVOCATE, Mar. 4, 2005, [http://www.advocate.com/news\\_detail\\_ektid03220.asp](http://www.advocate.com/news_detail_ektid03220.asp); cf. Ethics Comm. of the Am. Soc’y for Reprod. Med., *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons*, 86 FERTILITY & STERILITY 1333, 1335 (2006) (declaring that infertility clinics have an ethical responsibility to “treat single persons and gay and lesbian couples equally with married couples”).

<sup>53</sup> See, e.g., *Gov’t to Mull Measures to Support Surrogate Birth*, YAHOO! ASIA NEWS, Oct. 16, 2005, <http://asia.news.yahoo.com/061016/kyodo/d8kpneeg0.html>.

<sup>54</sup> See *infra* Part III.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See Wardle, *supra* note 49, at 36–38.

<sup>58</sup> See *id.* at 20.

orientation is nonexistent.<sup>59</sup> Consequently, to claim one is a gay or lesbian Muslim (not to mention a gay or lesbian Muslim parent) is an oxymoronic.<sup>60</sup> Islam recognizes homosexual acts and uniformly reviles them. The penalty for homosexual acts is death by burning, being thrown from tall buildings, or stoning.<sup>61</sup>

More important for a discussion of assisted reproduction and adoption, though, is not Islam's condemnation of homosexual acts, but Wardle's failure to mention its equally vigorous opposition to adoption.<sup>62</sup> For insight into the extent to which adoption is outlawed under Islam, we need only turn to anthropological work on infertility in the Islamic world. The portrait of adoption that emerges from this work is one that stands in very sharp contrast to countries where adoption is valued. As is true everywhere in the world, infertility can damage marital relationships and lead Muslim couples to lives marked by loneliness, isolation, and deepening states of depression.<sup>63</sup> Adoption is not a solution, as Islam disallows adoption as we understand it.<sup>64</sup>

---

<sup>59</sup> Wikipedia, Homosexuality and Islam, [http://en.wikipedia.org/wiki/Homosexuality\\_and\\_Islam](http://en.wikipedia.org/wiki/Homosexuality_and_Islam) (last visited Apr. 4, 2007).

<sup>60</sup> I.A. Haqq, *Homosexuality and Islam in America: A Brief Overview*, 5 J. ISLAMIC L. & CULTURE 87, 87 (2000).

<sup>61</sup> See Wikipedia, Illegal Sexual Relations: Adultery, Fornication, and Homosexuality, [http://en.wikipedia.org/wiki/Sharia#Illegal\\_sexual\\_relations:\\_adultery.2C\\_fornication\\_and\\_homosexuality](http://en.wikipedia.org/wiki/Sharia#Illegal_sexual_relations:_adultery.2C_fornication_and_homosexuality) (last visited Apr. 4, 2007) (indicating that the Quran and the Hadith condemn married homosexuals to being stoned to death and single homosexuals to being whipped one hundred times); James M. Arlandson, *Sharia Sure Ain't Gay: Muhammad and the Homosexual*, ANSWERING ISLAM, <http://answering-islam.org/Authors/Arlandson/homosexual.htm> (last visited Apr. 4, 2007) (detailing punishments for homosexual acts); Doug Ireland, *Shame of Iran: U.S. Remains Silent on Gay Hangings*, L.A. WKLY NEWS, Sept. 1, 2005, <http://www.laweekly.com/news/news/shame-of-iran/302/>.

<sup>62</sup> See MARCIA C. INHORN, *QUEST FOR CONCEPTION: GENDER, INFERTILITY, AND EGYPTIAN MEDICAL TRADITIONS* 5 (1994).

<sup>63</sup> Ellen A Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 923 n.156 (2000) (indicating that "shock and disbelief, denial, anxiety, anger, loss of control, isolation and alienation, guilt, depression and grief [are] the emotional stages of the infertility cycle"); Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1127 n.20 (2004) ("[I]nfertility and its treatment can imperil the infertile patient's marriage . . .").

<sup>64</sup> See Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 206 n.93 (2003); Sarah A. Rumage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 CAL. W. INT'L L.J. 1, 37 n.131 (continued)

Informal fostering relationships exist, but it is legally forbidden for a foster child to assume the name of his foster father or to inherit from his father.<sup>65</sup> Foster children are never fully integrated into the family circle—they are forever charges and charity cases.<sup>66</sup> These fostering relationships, where they exist at all, are completely unlike the informal adoption arrangements we might find in poor rural communities in the United States, because “[they are] unacceptable for a host of cultural reasons.”<sup>67</sup> Foster children in these arrangements are stigmatized<sup>68</sup> and considered culturally unacceptable because of the distrust of illegitimate children.<sup>69</sup> Foster mothers under Islam are also stigmatized,<sup>70</sup> given the conviction that true parental devotion only arises in the context of genetic ties.<sup>71</sup> These cultural prohibitions and stigma are powerful forces because, in Islamic societies, the will of the individual is entirely subordinate to the will of the group.<sup>72</sup>

The stigmatization of adoption under Islam arises largely from the biogenetic approach to parenthood that is so widespread in the Islamic world and also in many non-Muslim countries of the Third World.<sup>73</sup> Some of this biogenetic bias probably arises from fears about inheritance, but it also feeds off of the belief that the only way for a parent to feel full parental instincts and devotion to a child is through a genetic connection to that child. The

---

(1996) (stating that “adoption is forbidden in Islam”); Ella Landau-Tasseron, *Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies*, 66 BULLETIN OF SOAS 169, 189 (2003) (“Adoption [in pre-Islamic times] . . . was different from modern adoption in the Western world in that the adoptees were not legally the equals of biological sons.”).

<sup>65</sup> See MARCIA C. INHORN, *INFERTILITY AND PATRIARCHY: THE CULTURAL POLITICS OF GENDER AND FAMILY LIFE IN EGYPT* 190 (1996).

<sup>66</sup> See *id.* at 192 (“[A]n adopted child is simply not as ‘precious’ as a child of one’s own, and this may cause some adoptive parents to mistreat, exploit, or neglect such a child, especially if a biological child is born after the adoption.”).

<sup>67</sup> INHORN, *supra* note 62, at 5.

<sup>68</sup> *Id.* at 193.

<sup>69</sup> See *id.* at 191.

<sup>70</sup> *Id.* at 193.

<sup>71</sup> *Id.* at 192.

<sup>72</sup> *Id.* at 49. Indeed, Sharia has been condemned as inimical to democracy. Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 B.Y.U. L. REV. 699, 711 (2006).

<sup>73</sup> MARCIA C. INHORN, *LOCAL BABIES, GLOBAL SCIENCE: GENDER, RELIGION, AND IN VITRO FERTILIZATION IN EGYPT* 12 (2003) (discussing the mixed reception of adoption in India where secretive reproductive technology practices are preferred to the broadcasting of reproductive failure through adoption).

biogenetic bias for the prohibition of adoption renders artificial insemination by a third-party donor (AID) religiously forbidden as well.<sup>74</sup> Under Islam, AID is an act of adultery,<sup>75</sup> and the child born therefrom is forever illegitimate<sup>76</sup> and considered at best a foundling.<sup>77</sup> These circumstances explain why the fatwa governing assisted reproduction condones in vitro fertilization (IVF) only where the married couple contributes both gametes and gestation.<sup>78</sup>

In a very recent and controversial development, some religious authorities within Shi'a, the minority branch of Islam, have condoned egg donation.<sup>79</sup> This is not, however, to ensure that children born of AID are raised by married couples. Permitting limited gamete donation is thought to be a marriage-saving measure because its availability may convince some husbands within infertile couples not to abandon their wives for women they believe to be more fertile.<sup>80</sup> The problem of husbands abandoning infertile marriages is particularly acute in Islamic societies, because marital couples have no social value or even identity independent of their ability to procreate.<sup>81</sup> Indeed, there is no term for a married couple in either classical or Egyptian colloquial Arabic.<sup>82</sup> Marriages are thus inherently fragile and unstable until children are born, and infertility goes a long way toward destabilizing the marital relationship.<sup>83</sup> This response to marital breakdown caused by infertility was deemed necessary to save at least some marriages in

---

<sup>74</sup> See *id.* at 105.

<sup>75</sup> See *id.* at 107.

<sup>76</sup> See *id.* at 108. After all, under Islam the theory of parenthood is not only biogenetic but monogenetic. *Id.* at 64. Only husbands can contribute genetic material, and men are thought to be the sole genitors of embryos. *Id.* Thus, both adoption and artificial insemination by donors are forbidden under Islamic law. *Id.* at 12, 105. Children are believed to be the genetic offspring of their fathers but not of their mothers. *Id.* at 64. Women contribute no genetic material to the child but serve only as a vessel for the purposes of carrying the pregnancy to term. See *id.* Women interviewed about AID called it a "big sin." *Id.* at 107. The association of third-party gamete donation with adoption causes many Third World couples to desire reproductive assistance they can ill afford in order to have biological children. See *id.* at 13.

<sup>77</sup> See *id.* at 98.

<sup>78</sup> See Marcia C. Inhorn, *Fatwas and ARTs: IVF and Gamete Donation in Sunni v. Shi'a Islam*, J. GENDER RACE & JUST. 291, 300 (2005).

<sup>79</sup> See *id.* at 303–04.

<sup>80</sup> See *id.*

<sup>81</sup> See INHORN, *supra* note 65, at 91–92, 227.

<sup>82</sup> See INHORN, *supra* note 73, at 221, 227; INHORN, *supra* note 65, at 91.

