

# GLOBAL PERSPECTIVE ON PROCREATION AND PARENTAGE BY ASSISTED REPRODUCTION

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## I. INTRODUCTION: ART, PARTNER ADOPTION, AND THE RIGHT TO A CHILD

Comparative family law is a fascinating area of investigation, for we may learn much about our own legal system, procedures, and substantive family law policies and about how they might be improved, as we hold them up beside the family laws of other nations, societies, and cultures.<sup>1</sup> The study, discussion, and analysis of laws and policies regulating and cases deciding issues of assisted reproductive technology (ART) has become very popular in the United States recently.<sup>2</sup> This symposium issue

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<sup>1</sup> American interest in the comparative study of family law has grown in recent years. See, e.g., BARBARA STARK, *INTERNATIONAL FAMILY LAW: AN INTRODUCTION* (Ashgate 2005); D. MARIANNE BLAIR & MERLE H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY* (2003); see also John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 618–31, 633–35 (1998) (excerpted in BLAIR & WEINER, *supra*, at 11–18). The pedagogical benefits of comparative legal study have been noted. For example, “A student confronted with only one solution to a legal problem has a tendency to assume it is the right one. When he is confronted with two, he is encouraged to think.” James Gordley, *Comparative Law and Legal Education*, 75 TUL. L. REV. 1003, 1008 (2001).

<sup>2</sup> The Fall 2005 Issue (number 3) of Volume 39 of the *Family Law Quarterly* contained a Symposium on ART. The articles include Bruce Lord Wilder, *Current Status of Assisted Reproduction Technology 2005: An Overview and Glance at the Future*, 39 FAM. L. Q. 573 (2005) (outlining the changing landscape of legal parentage based on ART and its ability to create parent-child relationships outside of the traditional family unit); Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L. Q. 579 (2005) (focusing on the legal issues surrounding posthumous conception of one or both gamete providers); Susan L. Crockin, *The “Embryo” Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L. Q. 599 (2005) (exploring the political, legal, religious, and ethical viewpoints surrounding in vitro fertilization disposition); Steven H. Snyder & (continued)

of the Capital University Law Review will certainly find a receptive audience.

However, the comparative study of family law is also replete with the opportunity and potential for serious misperception, misinterpretation, and misunderstanding. It is very tempting to take foreign nations' laws and policies out of context or to interpret them in light of the assumptions underlying our own legal system, and thereby miss important dimensions of those laws that are hidden in the shadows of the differences in the procedural, structural, substantive, and cultural contexts unique to the foreign legal system. Our very approach, organization, categorization, definition, and questions we ask may reflect assumptions about the law that do not fully apply to—or that even mischaracterize—the issue as it would be viewed from the perspective of persons familiar with or living under the foreign legal system. Even language presents a problem, as English is not the language of the law in most of the 193 sovereign nations of the world.<sup>3</sup>

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Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L. Q. 633 (2005) (asserting that prebirth parentage orders are potentially useful in surrogacy relationships if no adoption-like proceedings are necessary to give affect to the parties' intent); Susan B. Apel, *Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent*, 39 FAM. L. Q. 663 (2005) (discussing the evolving trend of interpreting existing laws, particularly the Uniform Parentage Act, to deny children of cryopreserved embryos from divorced parents the right to a "legal father" and thus depriving these children of otherwise typical financial and economic support); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L. Q. 683 (2005) (highlighting the treatment of ART children born into same-sex households in recent cases); Cyrene Grothaus-Day, *Criminal Conception: Behind the White Coat*, 39 FAM. L. Q. 707 (2005) (revealing the "white collar crimes" associated with ART providers in derogation of regulations and rules established by governments); David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L. Q. 727 (2005) (summarizing mostly federal regulation of infertility treatment and research); and Nigel M. de S. Cameron, *Pandora's Progeny: Ethical Issues in Assisted Human Reproduction*, 39 FAM. L. Q. 745 (2005) (describing the regulatory, ethical, and problematic scenarios currently prominent in the United States as in vitro fertilization technology increases in use and potential). See also Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L. Q. 623 (2004) (arguing the concept of "intentional parent," which was developed in assisted reproduction cases as a means of determining parental rights, should be applied in same-sex assisted reproduction and surrogacy cases).

<sup>3</sup> U.S. Dep't of State, *Independent States in the World* (Sept. 11, 2006), <http://www.state.gov/s/inr/rls/4250.htm>; CIA, *THE WORLD FACTBOOK* (2005) (listing the  
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Thus, we begin with a very large caveat about the limits of our ability to understand fully and translate accurately into our terminology the rules and regulations of foreign legal systems concerning ART and adoption of children of ART.

One common source of misperception in the comparative study of family law is use of inapposite categories or distinctions. Thus, it is important to recognize and distinguish between two major categories of usage of ART which encompass a distinction around which the Wells Conference (Conference) was organized (whether intentionally or unintentionally). One category involved the use of assisted reproduction by infertile, married couples to produce desired children of or for the marriage. The other category involved the use of ART by unmarried individuals, couples, or groups to produce children who will be raised outside of a marital family, without a mother and a father. Whether deliberately or by accident, the use of that distinction in this Conference is perceptive, for the line that distinguishes those two categories constitutes a “fault line” of the social earthquake that is shaking most nations today concerning the reconceptualization of basic, nuclear family relations and a “battle line” in the culture wars that are raging not only in America, but around the world. We will find that this distinction explains the major differences in the regulation of ART by the nations of the world.

One additional caveat: this is an area of law that is changing rapidly. One of the best compilations I found reporting on the practice and regulation of ART around the world was produced by the World Health Organization in 2002,<sup>4</sup> yet many of the reports have been rendered outdated by the passage of legislation and adoption of administrative regulations since that report.<sup>5</sup> Likewise, the International Lesbian and Gay

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official languages of the countries of the world in the “people” category of each country’s profile).

<sup>4</sup> WORLD HEALTH ORG., CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION (Effy Vayena, Patrick J. Rowe & P. David Griffin eds., 2002) [hereinafter CURRENT PRACTICES].

<sup>5</sup> See, e.g., Current Good Tissue Practice for Human Cell, Tissue, and Cellular and Tissue-Based Product Establishments; Inspection and Enforcement, 69 Fed. Reg. 68,612 (Nov. 24, 2004) (codified at 21 C.F.R. pts. 16, 1270–71) (delineating a final rule that amended the manner in which human cellular products are regulated after the World Health Organization’s report was published).

Association (ILGA) has provided some very helpful reports,<sup>6</sup> but some of its material that is only a few years old proves to be outdated.

This Article reviews the global status of ART, investigates partner adoption by unmarried partners, especially by gay and lesbian partners of biological parents, and attempts to show that children deserve to be raised by their mother and father, whenever possible. It begins with a review of the current status of the law in the United States regulating ART and adoption of children by partners and couples (hereinafter lesbian adoption). It then considers two values unique to the United States that may partially explain the difference in American law regarding ART and lesbian adoption and considers one value that represents a universal norm, even if only given lip service in some places and times. The Article concludes with some reflections about the need to give priority to the needs and welfare of children in this rapidly evolving area of law.