<sup>83</sup> See INHORN, *supra* note 73, at 220, 227.

a culture where all infertility is blamed on women.<sup>84</sup> Despite this relaxation of doctrine within the minority branch of Islam, children born from gamete donation are nonetheless not considered fully fledged children of the married couple, at least insofar as inheritance rights are concerned.<sup>85</sup>

Interestingly, even though the biogenetic approach to parenthood causes adoption and AID to be prohibited in Islamic societies, as a practical matter many Muslims nonetheless hesitate to employ even permissible forms of assisted reproduction. Patients find it very difficult to develop trust in a doctor for fear there will be sperm mixing at the clinic.<sup>86</sup> More fundamental is the concern that a parent-child bond can emerge only through the married couple's intercourse, conception, and childbirth.<sup>87</sup> This is similar to the Catholic approach.<sup>88</sup> The fact that with IVF the fetus develops in part outside the woman's body undermines the seamlessness of this trajectory.<sup>89</sup> These attitudes and fears lead some Muslim couples to conclude that they could not be good parents to a child born of assisted reproduction, and that such a child, even though it would share a genetic connection with both members of the couple, would be like an orphan or a stranger.<sup>90</sup>

At the Wells Conference, Wardle made so many critical omissions when he discussed the Islamic regulation of assisted reproduction that it was impossible to discern that it offers him no support for his position that access to assisted reproduction around the world should be limited to heterosexual married couples. Under Islam, genetic ties are the "be and end all" of parent-

---

<sup>84</sup> See, e.g., INHORN, *supra* note 65, at 24 ("Just as men are seen as giving life, women are seen as taking life away, by virtue of wombs that fail to facilitate the most important act of male creation.").

<sup>85</sup> See Inhorn, *supra* note 78, at 305–06 (explaining that such children may inherit only from the gamete donor and can never be seen naked by the nonbiological parent of the opposite sex); Marcia C. Inhorn, *Religion and Reproductive Technologies: IVF and Gamete Donation in the Muslim World*, ANTHROPOLOGY NEWS, Feb. 2005, <http://www.aaanet.org/press/an/0502Inhorn.htm> (noting that the child born of third-party gamete donation may inherit only from the donor).

<sup>86</sup> See INHORN, *supra* note 73, at 115–19.

<sup>87</sup> See INHORN, *supra* note 65, at 192.

<sup>88</sup> See Martin L. Cook, *Guest Editorial: Reproductive Technologies and the Vatican*, ISSUES IN ETHICS, Spring 1988, <http://www.scu.edu/ethics/publications/iie/v1n3/homepage.html>; Richard C. Sparks, *Helping Childless Couples Conceive*, ST. ANTHONY MESSENGER, Apr. 1997, <http://www.americancatholic.org/Messenger/Apr1997/feature1.asp>.

<sup>89</sup> See Inhorn, *supra* note 78, app. I at 314 ("[B]ody contact (intercourse) is the basic and only means [that] allows a sperm to reach the proper location as per Allah's will.").

<sup>90</sup> *Id.* at 302.

child relationships, adoption is legally and culturally impermissible, and marriage has no social capital or meaning in the absence of children. Women, blamed for infertility, suffer the derision of their in-laws and neighbors, abandonment by their husbands, and ostracism from the community.<sup>91</sup> Even though Wardle's views exhibit a proud devotion to "traditional" mores, his appeal to the extremes found in Islamic regulation of assisted reproduction seem far out of step with what he ultimately hopes to achieve. His praise for a legal system in which adoption is stigmatized, outlawed, and culturally rejected is deeply unsettling.

#### IV. MARGINALIZING ADOPTION THROUGH THE REGULATION OF ASSISTED REPRODUCTION

Heterosexuals-only marriage and a ban on adoptions by gay and lesbian couples are two planks in the platform of an increasingly vocal worldwide marriage movement.<sup>92</sup> The movement's primary commitment has evolved from opposing divorce's corrosive effect on society to rallying in favor of stronger, more lasting heterosexual marriages.<sup>93</sup> The movement is certain that children do best when they are raised by their happily married biological parents in one household.<sup>94</sup> When children are not raised in this fashion, society suffers. The movement urges government to bankroll marriage incentives, counsels clergy to do more to strengthen both existing and not yet contracted marriages, and lobbies legislatures to pass laws disfavoring the formation and legal recognition of all families except those headed by heterosexually married couples with procreative capacity.<sup>95</sup> One source of disagreement within the marriage movement is whether extending equal marriage rights to gays and lesbians might temper some of the damaging effects of the divorce culture.<sup>96</sup> Some believe that it is two-parent families, not necessarily biological-mother-and-father families, that benefit children

---

<sup>91</sup> See INHORN, *supra* note 65, at 172, 203–04, 213–14, 221; INHORN, *supra* note 73, at 245.

<sup>92</sup> See generally Richard Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006).

<sup>93</sup> See *id.* at 324.

<sup>94</sup> See *id.* at 308.

<sup>95</sup> INSTITUTE FOR AMERICAN VALUES, *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES* 21–23 (2000), available at <http://www.americanvalues.org/pdfs/marriagemovement.pdf>.

<sup>96</sup> See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 200 (2000).

most.<sup>97</sup> Those who believe otherwise hew strongly to the notion that only genetic ties to their rearing parents and familiarity with differing gender roles within marriage ensure the wellbeing of children.<sup>98</sup> The movement says as little as possible about adoption. Some believe that institutions and foster care arrangements are preferable to bestowing legal parenthood via adoption.<sup>99</sup> Others style adoption as a noble act of charity and sacrifice that the infertile are left with when they fail to conceive either naturally or with medical assistance.<sup>100</sup> No marriage movement commentator believes adopted children

---

<sup>97</sup> See, e.g., Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 896–98, 903 (2000).

<sup>98</sup> See Wardle, *Parenthood and the Limits of Adult Autonomy*, *supra* note 2, at 187; Dr. Byrd Provides Testimony in English Court Case Regarding Same-Sex Adoption, at 2–3 (Feb. 1, 2007), <http://www.narth.com/docs/byrdtestimony.pdf> (detailing testimony of Dr. A. Dean Byrd on gender-role benefits received by children raised by their married, biological parents); James C. Dobson, *Two Mommies Is One Too Many*, TIME, Dec. 12, 2006, <http://www.time.com/time/magazine/article/0,9171,1568485-1,00.html> (emphasizing that a child can learn important gender-role lessons only in a household headed by his married mother and father); Mary Parke, *Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being*, POL’Y BRIEF, May 2003, at 1, [http://www.clasp.org/publications/Marriage\\_Brief3.pdf](http://www.clasp.org/publications/Marriage_Brief3.pdf) (emphasizing support among researchers for interpretation of studies as showing “on average, children do best when raised by their two married, biological parents”); Kristin Anderson Moore et al., *What Is “Healthy Marriage”? Defining the Concept*, CHILD TRENDS RES. BRIEF, Sept. 2004, at 3, [http://www.acf.hhs.gov/healthymarriage/pdf/Child\\_Trends-2004.pdf](http://www.acf.hhs.gov/healthymarriage/pdf/Child_Trends-2004.pdf) (citing research as showing children experience superior outcomes when they are raised by their married, biological parents).

<sup>99</sup> See William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 788 (2003) (recommending institutionalized care for adoptable children in absence of “ideal” heterosexual married couples); GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY 171 (1997) (“Orphanages have worked well in the past. They shouldn’t be ruled out in the present.”).

<sup>100</sup> See Kyle N. Weir, *The Magnifying Effect: The Recursive Benefits of Marriage and Adoption Throughout the Adoptive Family Life-Cycle*, 6 J.L. & FAM. STUD. 101, 108, 111 (2004); INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS 21 (2006), <http://www.americanvalues.org/pdfs/parenthood.pdf> (finding adoption an “inspiration”); *cf.* Testimony of Nancy Robertson, Congressional Executive Commission on China Roundtable: “China’s Children: Adoption, Orphanages, and Children with Disabilities” (Oct. 21, 2002), <http://www.cecc.gov/pages/roundtables/102102/robertson.php> (“In 1994 Nancy and Brooks Robertson adopted their daughter Grace in Shanghai. Like other adoptive parents, they were moved by the plight of the orphans who remain behind, most of whom have little chance of ever being adopted.”); Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best* (continued)

can do as well as children raised by both of their married biological parents in happy homes, no matter how successfully “families by law” might mimic biological families.<sup>101</sup> Even step-parent adoption, although it is favored by the law, is a deeply suspect form of parenthood that is said to place children at great risk of harm.<sup>102</sup> Preferred above all else is the biological tie.<sup>103</sup>

At the Wells Conference, Wardle presented views common to most marriage-movement commentary. He delivered numerous statistics showing public opposition to same-sex marriage and adoption by gays and lesbians and advocated legislative and judicial action to create obstacles to the legal recognition of anything but traditional nuclear families.<sup>104</sup> He praised the work of governmental commissions that have recently concluded that the married biological family is best for children.<sup>105</sup> He vilified the culture of individualism that has led activist legislatures and judges to make and interpret laws that allow children to be created and adopted by single individuals and same-sex couples.<sup>106</sup> He concluded that the best interests of the child should guide assisted reproduction policy in the direction of vindicating the right of every child to know and be raised by her biological parents.<sup>107</sup> Not to do so will render family law “schizophrenic.”<sup>108</sup>

In the course of his remarks, Wardle misled the audience with false information, a misleading translation of a recent French-government report on the family, and misrepresentations of authority. Relying on a recent French parliamentary commission’s report on family issues, Wardle characterized

---

*Interest of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 344 (2004) (“Prospective parents [of Korean adoptees] tended to make their decisions based on religious or moral dictates to save the children from their fate as orphans and to rescue them from the poverty and third-worldness of their country.”); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 135 (1998).

<sup>101</sup> See Storrow, *supra* note 92, at 353.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> Wardle, *supra* note 6.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; cf. ASSEMBLÉE NATIONALE, RAPPORT FAIT AU NOM DE LA MISSION D’INFORMATION SUR LA FAMILLE ET LES DROITS DES ENFANTS 135 (1958), available at <http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf> (“[La société] doit toujours prendre d’abord en considération l’intérêt de l’enfant, et notamment, dans la mesure du possible, son droit à connaître ses deux parents (biologiques) et à être élevés par eux.”).