## II. COMPARATIVE LAW OF ART AND LESBIGAY ADOPTION

### A. American Law of ART and Lesbian Adoption in a Nutshell

It would not be accurate to say that there is no regulation of ART in the United States of America. As one infertility expert alleged in an article published in *Family Law Quarterly* recently: “[T]here is significant regulation and oversight regarding ART in the United States.”<sup>7</sup> The federal laws and regulations applicable to infertility clinics and ART practices include: (1) the Federal Clinical Laboratory Improvement Act of 1988,<sup>8</sup> which governs “endocrinology and andrology laboratories that provide hormonal assays and semen analysis tests, respectively, for IVF”;<sup>9</sup> (2) federal research regulations promulgated by, *inter alia*, the National Institutes of Health (NIH);<sup>10</sup> (3) Food and Drug Administration (FDA) regulations applicable to somatic cell nuclear transfer;<sup>11</sup> (4) Federal Trade

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<sup>6</sup> See, e.g., Int’l Lesbian & Gay Assoc., *World Legal Survey*, [http://www.ilga.info/Information/Legal\\_survey/ilga\\_world\\_legal\\_survey%20introduction.htm](http://www.ilga.info/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm) (last visited Mar. 27, 2007) (providing synopses of the parentage laws effecting lesbian, gay, bisexual, and transgender individuals of many countries of the world).

<sup>7</sup> Adamson, *supra* note 2, at 737.

<sup>8</sup> Codified as amended at 42 U.S.C. § 263a (2000).

<sup>9</sup> Adamson, *supra* note 2, at 728; see also 42 U.S.C. § 263a.

<sup>10</sup> Adamson, *supra* note 2, at 728.

<sup>11</sup> *Id.*; 21 C.F.R. §§ 1270–71 (as amended in 2006). “The FDA first became involved in ART when Congress gave it the authority to oversee ‘cloning’ in 1996. . . . The FDA first exercised authority in an obvious way in 2002 when . . . it sent letters to ART clinics

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Commission (FTC) regulations that have resulted in regulatory sanctions of infertility clinics for improper advertising;<sup>12</sup> (5) payment regulations of the Centers for Medicare and Medicaid Services that apply to payments made to health care providers for services covered by Medicare and Medicaid;<sup>13</sup> (6) Public Health Service regulations that forbid human embryo research by those federally funded programs;<sup>14</sup> and (7) the Department of Health and Human Services “has multiple policies that affect ART genetic testing and genetic policy.”<sup>15</sup>

At the state level, Dr. Adamson notes that there are many indirect regulations of ART. These include regulations of the practice of medicine, state licensing of hospitals, licensing of fertility laboratories in some states (like California and New York), laws regulating informed consent, laws regulating sexually transmitted infection screening, and medical privacy laws, among other things.<sup>16</sup> However, most of these regulations are *indirect*.<sup>17</sup> The regulations or similar ones apply to all kinds of medical

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informing them of the need for a New Drug Application (NDA) for cytoplasmic transfer . . . .” Adamson, *supra* note 2, at 735–36. The FDA regulations issued since include the regulation on Established Registration and Listing for Human Cells, Tissues and Cellular and Tissue-based Products (effective January 21, 2004), the Eligibility Determination for Donors of Human Cells, Tissues and Tissue-based Products (effective May 25, 2005), and the Current Good Tissue Practice for Human Cell, Tissue and Cellular and Tissue-based Procut Establishments: Inspection and Enforcement (effective May 25, 2005). *Id.* at 736 (citing online sources for these three regulations).

<sup>12</sup> Adamson, *supra* note 2, at 728; *see also* Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 301 & n.247 (1997); Reproductive Genetics in Vitro, P.C. Consent Order, 57 Fed. Reg. 2554 (Jan. 22, 1992); Fertility Institute of Western Mass. Consent Order, 56 Fed. Reg. 3479 (Jan. 30, 1991); IVF Australia, Ltd. Consent Order, 56 Fed. Reg. 3479 (Jan. 30, 1991); NME Hospitals Consent Order, 56 Fed. Reg. 3479 (Jan. 30, 1991).

<sup>13</sup> Adamson, *supra* note 2, at 728. “Even though Medicare and Medicaid do not pay for IVF, the setting of reimbursement levels in general has a direct effect on payments by insurance companies and others to ART centers.” *Id.* at 728–29.

<sup>14</sup> *Id.* at 729.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> The President’s Council on Bioethics noted that the bulk of regulation of ART is indirect regulation, such as medical licensing, facility licensing, informed consent, etc., which are general medical regulations not specifically designed to address the context of ART. PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 54–69 (2004), *available at* (continued)

practices, procedures, clinics, and laboratories in the United States.<sup>18</sup> They exist to maintain a quality of health care in the United States that is unequaled in, and is the envy of, people living in all other nations in the world. But they are not designed to address the issues, problems, or context of assisted reproduction in particular.<sup>19</sup> Some indirect regulation also results from litigation involving ART procedures, clinics, providers, and patients.<sup>20</sup> Civil liability for damages for breach of contract, tort, and civil rights violations and establishment of legal rules and presumptions exert some influence on the practices and procedures of ART.<sup>21</sup> Likewise, self-regulation by professional organizations involved in the ART industry asserts some conduct-shaping influences on ART providers.<sup>22</sup> However, “compliance with the standards invoked is purely voluntary.”<sup>23</sup>

There are also direct regulations of ART. On the federal level, these tend to be uncommon and specific—generally enacted in response to particular highly controversial events, subjects, or issues. Thus, there have been a few laws and agency regulations aimed at prohibiting human cloning for reproduction, experimentation of human fetuses and embryos, limitations on federal funding of human embryonic stem cell research, and similar specific hot-button political issues.<sup>24</sup> The President’s Council on Bioethics reported in 2004: “There is only one federal statute that aims at the regulation of assisted reproduction: the Fertility Clinic Success Rate and Certification Act of 1992 . . . .”<sup>25</sup> This Act, known as the Wyden Law,<sup>26</sup> requires annual reporting of clinic-specific success rates and authorizes promulgation of model standards for certifying embryology laboratories.<sup>27</sup> The Wyden Law was promulgated with the support of the American Society for Reproductive Medicine (ASRM) and the Society for

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[http://www.bioethics.gov/reports/reproductionandresponsibility/\\_pcbe\\_final\\_reproduction\\_and\\_responsibility.pdf](http://www.bioethics.gov/reports/reproductionandresponsibility/_pcbe_final_reproduction_and_responsibility.pdf) [hereinafter REPRODUCTION AND RESPONSIBILITY].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 54.

<sup>20</sup> *Id.* at 69.

<sup>21</sup> *Id.* at 69–71.

<sup>22</sup> Adamson, *supra* note 2, at 732–35.

<sup>23</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 175.

<sup>24</sup> See Adamson, *supra* note 2, at 729–30.

<sup>25</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 47.

<sup>26</sup> Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. §§ 201, 263a); Adamson, *supra* note 2, at 731.

<sup>27</sup> Adamson, *supra* note 2, at 731; REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 47–51.