<sup>108</sup> Wardle, *supra* note 6; cf. Garrison, *supra* note 97, at 841–42 (advocating one policy for both sexual and technological reproduction).

France as exhibiting its devotion to children's rights through its prohibition on adoption by unmarried couples.<sup>109</sup> Although France allows unmarried couples to share parental authority of children biologically related to only one member of the couple,<sup>110</sup> it does reject joint adoption by unmarried couples.<sup>111</sup> This is not because, as Wardle claimed,<sup>112</sup> adopted children do better when *raised* by married persons. The Commission's actual statement was that adopted children are better protected as a juridical and emotional matter if the law of divorce governs custody issues when their parents *separate*, because the court takes full charge of decisions in the best interests of the child.<sup>113</sup> Since French divorce law does not apply to unmarried couples, the Commission concluded, for the time being unmarried couples must remain ineligible to adopt.<sup>114</sup> France is not yet prepared to extend the right to marry to same-sex couples in order to fully remedy this state of affairs, and it does not feel same-sex couples should have the right to adopt children or to have children via assisted reproduction.<sup>115</sup> Single individuals should continue to be allowed to adopt, even though certain groups oppose this option, because the best hope of hard-to-place and special-needs children almost always lies in that form of adoption.<sup>116</sup>

Despite its restrictions on adoption by unmarried couples, the French Commission did not think it inconsistent that unmarried heterosexual couples of procreative age are allowed access to assisted reproduction in France.<sup>117</sup> France treats adoption differently from assisted reproduction, because the French prefer biological parenthood to social parenthood,<sup>118</sup> and "children born of assisted reproduction . . . are the biological children of at least one

---

<sup>109</sup> See Wardle, *supra* note 49, at 32.

<sup>110</sup> *France's Highest Court Grants Equal Parental Authority to Gay Couples*, ADVOCATE, Feb. 25, 2006, [http://www.advocate.com/news\\_detail\\_ektid26109.asp](http://www.advocate.com/news_detail_ektid26109.asp); *France Gives Gay Couples Joint Parental Rights*, EURO-LETTER (ILGA-Europe, Brussels, Belg.), Mar. 2006, at 13, [http://www.steff.suite.dk/eurolet/eur\\_129.pdf](http://www.steff.suite.dk/eurolet/eur_129.pdf).

<sup>111</sup> ASSEMBLÉE NATIONALE, *supra* note 107, at 137, 149.

<sup>112</sup> Wardle, *supra* note 49, at 32, 33–34.

<sup>113</sup> ASSEMBLÉE NATIONALE, *supra* note 107, at 101, 150–51.

<sup>114</sup> *Id.* at 150.

<sup>115</sup> See ILGA-EUROPE, EQUALITY FOR LESBIANS AND GAY MEN: A RELEVANT ISSUE IN THE CIVIL AND SOCIAL DIALOGUE 47 (1998).

<sup>116</sup> See discussion *infra* note 143.

<sup>117</sup> See ILGA-EUROPE, *supra* note 115, at 47 (reporting that the Bioethics Act of 1994 allows artificial insemination for "married couples or (heterosexual) *concubins*").

<sup>118</sup> ASSEMBLÉE NATIONALE, *supra* note 107, at 133.

member of the couple and generally of both.”<sup>119</sup> To grant same-sex couples access to assisted reproduction would create more families in which the child has a biological link to only one parent. To Wardle, the French stance is a vindication of the child’s right to know his biological progenitors and to be raised in the best environment.<sup>120</sup> But in fact, France’s firm favoritism of biologically based parentage and resulting restrictions on access to assisted reproduction have nothing to do with a purported right to information about one’s origins. In France it remains an individual parental choice (and one very few parents choose)<sup>121</sup> whether to inform children about their origins or allow them to discover the identity of their donor.<sup>122</sup> To establish a right to know one’s biological origins would place *too* much weight on biological facts at the expense of other aspects of human experience.<sup>123</sup> Recognizing this, the Commission has proposed that France adopt a “double-track” policy for gamete donation; that is, one that allows prospective parents and donors to choose between nonanonymous or anonymous donation.<sup>124</sup> Thus, although Wardle lauds France’s solicitude for children, his claim that assisted reproduction policy should be based on a child’s right to know and be raised by both of his biological parents finds no support in French law. It likewise is not at all reflected, as Wardle claims,<sup>125</sup> in the work of the President’s Council on Bioethics, which states no position on access to assisted reproduction by same-sex couples, same-sex marriage, adoption by same-sex couples, or a child’s right to know.<sup>126</sup> When it comes to children, the President’s Council

---

<sup>119</sup> *Id.* (translation by author).

<sup>120</sup> See Wardle, *supra* note 49, at 31–32, 34.

<sup>121</sup> ASSEMBLÉE NATIONALE, *supra* note 107, at 206 (reporting that only ten or fifteen percent of children born from third-party gamete donation are aware of their origins).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 208–09.

<sup>124</sup> *Id.* at 210. On the double-track policy, see generally Guido Pennings, *The ‘Double Track’ Policy for Donor Anonymity*, 12 HUM. REPROD. 2839 (1997).

<sup>125</sup> Wardle, *supra* note 49, at 31.

<sup>126</sup> See generally THE PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES (2004) [hereinafter REPRODUCTION AND RESPONSIBILITY]; THE PRESIDENT’S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS (2003) [hereinafter BEYOND THERAPY]; THE PRESIDENT’S COUNCIL ON BIOETHICS, MONITORING STEM CELL RESEARCH (2004); THE PRESIDENT’S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY (2002) [hereinafter HUMAN CLONING AND HUMAN DIGNITY].

has expressed concern primarily about the *physical* problems that might afflict children born of reproductive technology.<sup>127</sup>

In addition to mistranslating the work of the French government and mischaracterizing the work of the President's Council on Bioethics, Wardle misquoted Professor David Popenoe, co-director of the National Marriage Project at Rutgers University, a nationally prominent family expert. Wardle ascribed to Popenoe the view that "homes with a married father and mother provide the best environment for raising children."<sup>128</sup> In his 1992 op-ed in the *New York Times*, Popenoe actually said "on the whole, for children, two-parent families are preferable."<sup>129</sup> Within his statement, Popenoe left ample room for an acknowledgment that unmarried straight and same-sex couples do a good job of parenting; Wardle, however, twisted Popenoe's words to make them refer only to married mothers and fathers.<sup>130</sup> Perhaps Wardle was confusing Popenoe with Popenoe's co-director Barbara Dafoe Whitehead, who has made the very narrow claim that children do best when they are raised in the same household by both of their biological parents who are married to each other and whose marriage is healthy and stable.<sup>131</sup> This may support an argument for restricting access to assisted reproduction to married couples who use their own gametes (as in most Islamic societies),<sup>132</sup> but it does not tell us much about the best way to structure adoption or whether to

---

<sup>127</sup> See, e.g., REPRODUCTION AND RESPONSIBILITY, *supra* note 126, at 4, 37–42, 94, 175–76, 199, 208–09, 216, 222 (expressing concern about the safety of assisted reproduction and about the possible development of human reproductive techniques not involving the union of eggs and sperm); BEYOND THERAPY, *supra* note 126, at 47–51; HUMAN CLONING AND HUMAN DIGNITY, *supra* note 126, at 89–90.

<sup>128</sup> Wardle, *supra* note 49, at 33 (citing David Popenoe, Op-Ed., *The Controversial Truth: Two Parent Families are Better*, N.Y. TIMES, Dec. 26, 1992, at 21).

<sup>129</sup> David Popenoe, Op-Ed., *The Controversial Truth: Two Parent Families are Better*, N.Y. TIMES, Dec. 26, 1992, at 21.

<sup>130</sup> See EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 88–89 (2004) (describing similar misquotation of the same language by another supporter of the marriage movement).

<sup>131</sup> See *Healthy Marriage: What Is It and Why Should We Promote It? Hearing Before the Subcommittee on Children and Families of the Committee on Health, Education, Labor, and Pensions*, 108th Cong. 18–19 (2004) (statement of Barbara Dafoe Whitehead, Co-Director, National Marriage Project, Rutgers University) (“[E]xcepting cases where parents are in high conflict, children who grow up in households with their married mother and father do better on a wide range of economic, social, educational, and emotional measures than do children in other kinds of families.”).

<sup>132</sup> See *supra* notes 57–91 and accompanying text.

support same-sex marriage.<sup>133</sup> Indeed, both Wardle and Whitehead appear to be “so anxious to push for the revival and reconstruction of the intact family that they forget to address the importance of adoption.”<sup>134</sup> This lack of attention to adoption has caused some unexpected consternation in the same-sex marriage debates in the United States as lobbyists for heterosexuals-only marriage do not hesitate to quote “the more than ten thousand studies” showing children fare best when raised by their married biological mothers and fathers.<sup>135</sup> These tactics do not appear to damage the prospects of heterosexuals-only marriage initiatives, but they do exhibit a certain ignorance of the importance of adoption in general and of the many specific cases where biological parents are not the best rearing option for children.<sup>136</sup>

In an attempt to distinguish their views from Whitehead’s, Robin Fretwell Wilson, a family law and medical ethics scholar whose work focuses primarily on the sexual abuse of children within families,<sup>137</sup> and Brad Wilcox,

---

<sup>133</sup> In an attempt to distinguish her views from Whitehead’s, Robin Fretwell Wilson argued that marriage per se so benefits children that adoption regulations should favor married couples. See W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 883 (2006). But predictably, Wilson relies on none other than the studies determining that children do best when raised by their happily married biological parents or, in the alternative, in two-parent households. See *id.* at 892, 895–96. She neglects to cite studies of adoptive families, but instead fashions her adoption policy from studies showing that stepfamilies and cohabiting couples put children at risk of sexual abuse. See *id.* at 896–903. She concludes that these studies “strongly suggest[.]” that adopted children will “have an edge” if their adoptive parents are married. *Id.* at 903 & n.114.

<sup>134</sup> Don S. Browning, *Adoption and the Moral Significance of Kin Altruism*, in THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES 52, 64 (Timothy P. Jackson ed., 2005) (referring to “other[.]” adoption analysts).

<sup>135</sup> Dr. James Dobson, *The 11 Arguments*, MARRIAGEUNDERFIRE.COM, <http://www.marriageunderfire.com/arguments.aspx> (“More than ten thousand studies have concluded that kids do best when they are raised by loving and committed mothers and fathers.”).

<sup>136</sup> See Diana Fishlock, *Expert’s Remarks Upset Adoptive Parents Who Are Growing a Family*, PATRIOT-NEWS, Apr. 4, 2006, at A01.

<sup>137</sup> See generally Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim’s Siblings*, 51 EMORY L.J. 241 (2002); Robin Fretwell Wilson, *Fractured Families, Fragile Children: The Sexual Vulnerability of Girls in the Aftermath of Divorce*, 14 CHILD & FAM. L.Q. 1 (2002); Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251 (2001) [hereinafter Wilson, *Children at Risk*]; Robin Fretwell Wilson, *Sexually* (continued)

a sociologist whose scholarship explores how Christian devotion shapes good parenting,<sup>138</sup> have argued that marriage per se so benefits children that regulations governing who may adopt children from foster care should strongly favor married couples but continue to permit special-needs adoptions by single persons and, as a last resort, cohabiting couples.<sup>139</sup> Wilson and Wilcox's recommendation for a marriage preference in adoption rests on the argument that a family's marital structure makes it more likely that a child adopted from foster care will thrive.<sup>140</sup> Their secondary preference for single-parent adoptions over cohabiting-couple adoptions from foster care rests on evidence "that a single parent might offer more stability and safety to a child than a cohabiting couple."<sup>141</sup> Despite good evidence that married couples already receive preferential treatment at every stage of the adoption process,<sup>142</sup> the authors believe *legislated* preferences are critically necessary because of the existence of an Alabama statute and a Kentucky administrative regulation prohibiting discrimination in adoption against single individuals "solely" because they are single.<sup>143</sup> These provisions do not mean, of course,

---

*Predatory Parents and the Children in Their Care: Remove the Threat, Not the Child*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE (Nancy E. Dowd et al. eds., 2006).

<sup>138</sup> W. BRADFORD WILCOX, *SOFT PATRIARCHS, NEW MEN: HOW CHRISTIANITY SHAPES FATHERS AND HUSBANDS* 9, 13 (2004) (arguing that when it comes to parenting and marriage, Protestantism domesticates men in ways that appeal to wives).

<sup>139</sup> See Wilcox & Wilson, *supra* note 133, at 883–85, 898, 904–06, 908 (2006).

<sup>140</sup> See *id.* at 883, 898, 903, 908.

<sup>141</sup> *Id.* at 883.

<sup>142</sup> Couples seeking to adopt are disproportionately married, two-thirds of children adopted out of foster care are adopted by married couples, and married couples are four times more likely than non-married applicants to have a child placed with them. See JEFF KATZ, EVAN B. DONALDSON ADOPTION INST., LISTENING TO PARENTS: OVERCOMING BARRIERS TO THE ADOPTION OF CHILDREN FROM FOSTER CARE 9, 10, 44 (2005), [http://www.adoptioninstitute.org/publications/2005\\_listening\\_jkatz\\_all.pdf](http://www.adoptioninstitute.org/publications/2005_listening_jkatz_all.pdf).

<sup>143</sup> ALA. CODE § 26-10A-5(a)(2) (LexisNexis Supp. 2006); 922 KY. ADMIN. REGS. 1:030 § 11 (2000). Wilcox and Wilson are incorrect in stating that "[a] significant number of states bar consideration of a prospective adopter's marital or non-marital status." Wilcox & Wilson, *supra* note 133, at 883. In suggesting that state statutes that permit single persons to adopt prohibit marital status discrimination, *see id.* at 890 n.34, the authors misapprehend the adoption process. Such statutes mean simply that single persons are not barred from *applying* to adopt. But the approval of an application for adoption does not guarantee placement of a child with the applicant. 922 KY. ADMIN. REGS. 1:030 § 2. It is well known that in practice single persons are routinely considered for a placement only when no married couple comes forward to adopt a particular child or when there are other extenuating circumstances. See Lectric Law Library, Adoption, <http://www.lectlaw.com/files/fam20.htm> (last visited Apr. 4, 2006).

*(continued)*

that a married couple cannot be chosen in preference to a single person if indeed they offer the benefits of two-parent care to the child. Wilson and Wilcox's primary aim, then, is that the law more forcefully express the state's conviction that children adopted from foster care should be raised by married couples when at all possible even though no evidence exists that children are harmed by unmarried adopters.<sup>144</sup> Wilson and Wilcox's support for expressive legislation extolling marriage is but a piece of the larger project of the contemporary marriage movement to advocate for favored treatment of married couples at all levels of society.

Wilson and Wilcox, like Whitehead in her work on healthy marriages and divorce reform, rely on social science studies showing that children do best when raised by their happily married biological parents.<sup>145</sup> They also cite numerous studies that do not emphasize the quality of the parents' marriage but nonetheless demonstrate that children fare better when they are raised by their married biological parents than when raised by cohabiting parents, in cohabiting or married stepfamilies, or by a single parent.<sup>146</sup> Aside from

---

2007) ("In county and agency adoptions, most state welfare departments give preference to married people in granting adoptions."). This explains why single persons "'tend[] to adopt 'special needs' children,'" Wilcox & Wilson, *supra* note 133, at 884, because they are left to adopt children married couples have no interest in adopting. See Rita Laws, *Single Parenting Nine, Then Eight, No, Make That Nine . . .*, ADOPTNET.ORG, 1998, [http://www.adoptnet.org/datacenter/bin/AN\\_parenting9.htm](http://www.adoptnet.org/datacenter/bin/AN_parenting9.htm) ("In most cases, singles are offered the waiting kids that married couples don't apply for."). Because so many children available for adoption from the foster care system have special needs, it is unsurprising that the system relies heavily on single adoptive parents. Outside of this system, it is well known that many adoption agencies will work only with married couples. See Jane Macartney & Rosemary Bennett, *Fat, Single and Over 50? Then Don't Go to China if You Want to Adopt*, TIMESONLINE, Dec. 20, 2006, <http://www.timesonline.co.uk/article/0,,3-2512331,00.html>.

<sup>144</sup> See Wilcox & Wilson, *supra* note 133, at 905 ("[W]e believe that legislation and agency policies should indicate that the preferred placement is foremost with a married couple, then with a single parent, and finally with a cohabiting couple.").

<sup>145</sup> See *id.* at 892. This proposition is far from controversial and is cited copiously in the vast literature "on the benefits of heterosexual marriage." See Sara McLanahan, Elizabeth Donahue & Ron Haskins, *Introducing the Issue*, 15 FUTURE OF CHILD. 3, 5 (2005); see also *id.* at 9 ("[T]he evidence is clear that unstable marriages and high-conflict relationships are harmful to children.").

<sup>146</sup> See, e.g., Wilcox & Wilson, *supra* note 133, at 892 n.49. Wilcox and Wilson cite Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD. 75 (2005). In this study, Amato

(continued)

marriage, the authors also find in the social science literature evidence that two-parent households are superior for children than are single-parent households.<sup>147</sup> The authors cite little in the way of studies on adoptive families and only one focusing specifically on children adopted out of foster care.<sup>148</sup> They find that adopted children generally do well, sometimes better than children raised by their happily married biological parents.<sup>149</sup> They also find that adopted children do better than children raised in one-biological-parent households.<sup>150</sup> The balance of Wilson and Wilcox's work attempts to isolate the value of marriage from the importance of biology in studies of nonadoptive families, a difficult task, given that "[t]he advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."<sup>151</sup> From a sparse literature "on the implications of cohabitation for children's lives,"<sup>152</sup> they rely primarily on two "tightly constructed studies" of married and cohabiting stepfamilies, which "suggest that children are still better off in families headed by a married couple even when they are not biologically related to one of those parents."<sup>153</sup> Because families formed by

---

concluded, "Research clearly demonstrates that children growing up with two continuously married parents are less likely than other children to experience a wide range of . . . problems." *Id.* at 89.

<sup>147</sup> See Wilcox & Wilcox, *supra* note 133, at 892–93, 896. For a similar conclusion, see also Steven Nock, *Marriage as a Public Issue*, 15 FUTURE OF CHILD. 13, 28 (2005). Two-parent households are believed superior because of their greater financial resources and the ability of two parents to support each other in the discharging of parenting responsibilities. See Adam Thomas & Isabel Sawhill, *The Future of Children*, 15 FUTURE OF CHILD. 57, 68 (2005); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 895 & n.279 (2000).

<sup>148</sup> See Wilcox & Wilson, *supra* note 133, at 895–96.

<sup>149</sup> See *id.* at 895, 903 n.114. *But see* U.S. Senate Committee on Commerce, Science, & Transportation, Social Science Data on the Impact of Marriage and Divorce on Children (May 13, 2004), [hereinafter Impact of Marriage and Divorce on Children] [http://commerce.senate.gov/hearings/testimony.cfm?id=1188&wit\\_id=3407](http://commerce.senate.gov/hearings/testimony.cfm?id=1188&wit_id=3407) (statement of Dr. Nicholas Zill, Vice President of Westat, arguing that the wider spectrum of "economic, parental, and community resources" that children need are better provided in "two parent biological families than in two-parent step, adoptive, or foster families").

<sup>150</sup> See Wilcox & Wilson, *supra* note 133, at 895.

<sup>151</sup> Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003).

<sup>152</sup> *Id.* at 876; *cf.* Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 214 ("Little is known about differences in parenting by unmarried parents.").