Assisted Reproductive Technology (SART), and in the opinion of Dr. Adamson, the law “has been considered a success by physicians, patients and the government.”<sup>28</sup> Others disagree. One of the principal findings of the extensive and detailed review of ART regulation by the President’s Council on Bioethics in 2004 was that “[t]here is no uniform, comprehensive, enforceable system of data collection, monitoring, or oversight for the biotechnologies affecting human reproduction.”<sup>29</sup>

There is more regulation of ART at the state level of government.<sup>30</sup> As Appendix II shows, all American jurisdictions but twelve states and the District of Columbia have enacted legislation regulating some aspect of ART.<sup>31</sup> In six strict states, ART is permitted only under the supervision of a physician.<sup>32</sup> However, my research assistants and I found no state that statutorily prohibited the use of ART by gays and lesbians or by unmarried heterosexual couples.<sup>33</sup> Only five states—New Hampshire, Pennsylvania, Louisiana, New Mexico and South Dakota—have anything resembling a comprehensive scheme of regulation regarding embryos, and only the latter three states specifically address the context of ART (as distinct from abortion).<sup>34</sup>

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<sup>28</sup> Adamson, *supra* note 2, at 731–32.

<sup>29</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 174.

<sup>30</sup> E.g., Richard F. 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, 311 (2006); Helene P. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 466–68 (2006). See generally Yvette V. Perry, *Assisted Reproductive Technology through a Family Policy Lens: Some Lessons from Adoption Policy*, NAT’L COUNCIL ON FAM. REL. REP. (Nat’l Council on Fam. Relations, Minneapolis, MN), Dec. 2002, at F1; John A. Robertson, *Assisted Reproduction in Germany and the United States: An Essay in Comparative Law and Bioethics*, BERKELEY ELECTRONIC PRESS (2004), available at <http://law.bepress.com/expresso.eps.226/cgi/viewcontent.cgi?article=1552&context=expresso>.

<sup>31</sup> The thirteen jurisdictions without ART legislation include Hawaii, Iowa, Kentucky, Maine, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, West Virginia, and the District of Columbia. See *infra* app. II.

<sup>32</sup> These states are Arkansas, Connecticut, Idaho, Ohio, Oklahoma and Oregon. See *infra* app. II. Ohio differs from the other states, however, in that only nonspousal ART must be performed by a licensed physician. See *infra* app. II.

<sup>33</sup> See *infra* app. II.

<sup>34</sup> See REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 51.

The vast majority of state statutes directly concerned with assisted reproduction . . . are concerned mostly with the question of access to such services . . . [such as,] whether and to what extent assisted reproduction services will be covered as insurance benefits. Other state statutes regarding assisted reproduction aim to prevent the malfeasance of rogue practitioners . . . . Still others focus on the regulation of gamete and embryo donation . . . . There are a host of states whose laws dictate parental rights and obligations in the context of assisted reproduction.<sup>35</sup>

And, like the federal regulation, most of the remaining state ART regulation tends to be addressed to specific issues that have caught the attention of lawmakers.<sup>36</sup> “In short, there are very few state laws that bear directly on assisted reproduction. Most of these laws relate to the provision of insurance coverage for infertility treatment.”<sup>37</sup>

Some working in the ART industry in the United States see a maze of state and federal regulations by “multiple overseeing authorities and organizations, and this has resulted in inconsistencies, duplication, and potentially inappropriate regulations.”<sup>38</sup> Nevertheless, “many think [this system] is working relatively well overall.”<sup>39</sup> Others, however, disagree. For example, in March of 2004, the President’s Council on Bioethics issued a report entitled *Reproduction and Responsibility: The Regulation of New Biotechnologies*,<sup>40</sup> which reviewed the state of ART regulation in the United States.<sup>41</sup> A major conclusion of the report was that “[t]here is *minimal* direct governmental regulation of the practice of assisted reproduction.”<sup>42</sup> Furthermore, it noted, “There are *no* nationally uniform laws or policies relating to access to assisted reproduction.”<sup>43</sup> There is “relatively little oversight or deliberation” restraining the movement of

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<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g., id.* at 53–54.

<sup>37</sup> *Id.* at 54.

<sup>38</sup> Adamson, *supra* note 2, at 737.

<sup>39</sup> *Id.*

<sup>40</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17.

<sup>41</sup> *Id.* at 173.

<sup>42</sup> *Id.* at 174 (emphasis added).

<sup>43</sup> *Id.* at 176 (emphasis added).

experimental procedures to clinical practice.<sup>44</sup> “[T]here is no uniform system for public review and deliberation regarding the larger human or social significance of new reproductive technologies.”<sup>45</sup> And, “[t]here is no comprehensive mechanism for regulation of commerce in [human] gametes, embryos, and ART services.”<sup>46</sup> Finally, the report noted, “The current regulatory landscape is a patchwork, with authority divided among numerous sources of oversight.”<sup>47</sup> Even defenders of the current American regulatory situation admit that there are significant concerns. “One of the biggest criticisms of [ART] regulation in the United States is that it has not controlled the increase in multiple birth rates that have occurred with ART procedures.”<sup>48</sup>

The regulation of adoption is long established in the United States of America. Adoption is a creature of state statutes (the first in Massachusetts in 1851), and it is a standard rule that adoption laws are strictly construed (as they are in derogation of the common law, which did not allow adoption).<sup>49</sup> There is a widening gap among the states regarding the legalization of lesbian adoption.<sup>50</sup> As of July 1, 2005, twenty states and the District of Columbia had explicitly resolved the issue of whether adoption by lesbian or gay couples or partners is legal in the state with either specific legislation or a currently valid state appellate court ruling specifically addressing the issue.<sup>51</sup> Twelve states and the District of

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

<sup>45</sup> *Id.* at 177.

<sup>46</sup> *Id.* at 178.

<sup>47</sup> *Id.* at 75.

<sup>48</sup> Adamson, *supra* note 2, at 733.

<sup>49</sup> *In re Molly Marie Adams*, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 50 *Duke L.J.* 1077, 1102 (2003).

<sup>50</sup> See generally Lynn D. Wardle, *The “Inner Lives” of Children in Lesbian Adoption: Narratives and Other Concerns*, 18 *ST. THOM. L. REV.* 511 (2005).

<sup>51</sup> The following states have resolved the issue in favor of lesbian and gay partner adoptions: California, CAL. FAM. CODE § 9000(b) (West 1998) (“A domestic partner . . . desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.”); *Sharon S. v. Superior Court*, 73 P.3d 554, 574 (Cal. 2003) (allowing adoption by former lesbian partner); Connecticut, CONN. GEN. STAT. ANN. § 45a-726a (West 2004) (allowing consideration of the prospective adoptive parent’s sexual orientation when placing a child for adoption and stating the law does not require a child to be placed with a homosexual or bisexual adoptive parent or parents); *Davis v. Kania*, 836 A.2d 480, 483–84 (Conn. Super. 2003) (allowing former domestic partner to enforce his legal right to custody under a custody agreement and paternity judgment that arose in another jurisdiction because it did not contravene the policy or laws of the state);

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Lavoie v. MacIntyre, No. FA010343228, 2002 WL 31829964, at \*7 (Conn. Super. Nov. 26, 2002) (holding that a same-sex partner has standing to sue for visitation rights of child conceived through artificial insemination by lesbian couple); Antonucci v. Frances-Cameron, No. FA98042047S, 1999 WL 130356, at \*3 (Conn. Super. Mar. 3, 1999) (“The concept of ‘family’ is evolving and changing. . . . The parties had a long-term-relationship and decided to start a family. . . . [The former partner] does in fact have standing based on the allegations of the present petition for visitation to claim visitation with the minor child.”); District of Columbia, *In re M.M.D. & B.H.M.*, 662 A.2d 837, 843, 862 (D.C. App. 1995) (recognizing that unmarried couples, whether same or opposite sex, are eligible to adopt and allowing second-parent adoption in stages by a gay male couple); Illinois, *In re K.M.*, 653 N.E.2d 888, 898–99 (Ill. App. Ct. 1995) (allowing lesbian partner adoption); *In re C.M.A.*, 715 N.E.2d 674, 679–80 (Ill. App. Ct. 1999) (holding that a former judge had no authority to prevent a later judge from issuing order allowing lesbian partners to adopt); Indiana, *Mariga v. Flint*, 822 N.E.2d 620, 632 (Ind. Ct. App. 2005) (denying petitioner’s motion to vacate the adoption of her former partner’s biological children because the original court had jurisdiction to grant the adoption and it was not procured by fraud); Massachusetts, *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (“[T]he Probate Court has jurisdiction to enter a decree on a joint adoption petition brought by the two petitioners[, a lesbian couple,] when the judge has found that joint adoption is in the subject child’s best interest. . . . [W]hen a natural parent is a party to a joint adoption petition, that parent’s legal relationship to the child does not terminate on entry of the adoption decree.”); *Adoption of Galen*, 680 N.E.2d 70, 71–72 (Mass. 1997) (holding that the adoption statute did not preclude same-sex cohabitants from jointly adopting a child); New Hampshire, N.H. REV. STAT. ANN. § 170-B:4 (LexisNexis 2001) (repealing, in 1999, New Hampshire’s twelve-year ban on gay adoption and foster parenting); New Jersey, *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) (allowing adoption by the biological mother’s partner without terminating the biological mother’s parental rights); New York, *In re Jacob*, 660 N.E.2d 397, 405–06 (N.Y. 1995) (holding that lesbian and unmarried heterosexual partners had standing under the domestic relations statute to become adoptive parents); Pennsylvania, *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002) (“Upon a showing of cause, the trial court is afforded *discretion* . . . to decree the adoption without termination of the legal parent’s rights . . . . There is no language in the Adoption Act precluding two unmarried same-sex partners . . . from adopting a child . . . .”); Vermont, *Adoption of B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993) (“[W]hen the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother’s rights is unreasonable and unnecessary.”); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002) (“If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection.”); Tennessee, *In re Adoption of M.J.S.*, 44 S.W.3d 41, 46 (Tenn. Ct. App. 2000) (allowing adoption by former same-sex partner as individual); Ohio, *In re Adoption of Charles B.*, 552 N.E.2d 884, 886 (Ohio 1990)

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Columbia allow lesbigay adoption (hereinafter pro), eight reject it (hereinafter con), four states have legislation explicitly allowing lesbigay adoption, and four states have legislation explicitly barring or restricting lesbigay adoption.<sup>52</sup> Four states (three pro and one con) have both a statute and an appellate court ruling.<sup>53</sup> At least one state has a regulation

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(affirming the adoption of a severely impaired eight-year-old child by a homosexual single parent). The following states have resolved the issue against gay and lesbian partner adoptions: Alabama, ALA. CODE § 26-10A-5 (LexisNexis Supp. 2005) (“Any adult person or husband and wife jointly who are adults may petition the court to adopt a minor.”), § 26-10A-6 (citing Acts 1998, No. 98-439, expressing the Legislature’s intent to prohibit child adoption by homosexual couples); Colorado, *In re Adoption of T.K.J.*, 931 P.2d 488, 493, 496 (Colo. Ct. App. 1996) (refusing to recognize lesbian partner adoption and finding no violation of equal protection); Florida, FLA. STAT. ANN. § 63.042(3) (West 2005) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”); *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1384 (S.D. Fla. 2001) (“[T]he Court must find Defendants’ purported legitimate interest in excluding homosexuals from adopting—namely, placing adopted children in married homes—to be valid.”); Mississippi, *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring) (noting that Mississippi does not allow same-sex partners to adopt); Nebraska, *In re Adoption of Luke*, 640 N.W.2d 374, 376 (Neb. 2002) (denying adoption petition jointly filed by mother and companion, in which companion sought to adopt mother’s child); Oklahoma, OKLA. STAT. ANN. tit. 10, § 7502-1.4 (West 2005) (“[T]his state . . . shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”); Utah, UTAH CODE ANN. § 78-30-1 (2000) (“A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. . . . [C]ohabiting’ means residing with another person and being involved in a sexual relationship with that person.”); Wisconsin, *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994) (holding second-parent adoption not permitted under step-parent adoption statutes).

<sup>52</sup> Wardle, *supra* note 50, at 512–15. The following states allow lesbigay adoption: California, CAL. FAM. CODE § 9000(b); Connecticut, CONN. GEN. STAT. ANN. § 45a-726a; New Hampshire, N.H. REV. STAT. ANN. § 170-B:4; Vermont, VT. STAT. ANN. tit. 15A, § 1-102(b). The following states are against lesbigay adoption: Alabama, ALA. CODE §§ 26-10A-5, 26-10A-6; Florida, FLA. STAT. ANN. § 63.042(3); Oklahoma, OKLA. STAT. ANN. tit. 10, § 7502-1.4; Utah, UTAH CODE ANN. § 78-30-1.

<sup>53</sup> The following states are pro: California, *Sharon S.*, 73 P.3d at 574; CAL. FAM. CODE § 9000(b); Connecticut, *Davis*, 836 A.2d at 483–84; *Lavoie*, 2002 WL 31829964, at \*7; *Antonucci*, 1999 WL 130356, at \*3; *Baby Z.*, 724 A.2d at 1059–61; CONN. GEN. STAT. ANN. § 45a-726a; Vermont, *B.L.V.B.*, 628 A.2d at 1272; VT. STAT. ANN. tit. 15A, § 1-102(b). The following states are con: Florida, *Lofton*, 157 F. Supp. 2d at 1384; FLA. STAT. ANN. § 63.042(3).

(supplemented by case law) that allows for lesbigay adoption.<sup>54</sup> Twelve states and the District of Columbia (eight pro and five con) have an appellate court ruling interpreting the general adoption statute regarding whether it permits lesbigay adoption, but they do not have a specific statute addressing the issue.<sup>55</sup> Three states (all con) have a specific statute explicitly addressing the issue whether lesbian or gay couples or partners can adopt, but they do not have an appellate court ruling or proceeding reinforcing the statute.<sup>56</sup>

### *B. What Does the Rest of the World Say?*

Most of the nations of the world have much more restrictive regulation of ART, especially who may use ART and how ART is to be done.<sup>57</sup> The

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<sup>54</sup> New York, N.Y. COMP. CODES R. & REGS. tit. 18 § 421.16(h)(2) (1999); *In re Jacob*, 660 N.E.2d at 405–06.

<sup>55</sup> The following states are pro: District of Columbia, *In re M.M.D.*, 662 A.2d at 862; Indiana, *Mariga*, 822 N.E.2d at 632; *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1254, 1260 (Ind. Ct. App. 2004); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 268, 270 (Ind. Ct. App. 2003); Massachusetts, *Adoption of Tammy*, 619 N.E.2d at 321; New Jersey, *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 555 (N.J. Super. Ct. Ch. Div. 1993); *Adoption of Two Children by H.N.R.*, 666 A.2d at 538; New York, *In re Jacob*, 660 N.E.2d at 405–06; Ohio, *Adoption of Charles B.*, 552 N.E.2d at 886; Pennsylvania, *Adoption of R.B.F.*, 803 A.2d at 1202; Tennessee, *Adoption of M.J.S.*, 44 S.W.3d at 46. The following states are con: Colorado, *Adoption of T.K.J.*, 931 P.2d at 493; Kentucky, *B.F. v. T.D.*, 194 S.W.3d 310, 311 (Ky. 2006); Mississippi, *S.B. v. L.W.*, 793 So. 2d at 662 (Payne, J., concurring); Nebraska, *Adoption of Luke*, 640 N.W.2d at 376; Wisconsin, *Angel Lace M.*, 516 N.W.2d at 686.