<sup>153</sup> Wilcox & Wilson, *supra* note 133, at 900.

the adoption of children from foster care do not fit neatly within the framework of studies on stepfamilies, and because research on adoptive families remains “embryonic,”<sup>154</sup> Wilson and Wilcox tepidly conclude that policymakers should extrapolate from the studies of stepfamilies and, in the exercise of caution, codify a preference for married couples in the adoption of children from foster care.<sup>155</sup>

Wilson and Wilcox claim the Manning and Lamb correlational study on outcomes for adolescents and the Hofferth and Anderson study on parental investment show that children do worse in cohabiting stepfamilies than they do in married stepfamilies.<sup>156</sup> The Hofferth and Anderson study actually supports the much narrower proposition that, in married stepfamilies, stepchildren do better when at least one of the children in the family is a joint biological child of both parents.<sup>157</sup> In other words, in “blended” stepfamilies (more precisely described as half-sibling stepfamilies), even though “co-resident genetic children are often still favored,”<sup>158</sup> stepchildren fare about as well as their “half-sibling who is the biological child of both parents.”<sup>159</sup> Stepchildren in this rare form of blended family thus do better than stepchildren in families where there is no joint biological child of both parents.<sup>160</sup> Hofferth and Anderson note that in their study marriage is an “important distinguishing factor”<sup>161</sup> but only because “there are too few cases of unmarried families with both biological and nonbiological children to examine the same type of interaction between marital status and blendedness

---

<sup>154</sup> *Id.* at 895.

<sup>155</sup> *See id.* at 903, 905.

<sup>156</sup> *See id.* at 897, 900. The social science literature has begun to classify as “stepfamilies” all families in which a biological parent merely lives with or is also married to a nonbiological parent.

<sup>157</sup> *See Hofferth & Anderson, supra* note 152, at 228, 230.

<sup>158</sup> KERMYT G. ANDERSON, HILLARD KAPLAN & JANE B. LANCASTER, INST. FOR SOC. RESEARCH, MEN’S FINANCIAL EXPENDITURES ON GENETIC CHILDREN AND STEPCHILDREN FROM CURRENT AND FORMER RELATIONSHIPS 5 (2001), available at <http://www.psc.isr.umich.edu/pubs/pdf/rr01-484.pdf>.

<sup>159</sup> Hofferth & Anderson, *supra* note 152, at 230; *see also* ANDERSON ET AL., *supra* note 158, at 11.

<sup>160</sup> Hofferth & Anderson, *supra* note 152, at 228. At least four other studies have reached the same conclusion without focusing specifically on marriage. *See* ANDERSON ET AL., *supra* note 158, at 5. *But see* Susan D. Stewart, *How the Birth of a Child Affects Involvement with Stepchildren*, 67 J. MARRIAGE & FAM. 461, 470–71 (2005) (describing a study showing that the birth of a half-sibling is not detrimental to stepchildren but nor is it particularly beneficial).

<sup>161</sup> Hofferth & Anderson, *supra* note 152, at 230.

for cohabiting partners.”<sup>162</sup> They thus do not attempt to isolate a benefit arising from marriage per se because cohabiting half-sibling stepfamilies were not included in their sample.

Manning and Lamb likewise do not commit to the claim that marriage per se benefits stepchildren in marital stepfamilies.<sup>163</sup> Indeed, they caution readers not to read causal connections into their findings, as the evidence is insufficient to demonstrate causation.<sup>164</sup> Any marriage advantage suggested by their findings is limited to the findings on the incidence of delinquency in adolescence.<sup>165</sup> This marriage advantage is called into question by the fact that not only do adolescents “living in married stepfather families have significantly lower levels” of delinquency than do adolescents living in cohabiting stepfather families, but so do adolescents living with just their mothers.<sup>166</sup> A marriage advantage was conspicuously absent or was barely detectable in their multivariate models of adolescents’ odds of being suspended or expelled from school,<sup>167</sup> school problems, academic well-being, verbal ability, and college expectations.<sup>168</sup>

In sum, neither Manning and Lamb nor Hofferth and Anderson were able to isolate the value of marriage to stepchildren. The importance of the studies, taken together, is largely about the value of biology. Improved parental investment in stepchildren in blended married stepfamilies was correlated with the presence of the parents’ joint biological child and, thus “[is] most consistent with the argument that the biological relationship with the child determines fathering patterns.”<sup>169</sup> This support for the “evolutionary theory” of parental investment and child well-being is precisely what Wilson finds significant about both studies in her work criticizing the American Law Institute’s *Principles of the Law of Family Dissolution*.<sup>170</sup> Wilson and Wilcox

---

<sup>162</sup> *Id.* at 228.

<sup>163</sup> Manning & Lamb, *supra* note 151, at 891 (describing their study as providing important “baseline information” but not an “accurate[] evaluat[ion of] how parental cohabitation or marriage causes changes in an adolescent’s well-being”).

<sup>164</sup> *See id.*

<sup>165</sup> *See id.* at 888 (“The multivariate model indicates that teenagers living in married rather than cohabiting stepparent families have significantly lower delinquency scores.”).

<sup>166</sup> *Id.* at 887–88.

<sup>167</sup> *Id.* at 886.

<sup>168</sup> *Id.* at 888.

<sup>169</sup> Hofferth & Anderson, *supra* note 152, at 227.

<sup>170</sup> *See* Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S (continued)

seriously misrepresent the studies when they claim that they “suggest that children are still better off in families headed by a married couple.”<sup>171</sup> Whatever marital benefit is experienced by stepchildren in blended families (and indeed other studies suggest they do *not* benefit)<sup>172</sup> is bound up with and, in the absence of better evidence, not isolable from the fact of the blending itself. Otherwise, we would see improved parental investment in married versus cohabiting stepfamilies. Hofferth and Anderson found instead that unmarried stepfathers are actually *more* available and spend *more* time with their children than do married stepfathers<sup>173</sup> and that both types of stepfathers are similarly engaged with their stepchildren, although cohabiting stepfathers may not be quite as warm.<sup>174</sup> Perhaps it is less warmth from cohabiting stepfathers that leads to higher adolescent delinquency in such families, but Wilson and Wilcox make no attempt to read the studies together. They choose instead to misrepresent the studies as demonstrating that “married stepfathers are more engaged with their children than cohabiting stepfathers.”<sup>175</sup> The Hofferth and Anderson study, though, is clear throughout that differences in the parental investment of married versus unmarried stepfathers are of no statistical significance. The Manning and Lamb study likewise leaves unanswered the question whether children in married stepfamilies experience a remarkable marriage advantage.<sup>176</sup> Manning and Lamb’s and Hofferth and Anderson’s studies, then, do little to resolve the high level of disagreement as to whether the marriage of cohabiting step-parents has a beneficial effect on the circumstances of the children in such families. Even if we could extrapolate from these studies something helpful for the formulation of policy to govern adoptions from foster care, the closest comparable adoptive family structure—joint biological-step-adoptive families and joint step-adoptive families, as defined by Jeanne Moorman and Donald

---

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90, 102–06 (Robin Fretwell Wilson ed., 2006).

<sup>171</sup> Wilcox & Wilson, *supra* note 133, at 900.

<sup>172</sup> See, e.g., Stewart, *supra* note 160.

<sup>173</sup> See Hofferth & Anderson, *supra* note 152, at 227.

<sup>174</sup> *Id.* at 224.

<sup>175</sup> Wilcox & Wilson, *supra* note 133, at 900; see also *id.* at 897 (representing the Hofferth and Anderson study as finding that “married stepfathers were more involved and affectionate than cohabiting stepfathers”).

<sup>176</sup> Cf. Manning & Lamb, *supra* note 151, at 886 (“[I]n the multivariate model teens living in married and cohabiting stepparent families share similar odds of being suspended or expelled from school.”).

Hernandez<sup>177</sup>—appears to be even rarer than the half-sibling stepfamilies that allegedly advantage stepchildren. Furthermore, establishing a marriage preference for families that wish to adopt children might benefit the *stepchildren* in such families, but not necessarily the adoptive children, who as a general matter receive high levels of investment and experience good outcomes despite the presence of joint biological children in the family.<sup>178</sup> In an adoption system where married step-parents already receive favored treatment in ways unsupported by Manning and Lamb's and Hofferth and Anderson's findings, and even in ways contraindicated by Wilson's own research into how children suffer sexual abuse at the hands of their stepfathers,<sup>179</sup> it would seem unnecessary and perhaps reckless to further inscribe a broad preference for married couples seeking to adopt children from foster care. The slender evidence offered up by Wilson and Wilcox in support of expressing such a policy preference actually supports a much narrower policy preference that already is firmly entrenched within existing adoption structures. Where Wilson and Wilcox perceive this preference as inadequately expressed, Alabama legislators and Kentucky regulators are unlikely to devote their resources to implementing marriage preferences in the formation of joint step-adoptive families.

This brings us to Wilson and Wilcox's scant treatment of studies of adoptive families. Although they share with us their personal experience with adoption,<sup>180</sup> they inexplicably approach adoption as "a curious form of family life"<sup>181</sup> that needs explaining within the same framework of biology and marriage that leads Wardle to imply its inferiority. In yet another awkward attempt to demonstrate the value of marriage per se, Wilson and Wilcox opine that because adopted children in married families fare better than children raised by a single biological parent, this must mean that "family structure trumps biological relatedness"<sup>182</sup> and adopted children will more likely "thrive socially, emotionally, and educationally when they are reared in an . . . adoptive family headed by a married couple."<sup>183</sup> Here again, they

---

<sup>177</sup> See Jeanne E. Moorman & Donald J. Hernandez, *Married-Couple Families with Step, Adopted, and Biological Children*, 26 DEMOGRAPHY 267, 270 (1989).

<sup>178</sup> See Hofferth & Anderson, *supra* note 152, at 215.