<sup>56</sup> These states are Alabama, ALA. CODE § 26-10A-5, Oklahoma, OKLA. STAT. ANN. tit. 10, § 7502-1.4, and Utah, UTAH CODE ANN. § 78-30-1.

<sup>57</sup> See Riita Burrell, *Assisted Reproduction in the Nordic Countries: A Comparative Study of Policies and Regulation*, NORDIC COMMITTEE ON BIOETHICS, Oct. 2005, at 6–7, available at <http://www.norden.org/pub/ovrigt/ovrigt/uk/TN2006505.pdf> (last visited Mar. 27, 2007); see also Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 13 REPRODUCTIVE HEALTH MATTERS 120 (2005), available at 2005 WLNR 11574861; SONIA MAGRI, KATE FOORD, MARY POLIS & MARCIA NEAVE, VICTORIAN LAW REFORM COMM'N, ASSISTED REPRODUCTIVE TECHNOLOGY & ADOPTION 4 (Alison Hetherington ed., 2005); Marcia C. Inhorn, *Fatwas and ARTs: IVF and Gamete Donation in Sunni v. Shi'a Islam*, 9 J. GENDER, RACE & JUST. 291 (2005); Colin Rasmussen, *Canada's Assisted Human Reproduction Act: Is it Scientific Censorship, or a Reasoned Approach to the Regulation of Rapidly Emerging Reproductive Technologies?*, 67 SASKATCHEWAN L. REV. 97 (2004); Trees A.M. te Braake, *Regulation of Assisted Reproductive Technology in the Netherlands*, 35 TEX. INT'L L.J. 93 (2000); Gordana Kovaček Stanić, *The Significance* (continued)

fault line noted above between married and unmarried persons is much brighter in most of the world outside of North America and Europe. Even in Europe, where there are many more permissive lifestyle standards for adults, ART is generally regulated much more strictly than it is in the United States.

### 1. *Europe and Canada*

“Many countries have enacted strict laws limiting the number of embryos (from two to four) that can be transferred. These [nations] include Brazil, Denmark, Germany, Hungary, Saudi Arabia, Singapore, Sweden, Switzerland, and the United Kingdom.”<sup>58</sup> Access to ART is often significantly restricted in terms of who may use ART (for instance, people younger than age thirty-six in Belgium, and the European Society for Human Reproduction and Embryology recommends ART be used by people younger than age thirty-four who use a “top-quality embryo”).<sup>59</sup> In 2003, Italy passed a law as strict as Germany’s that limits “fertility treatments to heterosexual couples who live together and are of childbearing age, [and] prohibits egg or sperm donation or surrogacy.”<sup>60</sup> French law limits ART to married couples or unmarried heterosexual couples who can prove two years of common law relationships.<sup>61</sup> In 2004,

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*of Biological Parentage in Yugoslav Family Law*, 31 CAL. W. INT’L L.J. 101, 110–12 (2000); Claudia Lima Marques, *Assisted Reproductive Technology (ART) in South America and the Effect on Adoption*, 35 TEX. INT’L L.J. 65 (2000); Ruth Landau, *Assisted Reproduction in Israel and Sweden: Parenthood at Any Price?*, 16 INT’L J. SOC. & SOC. POL’Y 29 (1996); Carl E. Schneider & Lynn D. Wardle, *Genetics and Artificial Procreation in the U.S.A.*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS 55, 71–82 (Marie-Thérèse Meulders-Klein, Ruth Deech & Paul Vlaardingerbroek eds., 2002); Loane Skene, *Genetics and Artificial Procreation in Australia*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS, *supra*, at 107, 111–12; Ken Daniels, *Genetics and Artificial Procreation in New Zealand*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS, *supra*, at 123, 124–25; Maria Donata Panforti & Mario Serio, *Genetics and Artificial Procreation in Australia*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS, *supra*, at 253, 256–57; Michael Stormann, *Genetics and Artificial Procreation in Austria*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS, *supra*, at 367, 373; Olga A. Khazova, *Genetics and Artificial Procreation in Russia*, in BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS, *supra*, at 377, 384–85. See generally CURRENT PRACTICES, *supra* note 4.

<sup>58</sup> Adamson, *supra* note 2, at 740.

<sup>59</sup> *Id.* (citation omitted).

<sup>60</sup> *Id.* at 741; see also Robertson, *supra* note 30, at 4, 6.

<sup>61</sup> See Nan T. Ball, *The Reemergence of Enlightenment Ideas in the 1994 French Bioethics Debates*, 50 DUKE L.J. 545, 553 (2000) (citing 1994 French Bioethics Law No.

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Canada passed the Assisted Human Reproduction Act, creating the Assisted Human Reproduction Agency, a federal body to oversee the area of assisted reproduction.<sup>62</sup> Among other things, the Act prohibits payment to gamete or embryo donors or surrogates, forbids sex selection generally, and bars any inheritable change of the genome.<sup>63</sup>

Europe is the part of the world that is most like the United States in its embrace of homosexual lifestyles and families. However, even in “Old Europe” (the most progressive western European nations) and more pointedly in the nations of “New Europe” (many of which are former Central and Eastern European communist countries), there are many restrictions and prohibitions of lesbian and gay ART and adoption. Law prohibits gay, lesbian, and transgendered individuals and partners from participating in ART in Austria, the Czech Republic, Denmark (stepping back from its earlier law), France, Germany, Hungary, Iceland, Italy, Norway, Poland, the Slovak Republic, Switzerland, and Portugal.<sup>64</sup> Australia, for the most part, also bars lesbian and gay ART.<sup>65</sup>

On the other hand, use of ART by lesbians and gays is permitted in at least some circumstances (either by explicit law or by the absence of any contrary law) in at least six or seven European nations.<sup>66</sup> In the United Kingdom, the Human Fertilisation and Embryology Act of 1990 does not

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94-654, Article L., section 152.2: “The man and woman forming the couple must be alive, of procreative age, married or able to prove that they have lived together for at least two years and have consented to the transfer of embryos and insemination.”); *see also* PARLIAMENTARY REPORT ON THE FAMILY AND THE RIGHTS OF CHILDREN 6–8, 14–16 (2006), available at <http://www.marriageinstitute.ca/images/PARLIAMENTARY%20REPORT%20ON%20THE%20FAMILY%20AND%20THE%20RIGHTS%20OF%20CHILDREN.pdf> [hereinafter PARLIAMENTARY REPORT] (putting children’s interests above adults in ART, emphasizing right of children to know origins, encouraging mother-father parenting, etc.).

<sup>62</sup> Assisted Human Reproduction Agency of Canada, [http://www.hc-sc.gc.ca/hl-vs/reprod/agenc/index\\_e.html](http://www.hc-sc.gc.ca/hl-vs/reprod/agenc/index_e.html) (last visited Mar. 28, 2007).

<sup>63</sup> *See* Rasmussen, *supra* note 57, at 98.

<sup>64</sup> Joseph G. Schenker, *Assisted Reproduction Practice in Europe: Legal and Ethical Aspects*, 3 HUM. REPROD. UPDATE 174–76 (1997).

<sup>65</sup> *See* Skene, *supra* note 57, at 111–12; MAGRI ET AL., *supra* note 57, at 4.

<sup>66</sup> *See generally* *Toward Equal Access to Parenting for LGBT Persons in Europe*, ILGA EUROPE NEWSLETTER (ILGA Europe, Brussels, Belg.), Spring 2006, at 8, available at [http://www.ilga-europe.org/europe/publications/newsletter/2006/spring\\_2006](http://www.ilga-europe.org/europe/publications/newsletter/2006/spring_2006) (citing examples of lesbian ART in Belgium, Denmark, Finland, the Netherlands, Spain, Sweden and the United Kingdom).

absolutely bar lesbian ART, but it allows clinics to deny service at will to lesbians and single women for the “welfare of any child.”<sup>67</sup>

## 2. South America

In South America, where ART is expensive and only available to a very small portion of the population, there are as of yet few regulations governing ART.<sup>68</sup> In many Latin American countries, ART bills have been proposed but not yet enacted, so laws allowing and regulating transplants are applied by analogy.<sup>69</sup> Selling body parts (including eggs, semen, and embryos) is prohibited in Brazil, and similar laws exist in the other Mercosur countries (Argentina, Paraguay, and Uruguay).<sup>70</sup> Most South American countries are protective of the unborn person (abortion is prohibited in Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, Paraguay, Peru, and Uruguay).<sup>71</sup> The *natalista* doctrine imposes the duty to protect the “‘future’ person” in Brazil, Chile, and Uruguay, and the *concepcionista* doctrine recognizes and protects the existential unity (*unidad existencial*) of the child from conception in Argentina, Paraguay, and Peru.<sup>72</sup> Genetic engineering is deemed a violation of the dignity of the person and prohibited in Brazil, Argentina, and some other countries.<sup>73</sup> Argentina and Brazil prohibit surrogacy contracts entirely.<sup>74</sup> Brazil does not bar the use of ART by unmarried heterosexuals or by homosexuals.<sup>75</sup> However, “Argentine legal doctrine refuses to allow the use of ART in the context of homosexual relationships.”<sup>76</sup> Generally, there is widespread legal restriction and social discrimination against homosexuals in South America.<sup>77</sup> Because of “divergence of opinions, in many [South American] countries it is very difficult to pass any legislation on embryos. Therefore, ART is still unregulated.”<sup>78</sup>

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<sup>67</sup> See Human Fertilisation and Embryology Act, 1990, c. 37, § 13 (Eng.).

<sup>68</sup> See Marques, *supra* note 57, at 66–67.

<sup>69</sup> See *id.* at 72–73.

<sup>70</sup> See *id.* at 73–75.

<sup>71</sup> *Id.* at 70–71.

<sup>72</sup> *Id.* at 70.

<sup>73</sup> *Id.* at 73–75.

<sup>74</sup> *Id.* at 80.

<sup>75</sup> *Id.* at 83–84.

<sup>76</sup> *Id.* at 84.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 69.

Adoption is permitted in all South American countries—either “full” or “simple” adoption.<sup>79</sup> But “strong principles of adoption laws and their focus on the best interest[s] of the child can be a barrier to the use of ART, especially in the cases of unmarried persons, homosexuals, and surrogate mothers [in South America].”<sup>80</sup>

### 3. *Muslim Nations*

In the Muslim world, modern forms of ART are just beginning to be considered.<sup>81</sup> In these nations, marriage seems to demark the line at which certain ART practices are accepted, though many ART practices are not allowed for even married couples. In countries where minority *Shi'ite* law is dominant—parts of Afghanistan, Bahrain, India, Iran, Iraq, Lebanon, and Pakistan—use of donor gametes is not legally forbidden, surrogacy is generally permitted, single women can be inseminated, and adoption is generally permitted (though social norms are generally quite conservative and use of ART by nonmarried individuals or couples is largely unacceptable).<sup>82</sup> In most countries where majority (nearly 90%) *Sunni* law is dominant—Indonesia, Iran, Jordan, Kuwait, Lebanon, Malaysia, Morocco, Pakistan, Qatar, Turkey and Saudi Arabia—all forms of third party gamete donation are strictly prohibited.<sup>83</sup> In some of the more progressive *Sunni* nations (such as Egypt and Saudi Arabia), artificial insemination (AI) or in vitro fertilization (IVF) using donor sperm, eggs, or embryos is considered adultery, but use by a married couple of their own gametes for AI or IVF is permitted by law.<sup>84</sup>

Muslim doctrines and values are very supportive of traditional families. For example, the Arab world and diplomatic representatives from dozens of countries gathered in Doha, Qatar for the Doha International Conference for the Family in 2004 (the tenth anniversary of the United Nations International Year of the Family), producing the Doha Declaration,<sup>85</sup> which scores of nations noted and which the United Nations

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<sup>79</sup> *Id.* at 88.

<sup>80</sup> *Id.*

<sup>81</sup> See Inhorn, *supra* note 57, at 291.

<sup>82</sup> See *id.* at 303–09.

<sup>83</sup> *Id.* at 293–303.

<sup>84</sup> See *id.*

<sup>85</sup> Doha Int'l Conference for the Family, Nov. 29–30, 2004, *Doha Declaration*, U.N. Doc. A/59/592, at 2 (Dec. 3, 2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/634/18/pdf/N0463418.pdf?OpenElement> [hereinafter *Doha Declaration*].

General Assembly recognized.<sup>86</sup> The Doha Declaration emphasizes that “the family is the natural and fundamental group unit of society”; the right to marriage belongs to “men and women of marriageable age” who become as “husband and wife . . . equal partners”; “[f]or the full and harmonious development of their personality, children should grow up in a family environment, in an atmosphere of happiness, love and understanding”; “strong, stable families contribute to the maintenance of a culture of peace and promote dialogue among civilizations and diverse ethnic groups”; and the family is “entitled to the widest possible protection and assistance by society and the State.”<sup>87</sup>

Homosexuality is highly offensive to Islam and is prohibited in Muslim nations;<sup>88</sup> Islamic nations are among the most vigorous opponents of same-sex family relations including parenting by gays, lesbians, and transsexuals, and the use of ART or lesbigay adoption in Islamic nations to create families for homosexual individuals or couples, or even unmarried heterosexuals or couples, is highly unlikely in the foreseeable future.<sup>89</sup>

#### 4. *Asian and Pacific Nations*

Asian nations are a hybrid of conservative, traditional family values and quest for scientific advance. China forbids adoption by homosexuals.<sup>90</sup> But China and Korea have some of the most aggressive, least-restricted ART research (including human cloning) programs in the

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<sup>86</sup> The United Nations General Assembly adopted a consensus resolution on Monday, December 6, 2004, welcoming the Doha International Conference for the Family and noting the Doha Declaration. G.A. Res. 59/111, U.N. Doc. A/RES/59/111, at 3 (Dec. 6, 2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/482/92/pdf/N0448292.pdf?OpenElement>.

<sup>87</sup> *Doha Declaration*, *supra* note 85, at 3–5.