<sup>179</sup> See Wilson, *Children at Risk*, *supra* note 137, at 267–70. Wilson and Wilcox explicitly bracket any discussion of step-parent adoptions. Wilcox & Wilson, *supra* note 133, at 885 n.6.

<sup>180</sup> Wilcox & Wilson, *supra* note 133, at 883 n.\* ("Professor Wilcox is also the adoptive father of three children."), n.\*\* ("Professor Wilson is . . . an adopted child.")

<sup>181</sup> Roberta Goldber, Book Review, 36 J. COMP. FAM. STUD. 352, 352 (2005).

<sup>182</sup> Wilcox & Wilson, *supra* note 133, at 896.

<sup>183</sup> *Id.* at 898.

misrepresent the data. None of the studies attempts to isolate a marriage advantage for children adopted from foster care. Indeed, “[s]ocial scientists have not directly compared child well-being in single-parent versus married couple (or unmarried couple) adoptions.”<sup>184</sup> The Benson study makes no mention of single-parent families,<sup>185</sup> and the Zill study found numerous areas in which adopted children performed just as poorly as children raised by single biological parents.<sup>186</sup> Furthermore, Zill himself has testified that adopted children do worse than children in married two-parent biological families.<sup>187</sup> Contrary to Wilson and Wilcox’s description of it, Professors Brinig and Nock’s article makes no distinction between adopted children in married families and adopted children in single-parent or cohabiting families.<sup>188</sup> The entire focus of their work is how to address, through adoption, the disparity of outcomes between children in foster care and children “living with at least one biological parent.”<sup>189</sup> Marriage is simply not part of the calculus.<sup>190</sup>

Perhaps of most concern is what Wilson and Wilcox inexplicably omit. They fail to explore Brinig and Nock’s suggestion that it is the legal status conferred by *adoption*, not marriage, that helps adopted children experience a

---

<sup>184</sup> Joshua K. Baker & William C. Duncan, *Marital Preferences in Adoption Law: A 50 State Review*, IMAPP POL’Y BRIEF, Feb. 4, 2005, <http://www.marriagedebate.com/pdf/iMAPPmarriage.adoption.pdf>.

<sup>185</sup> See generally DR. PETER L. BENSON, DR. ANU R. SHARMA & EUGENE C. ROEHLKEPARTAIN, SEARCH INST., *GROWING UP ADOPTED: NEW STUDY IDENTIFIES STRENGTHS OF ADOPTIVE FAMILIES* (1994), available at <http://www.search-institute.org/archives/gua.htm>.

<sup>186</sup> Dr. Nicholas Zill, *Adopted Children in the United States: A Profile Based on a National Survey of Child Health*, [http://www.childtrends.org/Files/85-15\\_Adopted\\_Children.pdf](http://www.childtrends.org/Files/85-15_Adopted_Children.pdf) (last visited Apr. 4, 2007).

<sup>187</sup> See *Impact of Marriage and Divorce on Children*, *supra* note 149.

<sup>188</sup> Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter?: Adoptions by Kin Caregivers*, 36 *FAM. L.Q.* 449, 463 (2002) (“Adopted children, regardless of race, perform about as well as children remaining with biological families.”). Wilcox and Wilson’s “paraphrase” reads: “Still other research indicates that adopted children in married households do about as well as children in biological, married households.” Wilcox & Wilson, *supra* note 133, at 895–96.

<sup>189</sup> Brinig & Nock, *supra* note 188, at 463.

<sup>190</sup> See *id.* at 466 (“The statistical technique that we have applied attempts to make children identical in all ways except their foster, adopted, or kinship care status.”). Brinig and Nock limit their discussion of marriage to the suggestion that married couples have more faith than do cohabitants that “the relationship will continue.” *Id.* at 469. Measures of marriage on the lives of the children in the study were found to be not statistically significant. See *id.* at 473 tbl.2.

quality of life similar to (and sometimes superior to)<sup>191</sup> that of children raised by their biological parents.<sup>192</sup> In the course of insisting marriage is a good proxy for parental investment, they choose to overlook the fact that “the majority of today’s adoptive parents are adopting in response to infertility.”<sup>193</sup>

Because the procreative expectations of married couples who adopt are called into question and strained by adoption,<sup>194</sup> married couples require special support before they should even consider adoption.<sup>195</sup> The unique difficulty that adoption poses for married couples is recognized in existing regulation but strangely absent from Wilson and Wilcox’s proposal. Kentucky, whose regulation Wilson and Wilcox criticize, exhibits sensitivity to the complexity of motivations held by prospective adoptive parents and

---

<sup>191</sup> See Wilcox & Wilson, *supra* note 133, at 895, 903 n.114; see also ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 97 (1999) (noting that “abuse is lower in adoptive families than the norm in the general population”); Moorman & Hernandez, *supra* note 177, at 272 tbl.3 (noting higher age of parents, educational attainment, and income in purely adoptive families than in purely biological families); David C. Rowe & Jay Teachman, *Behavioral Genetic Research Designs and Social Policy Studies*, in *THE WELL-BEING OF CHILDREN AND FAMILIES: RESEARCH AND DATA NEEDS* 157, 171 (Arland Thornton ed., 2001) (“As adoptive families are typically well-to-do, stable, and without histories of mental illness or criminality in the parents, the most severely harmful kinds of family environments are rare among them.”).

<sup>192</sup> See Brinig & Nock, *supra* note 188, at 465–66, 468–70; see also WILLIAM FEIGELMAN, *CHOSEN CHILDREN* 231 (1983) (“Our evidence suggested single parents were as effective as couples in raising their adopted children.”); Seth J. Schwartz & Gordon E. Finley, *Father Involvement, Nurturant Fathering, and Young Adult Psychosocial Functioning: Differences Among Adoptive, Adoptive Stepfather, and Nonadoptive Stepfathers*, 27 *J. FAM. ISSUES* 712, 728 (2006) (emphasizing that “correlations of adoptive fathers’ nurturance and involvement to their young adult children’s psychosocial functioning appear to reflect the unique and selected nature of adoptive families”).

<sup>193</sup> FEIGELMAN, *supra* note 192, at 229.

<sup>194</sup> See *id.* at 62 (“Infertile adopters tended to emphasize personal considerations in their decision to adopt: completion of desired family size, companionship for family members, success with a previous adoption, and family pressure to have children.”); *id.* at 232 (“[I]nfertile couples are often likely to feel very anxious about becoming adoptive parents, perceiving a deficiency within themselves in their failure to bear offspring. In response to their great uneasiness about adoption, many infertile parents are likely to deny the differences between biological and adoptive parenthood.”); *THE PSYCHOLOGY OF ADOPTION* 53–55 (David M. Brodzinsky & Marshall D. Schechter eds., 1990).

<sup>195</sup> See generally Margaret Joan Ward, *Our Stories: Older Child and Special Needs Adoption and the New Parents’ Marriage* (Apr. 30, 1996), (unpublished Ph.D. dissertation, Graduate School of the Union Institute) (on file with author).

will not approve an application to adopt or place a child with anyone whose opinions or feelings concerning infertility “might be expected to adversely affect the applicant’s capacity for adoptive parenting.”<sup>196</sup> Although Wilson and Wilcox do not argue that comprehensive and searching home studies should be eliminated for married couples who wish to adopt from foster care, their unwavering sense that a marital family structure benefits every adoptive child,<sup>197</sup> a position that many social scientists dispute,<sup>198</sup> leaves little room for individualized assessments that a single parent or cohabiting couple might be a better placement for a particular child than a married couple who will require intervention before demonstrating readiness to become adoptive parents.

Wilson and Wilcox’s rigid position also ignores that “[c]hildren who are adopted from foster care . . . may have more complex health, developmental, and mental health needs than other adopted children,”<sup>199</sup> and infertile married couples, who as a class are less willing to adopt special-needs children,<sup>200</sup> may be less capable than single adoptive parents or gay and lesbian couple adoptive parents at coping with the considerable challenges that arise from these special-needs adoptions.<sup>201</sup> At the very least, to show their capacity for high levels of parental investment, married couples should be required to

---

<sup>196</sup> 922 KY. ADMIN. REGS. 1:030 § 7 (2000).

<sup>197</sup> See Wilcox & Wilson, *supra* note 133, at 905 (“[W]e believe that legislation and agency policies should indicate that the preferred placement is foremost with a married couple, then with a single parent, and finally with a cohabiting couple.”).

<sup>198</sup> See, e.g., Jennifer E. Lansford et al., *Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households*, 63 J. MARRIAGE & FAM. 840, 850 (2001) (finding “support for the perspective suggesting that the processes occurring in all types of families are more important than family structure in predicting well-being and relationship outcomes” and remarking that social scientists’ future efforts “should concentrate on elucidating factors beyond family structure that contribute to relationship quality and well-being of parents and children. It is not enough to know that an individual lives in a particular family structure without also knowing what takes place in that structure.”).

<sup>199</sup> Judith S. Rycus et al., *Confronting Barriers to Adoption Success*, 44 FAM. CT. REV. 210, 216 (2006).

<sup>200</sup> See FEIGELMAN, *supra* note 192, at 43–44.