<sup>88</sup> See Sodomies Laws, *Laws Around the World*, <http://www.sodomylaws.org/world/world.htm> (last visited Mar. 28, 2007) (listing more than seventy nations where sodomy is illegal and nine nations where it is punishable by death); Jeffrey A. Redding, *Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion, and Law*, 4 NW. U. J. INT'L HUM. RTS. 436, 484–87 (2006); Robert F. Worth, *Gay Muslims Face a Growing Challenge Reconciling Their Two Identities*, N.Y. TIMES, Jan. 13, 2002, at 30 (“In most Islamic societies, homosexual behavior is a crime, punishable in some cases by death.”).

<sup>89</sup> See Sarah A. Ramage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and Strength of the Islamic Response*, 27 CAL. W. INT'L L.J. 1, 44–46 (1996).

<sup>90</sup> Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 607 (2005).

world (and have also produced some of the most stunning ethical lapses in the atmosphere of quest for scientific development at any cost).<sup>91</sup> In Japan ART is widely used for marital reproduction, but use donor of gametes is against professional standards and regulations.<sup>92</sup>

### 5. Africa

“Today most African states outlaw homosexuality through a variety of laws . . . .”<sup>93</sup> Indeed, according to one oft-referenced source, same-sex relations are absolutely, criminally prohibited in twenty-two African nations (and a capital offense in at least three of these), and at least partially prohibited (for males only or for females only) in a dozen other African countries.<sup>94</sup> However, sodomy is legal (not criminally prohibited)

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<sup>91</sup> See Lisa Handwerker, *Social and Ethical Implications of In Vitro Fertilization in Contemporary China*, 4 CAMBRIDGE Q. OF HEALTHCARE ETHICS 355, 357 (1995); see also Rosario M. Isasi, Bartha M. Knoppers, Peter A. Singer & Abdallah S. Daar, *Research Ethics: Legal and Ethical Approaches to Stem Cell and Cloning Research: A Comparative Analysis of Policies in Latin America, Asia, and Africa*, 32 J.L. MED. & ETHICS 626, 633 (2004) (noting that China and South Korea have permissive ART and cloning policies because the overall goal in these countries is to promote scientific and medical progress); Choe Sang-Hun & Nicholas Wade, *Korean Cloning Scientist Quits Over Report He Faked Research*, N.Y. TIMES, Dec. 24, 2005, at A1; David Barboza, *China Turns Out Mummified Bodies for Displays*, N.Y. TIMES, Aug. 8, 2006, at A1 (discussing a new industry of producing and displaying human corpses accompanied by shipping preserved cadavers among Asian nations with little governmental oversight); Jim Yardley, *Desperate Search for Justice: One man vs. China*, N.Y. TIMES, Nov. 12, 2005, at A1 (describing China’s black market in body parts).

<sup>92</sup> See Jennifer Gunning, *Regulation of Assisted Reproductive Technology: A Case Study of Japan*, 22 MED. & L. 751 (2003). The per capita rate of use of ART is reportedly higher in Japan than in the United States. See SIRM: A Rational Basis for the Introduction of Universal Infertility Insurance Coverage, <http://www.haveababy.com/news/insurance.asp> (last visited May 9, 2007).

<sup>93</sup> Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*, 35 CAL. W. INT’L. L.J. 1, 4 (2004).

<sup>94</sup> See Sodomy Laws, *supra* note 88; Maguire, *supra* note 93, at 5–6 (summarizing condemnation of homosexuality by several African political leaders). In 1998, a former President of Zimbabwe, Canaan Banana, was convicted of sodomy and homosexual assault, causing much embarrassment to Robert Mugabe, his successor, who has been outspoken in his criticism of homosexuality. *Banana Under House Arrest*, BBC NEWS ONLINE, Dec. 16, 1998, <http://news.bbc.co.uk/1/low/world/africa/235993.stm>; Maguire, *supra* note 93, at 2–3 (quoting President Mugabe’s harsh criticism of homosexuality and gay public activism).

in seventeen African nations,<sup>95</sup> and one African nation is among the most supportive nations in terms of its legal treatment of (*not* social or cultural reaction to) homosexual relations.<sup>96</sup> Perhaps reflecting its Dutch-English colonial heritage, the South African Constitutional Court has ruled that same-sex unions must be legalized in that nation, and the South African parliament is now considering whether to create some form of same-sex domestic partnership or to legalize same-sex marriage.<sup>97</sup>

Obviously, the use of ART to facilitate childbearing and childrearing by gay and lesbian couples is not legal in most African countries where the behavior that defines their identity is illegal. However, South Africa is among the most aggressive nations in international commercial marketing of ART in general, and seeking the gay and lesbian couple ART trade in particular.<sup>98</sup>

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<sup>95</sup> See Sodomy Laws, *supra* note 88 (listing African nations where sodomy has been decriminalized).

<sup>96</sup> See Maguire, *supra* note 93, at 7–9.

<sup>97</sup> See Joshua Pantesco, *South Africa Parliament Set to Approve Same-sex Partnership Bill*, JURIST, Aug. 24, 2006, <http://jurist.law.pitt.edu/paperchase/2006/08/south-africa-parliament-set-to-approve.php>; UN Office for the Coordination of Humanitarian Affairs, *South Africa: Zuma Slammed for Views on Homosexuality, Same-sex Marriage*, IRINNEWS, Sept. 27, 2006, [http://www.irinnews.org/report.asp?ReportID=55741&SelectRegion=Southern\\_Africa&SelectCountry=SOUTH\\_AFRICA](http://www.irinnews.org/report.asp?ReportID=55741&SelectRegion=Southern_Africa&SelectCountry=SOUTH_AFRICA); Craig Timberg, *S. Africa's Top Court Blesses Gay Marriage*, WASH. POST, Dec. 2, 2005, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120100583.html>.

<sup>98</sup> For example, a recent law review article noted,

South Africa, like Romania, has sought to promote “fertility tourism” as a boon to its domestic economy by capitalizing on looser regulation for access to fertility services. Since the 1997 change in law permitting single woman access to donated sperm, South Africa has attempted to advertise a “gaybe (as opposed to baby) revolution.” The term “gaybe” was coined to express access to fertility services offered within South Africa to homosexual couples from other countries who are barred from enjoying such services in their local jurisdictions. Through advertisement of such services, South Africa is attempting to attract consumers by its lax restrictions, encouraging jurisdiction shopping. “Baby-on-Safari” is now an entry in South Africa’s official tourism guide, and perhaps an aid to those who would like to undermine discrimination against gays and lesbians in the provision of fertility services.