<sup>201</sup> See Patrick Leung et al., *A Comparison of Family Functioning in Gay/Lesbian, Heterosexual and Special Needs Adoptions*, 27 CHILD. & YOUTH SERVICES REV. 1031, 1042 (2005); Jeffrey J. Haugaard et al., *Single-Parent Adoptions*, 2 ADOPTION Q. 65, 69–70 (1999); Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 52, at 1334 (noting that studies show gay fathers to be “more alert to children’s needs and more nurturing in providing care than heterosexual fathers”).

demonstrate their rejection of “sex role traditionalism” and their autonomy and independence from “traditional family norms and roles” before adopting the hard-to-place.<sup>202</sup> A categorical preference for married couples over single parents or cohabiting couples in the adoption of children from foster care is misguided. Any chance of a delay in placement is what most harms foster children waiting to be adopted.<sup>203</sup> The “education and widespread advertising campaigns” that Wilson and Wilcox believe will ensure a broad enough adoptive pool “to absorb the masses of children,”<sup>204</sup> does nothing to address the delays a marriage preference will cause in the assessment of individual placements.<sup>205</sup>

Certain of Wilson and Wilcox, Whitehead, and Wardle’s fellow scholars in the marriage-promotion movement have decided to approach the issue of adoption from a different direction. A recent collection of essays, *The Morality of Adoption*, is an attempt to fill a gap in a literature marked by

---

<sup>202</sup> FEIGELMAN, *supra* note 192, at 64; *see also id.* at 39 (noting correlation of paternal investments in child care with willingness to adopt hard-to-place children); *cf.* Schwartz & Finley, *supra* note 192, at 713 (noting evidence that “adoptive fathers may be closer to their children than are biological fathers” and that “children from adoptive families may rate their relationships with their fathers more positively than do children from other family forms”); JEANNE HOWARD, EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES? 6 (Mar. 2006) (citing studies that “found greater involvement and more equality in parenting of both parents in families headed by gays and lesbians”).

<sup>203</sup> BARTHOLET, *supra* note 191, at 97; Rycus et al., *supra* note 199, at 212; Leung et al., *supra* note 201, at 1042; Alan Rushton & Cheryl Dance, *The Adoption of Children from Public Care: A Prospective Study of Outcome in Adolescence*, 45 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 877, 882 (2006) (“The findings on the negative influence of older age at placement, longer time in care, and repeated attempts at rehabilitation home placement strongly support policies that reduce delay between the decision that adoption is in the child’s best interests and establishment of the adoptive placement.”).

<sup>204</sup> Wilcox & Wilson, *supra* note 133, at 906. Indeed, *removing* barriers to gay and lesbian adoption is what the Evan B. Donaldson Adoption Institute urges as a means “to expand the pool of adoptive parents.” *See* HOWARD, *supra* note 202, at 13.

<sup>205</sup> Greater efforts to advertise and educate are precisely what is *not* required to expand the pool of prospective adoptive parents. *See* KATZ, *supra* note 142, at 4, 6, 9 (noting success of current broad use of advertising channels to generate interest in adoption from some 240,000 Americans annually). The current problem is to understand why so many individuals who begin the adoption process or who are otherwise interested in adoption later withdraw. *See id.* at 5, 10.

“sentimentality, political manipulation, and ungrounded assertions.”<sup>206</sup> The socio-psychological, religious, and legal perspectives included in this book find little of value in Wardle’s, Wilson’s, and Whitehead’s work on marriage and the family: “[I]nvoking the appearance (or irrelevance) of a preferred family structure becomes a crude political weapon used by partisans in the culture wars over so-called ‘family values,’ a move that serves to disregard the needs of adoptive children.”<sup>207</sup> The ideal of “the one-flesh unity of marriage provid[ing] the normative foundation of parentage”<sup>208</sup> is rejected as a prerequisite to a viable “familial sphere of mutual belonging,”<sup>209</sup> as long as “the *initial* motive [for adoption] is charitable rather than reproductive.”<sup>210</sup> Recognizing that “[i]t is not being raised in a nontraditional family that causes needless human suffering, but rather being uncared for,” it is urged that we infuse adoption debates with a focus less on “the rights of marginalized would-be parents” and more on “the rights of suffering children to be adopted by the marginalized.”<sup>211</sup> Finally, a theological scholarship that is “seriously and rigorously biblical in orientation”<sup>212</sup> would have us question the very categories of natural and unnatural that formerly undergirded the institution of slavery and today undergird heterosexual-only definitions of marriage.<sup>213</sup> Viewed from these many perspectives, there is no compelling reason to bar same-sex couples from adopting.

It would have been helpful to participants at the Wells Conference to learn how other scholars committed to traditional notions of the family are finding a primary role for adoption in their discussions of family policy. Instead of helping the audience become better informed about how adoption policy influences the regulation of assisted reproduction, however, Wardle chose to advocate for heterosexuals-only marriage and bans on adoption and assisted reproduction by gay and lesbian couples in ways that cast adoption as

---

<sup>206</sup> Don S. Browning & John White, Jr., *Foreward* to THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES vii, viii (Timothy P. Jackson ed., 2005).

<sup>207</sup> Brent Waters, *Adoption, Parentage, and Procreative Stewardship*, in THE MORALITY OF ADOPTION, *supra* note 206, at 32, 45.

<sup>208</sup> *Id.* at 44.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Timothy P. Jackson, *Suffering the Suffering Children: Christianity and the Rights and Wrongs of Adoption*, in THE MORALITY OF ADOPTION, *supra* note 206, at 188, 203.

<sup>212</sup> Jeffrey Stout, *A Conversation We Ought to Be Having over Adoption*, in THE MORALITY OF ADOPTION, *supra* note 206, at 117, 124.

<sup>213</sup> *See id.* at 124–26.

at best a degraded and substandard form of parenthood. Under this view, true parenthood is not achievable in the absence of a consanguineous relationship; adoption a fortiori is merely a second or third best alternative to “true” parenthood.<sup>214</sup> This attitude conforms neatly to messages that adoption is a “debased form of parenting”<sup>215</sup> and to the practices of domestic adoption agencies that often complicate the ability to adopt by mandating open adoption, imposing age caps on prospective adoptive parents, and practicing de facto race matching.<sup>216</sup>

In a final gesture of misinformation, Wardle, relying on a 2003 European Gallup poll, claimed that although many European countries support same-sex marriage, Europe remains staunchly opposed to adoption by same-sex couples.<sup>217</sup> Developments in Europe over the past three years have been brisk, however, with many European nations recently authorizing adoption by lesbian and gay couples or otherwise taking measures to ensure the legal recognition of the children of same-sex couples.<sup>218</sup> Wardle’s argument that

---

<sup>214</sup> See FREUNDLICH, *supra* note 11, at 4.

<sup>215</sup> Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 916 (1994) (quoting ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 168 (1993)).

<sup>216</sup> See Storrow, *supra* note 48, at 322; see also Elizabeth Bartholet, *Cultural Stereotypes Can and Do Die: It’s Time to Move on with Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY & L. 315 (2006).

<sup>217</sup> See Wardle, *Parenthood and the Limits of Adult Autonomy*, *supra* note 2, at 186 (reporting the European Omnibus Survey’s indication of “overwhelming opposition to legalizing adoption by homosexual couples in Europe”).

<sup>218</sup> See Jean Pierre, *La Grande-Bretagne Autorise L’Adoption Par Les Couples Homosexuels*, LE MONDE, Nov. 8, 2002; *France’s Highest Court Grants Equal Parental Authority to Gay Couples*, *supra* note 110; *France Gives Gay Couples Joint Parental Rights*, *supra* note 110 (reporting that lesbians and gay men may delegate parental authority to their same-sex partners in the best interests of the child); *Dutch Gay Couples May Be Allowed to Adopt Children Abroad*, ADVOCATE, May 6, 2006, [http://www.advocate.com/news\\_detail\\_ektid30582.asp](http://www.advocate.com/news_detail_ektid30582.asp); *Northern Irish Gays to Gain Adoption Rights*, ADVOCATE, July 6, 2006, [http://www.advocate.com/news\\_detail\\_ektid33414.asp](http://www.advocate.com/news_detail_ektid33414.asp); *Gay Spanish Air Force Members to Wed*, ADVOCATE, June 29, 2006, [http://www.advocate.com/news\\_detail\\_ektid33155.asp](http://www.advocate.com/news_detail_ektid33155.asp); *Gay Couples in Belgium Get Adoption Rights*, ADVOCATE, Apr. 22, 2006, [http://www.advocate.com/news\\_detail\\_ektid29929.asp](http://www.advocate.com/news_detail_ektid29929.asp); *Belgian Parliament Approves Equal Adoption Rights for Gay Couples*, ADVOCATE, Dec. 3, 2005, [http://www.advocate.com/news\\_detail\\_ektid23040.asp](http://www.advocate.com/news_detail_ektid23040.asp); *Sweden to Allow Gay Adoption*, ADVOCATE, Oct. 25, 2002, [http://www.advocate.com/news\\_detail\\_ektid13967.asp](http://www.advocate.com/news_detail_ektid13967.asp). The Church of Scotland has announced its support of a bill that would allow Scottish gay and lesbian couples to adopt. *Church of Scotland Approves Adoptions by Gays*, ADVOCATE, June 9, 2006, (continued)

European animosity toward the adoption of children by lesbians and gays has led or should lead to restrictions on access to assisted reproduction is not only based on a false premise but is further undermined by recent developments in Great Britain.

Great Britain has been supportive of not employing its assisted reproduction laws to demean adoption. Britain has had a significant period of time since the enactment of the Human Fertilisation and Embryology Act in 1990 to observe how clinics grant or deny access to reproduction with the use of the Act's child-welfare provision.<sup>219</sup> For over ten years, British legislation has mandated that the welfare of the potential child be taken into account in every case of infertility treatment, and the agency responsible for executing this legislation has permitted clinics to engage in a wide range of screening practices, including best-interests screening.<sup>220</sup> The clinical application of the standard came under sustained attack by infertile couples and individuals, scholars, and even members of Parliament<sup>221</sup> as varying widely across clinics and resulting in discriminatory and arbitrary screening within individual clinics.<sup>222</sup> In response, for most of 2005, the Human Fertilisation and Embryology Authority (HFEA) conducted a study of the clinical screening

---

[http://www.advocate.com/news\\_detail\\_ektid32007.asp](http://www.advocate.com/news_detail_ektid32007.asp); *Gays Likely to Win Adoption Rights in Scotland*, ADVOCATE, Mar. 30, 2006, [http://www.advocate.com/news\\_detail\\_ektid28416.asp](http://www.advocate.com/news_detail_ektid28416.asp); cf. *Germany Expands Rights for Gay Couples*, ADVOCATE, Oct. 30, 2004, [http://www.advocate.com/news\\_detail\\_ektid06875.asp](http://www.advocate.com/news_detail_ektid06875.asp) (detailing approval of second-parent adoption in Germany); *Israeli Court Grants Lesbian Couple Adoption Rights in Landmark Case*, ADVOCATE, Jan. 11, 2005, [http://www.advocate.com/news\\_detail\\_ektid02939.asp](http://www.advocate.com/news_detail_ektid02939.asp); *South African Court Approves Gay Adoption*, ADVOCATE, Sept. 11, 2002, [http://www.advocate.com/news\\_detail\\_ektid14540.asp](http://www.advocate.com/news_detail_ektid14540.asp); *Gay Adoption in the U.S. and Abroad*, NOW, Apr. 7, 2006, <http://www.pbs.org/now/politics/fightforfamily3.html> ("Iceland, Norway, Germany and Denmark allow 'stepchild-adoption', which permits the partner in a civil union to adopt the child of his partner."); ASSEMBLÉE NATIONALE, *supra* note 107, at 102 (noting that all countries that authorize same-sex marriage authorize adoption by married same-sex couples).

<sup>219</sup> See Human Fertilisation and Embryology Act, 1990, c. 37, § 25(1)–(2); HUM. FERTILISATION & EMBRYOLOGY AUTH., CODE OF PRACTICE 9, 37–42 (6th ed. 2003), available at [http://www.hfea.gov.uk/cps/rde/xbc/SID-3F57D79B-151028BF/hfea/Code\\_of\\_Practice\\_Sixth\\_Edition\\_-\\_final.pdf](http://www.hfea.gov.uk/cps/rde/xbc/SID-3F57D79B-151028BF/hfea/Code_of_Practice_Sixth_Edition_-_final.pdf).

<sup>220</sup> See sources cited *supra* note 219.

<sup>221</sup> See SECRETARY OF STATE FOR HEALTH, GOVERNMENT RESPONSE TO THE REPORT FROM THE HOUSE OF COMMONS SCIENCE AND TECHNOLOGY COMMITTEE: HUMAN REPRODUCTIVE TECHNOLOGIES AND THE LAW, 2005, Cm. 6641, at 15–17.

<sup>222</sup> European Society of Human Reproduction and Embryology, Pre-Congress Course 6: Joint Special Interest Groups "Psychology – Counselling" and "Ethics-Law" Course, at 18, <http://www.eshre.com/emc.asp?pageId=817> (last visited Apr. 4, 2007).

practices.<sup>223</sup> In a remarkable turnabout said to be motivated to “provide greater clarity and give clinics more confidence about deciding whether or not treatment is appropriate,” HFEA has quite pointedly embraced the avoidance-of-harm principle in gatekeeping<sup>224</sup> and has revised its code of practice with appropriate language.<sup>225</sup> A new guidance issued by the Authority in November of 2005 permits nothing beyond fitness screening.<sup>226</sup> Henceforth, clinics in the United Kingdom must entertain a presumption in favor of providing treatment and may not refuse treatment unless there is evidence that the child is likely to suffer serious physical or psychological harm.<sup>227</sup> The new approach has been fully implemented as of January 2006.<sup>228</sup> A similar ethic was behind the enactment of New Zealand’s regulation of assisted reproduction in 2004,<sup>229</sup> and is behind ongoing reform efforts in Victoria, Australia.<sup>230</sup>

---

<sup>223</sup> See HUM. FERTILISATION & EMBRYOLOGY AUTH., TOMORROW’S CHILDREN: REPORT OF THE POLICY REVIEW OF WELFARE OF THE CHILD ASSESSMENTS IN LICENSED ASSISTED CONCEPTION CLINICS 1, 9 (2005).

<sup>224</sup> *Id.*; see also *id.* at 6 (“The involvement of a medical team in assisted conception means that certain third parties have some responsibility towards the child to be born. However, the importance of patient autonomy means that clinics should only refuse to provide treatment where there is evidence that the child is likely to suffer serious physical or psychological harm.”).

<sup>225</sup> See HUM. FERTILISATION & EMBRYOLOGY AUTH., CODE OF PRACTICE §§ 3.1–3.24 (6th ed. 2005), available at [http://www.hfea.gov.uk/cps/rde/xbc/SID-3F57D79B-90B82D49/hfea/Code\\_of\\_Practice\\_Sixth\\_Edition\\_-\\_final.pdf](http://www.hfea.gov.uk/cps/rde/xbc/SID-3F57D79B-90B82D49/hfea/Code_of_Practice_Sixth_Edition_-_final.pdf).

<sup>226</sup> See *id.*

<sup>227</sup> See *id.* § 3.1.

<sup>228</sup> *Improved Welfare Checks System Will Be Better, Fairer and Clearer for Fertility Patients, GPs and Clinics*, HUM. FERTILISATION & EMBRYOLOGY AUTH., Nov. 2, 2005, <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-08FFFD3D/hfea/hs.xsl/1113.html>. This is likewise the case in Australia and Canada. See Julian Savulescu, *Assisted Reproduction for HIV Serodiscordant Couples: The Ethical Issues in Perspective*, 3AM. J. BIOETHICS 53, 53 (2003); *Canadian Parliament Approves the “Assisted Human Reproduction Act,” A Model of Responsible Policy*, CENTER FOR GENETICS & SOC’Y, May 17, 2004, <http://www.genetics-and-society.org/policies/other/canada.html>.

<sup>229</sup> See Human Assisted Reproductive Technology Act 2004 § 4(a), 2004 S.R. No. 92 (N.Z.), available at [http://www.legislation.govt.nz/libraries/contents/om\\_isapi.dll?clientID=1590201400&infobase=pa\\_l\\_statutes.nfo&jd=a2004-092%2fs.4&record={3EFA9}&softpage=DOC](http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=1590201400&infobase=pa_l_statutes.nfo&jd=a2004-092%2fs.4&record={3EFA9}&softpage=DOC) (listing child welfare as “an important consideration”).

<sup>230</sup> *Access to Assisted Reproductive Technology, Donation of Gametes and Embryos, and Posthumous use of Gametes*, POSITION PAPER (Victorian Law Reform Comm’n, Vict., Austl.), (continued)

## CONCLUSION

In my view, Lynn Wardle did a very poor job at the Wells Conference of addressing whether countries around the world look to adoption doctrine when fashioning regulation of assisted reproduction. Although he promised to deliver a “global perspective” on the regulation of assisted reproduction, in the course of his remarks he made merely a vague reference to comparative family law as a fascinating area of investigation but then proceeded to cobble together a series of condemnations of gay and lesbian parents lifted from his previously published articles on domestic relations law in the United States. What he did have to say about the perspective of other countries was largely incorrect or focused exclusively on adoption law. The many inaccuracies in his remarks revealed that his objectives were to extol heterosexual marriage by any means available and to articulate rationales for barring gays and lesbians from paths to parenthood. The question he was asked to address was not susceptible to satisfactory treatment from this narrow point of view. No matter how much Wardle might wish it, marriage is not a governing principle in the worldwide regulation of assisted reproduction, the United Nations does not extol heterosexual marriage as the fundamental organizing principle of society, and adoption is just as offensive to Islam as are homosexual acts. Wardle’s presentation would have benefited immensely from greater attention to the ramifications of his statements, more faithful translations of foreign language documents, and updating.

Countries around the world seem out of sync with the notion that heterosexual marriage is an adequate proxy for good parenting and that adoption and assisted reproduction should be regulated accordingly. In response, some scholars claim that access to assisted reproduction by unmarried couples, use of third-party gametes and gestation in the reproductive process, and insufficiently strong preferences for married couples in adoption betray inadequate solicitude for traditional marriage, sex-role differentiation in the family, and the best interests of the child. Most recently, Robin Wilson and Brad Wilcox have recycled the often repeated wisdom of “10,000 studies” that children do best when they are raised by their happily married biological parents in a low-conflict household to support their argument for inscribing preferences for married couples in the law governing the adoption of children from foster care. In the course of their brief, Wilson and Wilcox exhibit a lack of understanding of the adoption process and are quick to misread social science data on stepfamilies as establishing that

---

Apr. 2005, at 4, [http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted\\_Reproductive\\_Technology\\_and\\_Adoption/\\$file/Position\\_Paper\\_1.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/Position_Paper_1.pdf).

*adopted* children do best when raised by married couples. From the perspective of the struggle to find permanent homes for the over 100,000 children in our foster care system, their proposal to codify a marriage preference in the adoption of children from foster care is breathtakingly naïve.

Like the flaws in Wardle's presentation, the level of misstatement and inaccuracy contained in Wilson and Wilcox's analysis has no place in a discussion of an issue of this magnitude.

In the regulation of assisted reproduction around the world, countries have taken two directions. Some prize the genetic connection in parent-child relationships so highly that access to assisted reproduction is tightly controlled. Whether justified in terms of optimal rearing conditions, a child's right to know, or that heterosexual marriage has no value apart from the children it produces, such regulation is based on a narrow view of what constitutes family life. Within such a regulatory structure, adoption remains at best a substandard form of parenting or, at the other extreme, is legally impossible and culturally rejected. Countries with a less constrained view of the possibilities for organizing family life believe strong commitments to both individual autonomy and child welfare are compatible. They reject the notion that medical assistance to reproduce should be employed only to enable heterosexual couples to complete the picture of a family that, under happier circumstances, could have arisen without medical intervention. Under this view, access to both assisted reproduction and adoption is more open.

There is no question that marriage is a wonderful way for two individuals to join together and perhaps expand their family by having children. But like Wardle, Wilson and Wilcox, we risk making too much of marriage when we view it as the only way to make sense of adoption and assisted reproduction. When marriage is elevated in the regulation of assisted reproduction and adoption so as to make it more difficult for gays, lesbians and unmarried persons to find their way to parenthood, no one suffers more than the children who are denied loving, supportive, and permanent homes.