(continued)

*C. Public Opinion Behind the Varied Legal Policies*

In the United States there is a growing, vocal movement to legalize adoption by same-sex couples.<sup>99</sup> In opinion-setting sectors of society such as legal publications, support for adoption by lesbian couples, partners, or individuals is overwhelming (and the literature clearly reflects—or enhances—that bias).<sup>100</sup> For example, as Appendix I shows, a survey of law review articles, comments, notes, and essays published between January 2004 and December 2005 (two years inclusive) found a total of 157 pieces published, of which 102 (65%) clearly support lesbian adoption or custody; 25 (15.9%) oppose, criticize, or question pro-lesbian adoption and custody policies or rulings; and 30 (19.1%) are basically neutral.<sup>101</sup> Thus, the ratio of recently published pieces favoring lesbian adoption or custody to those opposing is over four-to-one.<sup>102</sup>

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June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 523–24 (2006) (citations omitted). “For the price of one I.V.F. cycle in the U.S.A. the patient can come to South Africa, have the treatment done . . . in Cape Town and have a lovely holiday at the same time and still take some cash home . . . .” Felicia R. Lee, *Driven by Costs, Fertility Clients Head Overseas*, N.Y. TIMES, Jan. 25, 2005, at A1 (quoting Dr. S. Sulaiman Heylen). It is not surprising that South Africa also has a very laissez-faire approach to, and quite loose regulation of, human cloning and stem cell research, as well. See generally Rosario M. Isasi, Bartha M. Knoppers, Peter A. Singer & Abdallah S. Daar, *Legal and Ethical Approaches to Stem Cell and Cloning Research: A Comparative Analysis of Policies in Latin America, Asia and Africa*, J. L. MED. & ETHICS 626, 629 (2004).

<sup>99</sup> Nicole M. Shkedi, Comment, *When Harry Met Lawrence: Allowing Gays and Lesbians to Adopt*, 35 SETON HALL L. REV. 873, 875 (2005). See generally National Center for Lesbian Rights, *Adoption by Lesbian, Gay and Bisexual Parents: An Overview of Current Law*, <http://www.nclrights.org/publications/pubs/adptn0204.pdf> (last visited Mar. 28, 2007).

<sup>100</sup> There is strong support for lesbian adoption and custody among legal intellectuals. For example, I did a survey of law review literature in 1997 and found that of ninety articles, comments, and notes published in American law reviews between 1990 and 1996 on the subject of adoption, custody, visitation, or parenting by same-sex couples, partners, or individuals, *all* of them were supportive of and *none* of them opposed adoptions by same-sex couples, partners, or individuals engaged in same-sex relations. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 836–40, app. A3 at 902–05. Today there are more articles, comments, notes and essays published that oppose or question same-sex adoption or custody, but a tremendous imbalance remains. See *infra* app. I.

<sup>101</sup> See *infra* app. I.

<sup>102</sup> See *infra* app. I.

Public opinion also seems to be, to some extent, moving toward support of gay adoptions.<sup>103</sup> Less than thirty years ago, there was very little support for adoptions by gay couples. For example, a 1977 Gallup poll reported that 77% of persons surveyed responded that homosexuals should not be allowed to adopt children, while only 14% favored such adoptions.<sup>104</sup> Yankelovich/CNN/Time surveys fifteen years later (in 1992) found support for legally permitting homosexual couples to adopt at only 29% (compared to 63% opposed), and in 1998, support for lesbigay adoption was still only 35% (compared to 57% opposed).<sup>105</sup> However, since the dawn of the twenty-first century, public opinion poll support for adoption by gay couples has increased. The PSRA/Newsweek poll for February 5–6, 2004, reported that 45% of Americans favored lesbigay adoption, compared to 47% who opposed lesbigay adoption.<sup>106</sup> A 2004 Harris poll reported that 33% of those surveyed favored allowing gay men to adopt, but 45% disapproved; while 36% supported allowing lesbians to adopt, with 43% opposing.<sup>107</sup> The Gallup poll conducted May 5–7, 2003, showed support for adoption by same-sex couples and partners was 49%, compared to 48% opposition.<sup>108</sup> While the numbers vary significantly—reflecting differences in how the questions are asked, the different populations being surveyed (age, geographic locale, other opinion-influencing characteristics), and timing (the numbers rise and fall as favorable and unfavorable publicity occurs)—some other public opinion surveys in the past five years report similar trends and results.<sup>109</sup>

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<sup>103</sup> This may reflect the bias and imbalance in the media coverage of the issue, including the imbalance in the legal literature.

<sup>104</sup> KARLYN BOWMAN, AMERICAN ENTERPRISE INSTITUTE, ATTITUDES ABOUT HOMOSEXUALITY 24 (2003), [http://www.aei.org/docLib/20030731\\_Homosexuality3.pdf](http://www.aei.org/docLib/20030731_Homosexuality3.pdf) (citing June 17–20, 1977 Gallup opinion survey).

<sup>105</sup> *Id.* (citing Yankelovich/CNN/Time opinion surveys of August 19–20, 1992, and of October 14–15, 1998).

<sup>106</sup> KARLYN H. BOWMAN, AMERICAN ENTERPRISE INSTITUTE, ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 41 (2006), [http://www.aei.org/publications/pubID.14882,filter.all/pub\\_detail.asp](http://www.aei.org/publications/pubID.14882,filter.all/pub_detail.asp) (citing PSRA/Newsweek opinion survey of February 5–6, 2004).

<sup>107</sup> *Id.* at 42 (citing 2004 Harris opinion survey).

<sup>108</sup> *Id.* (citing May 5–7, 2003 Gallup opinion survey); *see also* BOWMAN, *supra* note 104 (citing May 5–7, 2003 Gallup opinion survey).

<sup>109</sup> BOWMAN, *supra* note 104, at 24–25 (citing PSRA/Kaiser February 7–September 4, 2000 survey reporting 46% favoring and 47% opposing adoption rights for gay spouses; PSRA/Newsweek poll of April 25–26, 2002, finding 46% favoring and 44% opposing  
(continued)

By contrast, the Gallup organization's European Omnibus Survey (EOS) showed strikingly different results based on interviews with over 15,000 persons living in thirty European countries in January 2003.<sup>110</sup> The persons polled were grouped into three categories depending on whether they lived in Old Europe (the fifteen existing European Union (EU) countries including Austria, Belgium, Denmark, France, Germany, Italy, Netherlands, Sweden, United Kingdom, etc.), New Europe (the thirteen countries seeking to join the EU, including Bulgaria, Cyprus, Czech Republic, Latvia, Lithuania, Malta, Poland, Romania, Turkey, etc.), or Not-Aligned-with-EU nations of Europe (Norway and Switzerland).<sup>111</sup> The EOS reported that 55% of persons from the Old Europe nations *opposed* the authorization of adoption by homosexual couples throughout Europe, and only 42% *supported* it; 76% of those surveyed in the New Europe nations *opposed* legalization of adoption by same-sex couples, while only 17% supported it; and 59% and 51% of persons from the non-aligned nations of Norway and Switzerland, respectively, *opposed* such gay adoption.<sup>112</sup>

The data is even more interesting when examined more particularly. In only four of the thirty European countries surveyed (13%) did a majority of those polled favor legalization of adoption of children by same-sex

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adoption rights for gay spouses; ABC poll of March 27–31, 2002, finding 47% favoring and 42% opposing the statement “homosexual couples should be legally permitted to adopt children”; and Harris Interactive polls of January 6–10, 2000, reporting support for adoption by female and male couples at 22% and 21% respectively and opposition at 55% and 57% respectively). However, it is important to note that all of these public opinion surveys concerning adoption by same-sex couples were taken before the June 27, 2003, Supreme Court ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003). After the *Lawrence* decision there was a backlash (at least temporarily) in public opinion against homosexual relations, presumably including lesbigay adoptions. See Susan Page, *Americans Less Tolerant on Gay Issues: Poll Indicates Backlash*, USA TODAY, July 29, 2003, at 1A, available at [http://www.usatoday.com/news/washington/2003-07-28-poll\\_x.htm](http://www.usatoday.com/news/washington/2003-07-28-poll_x.htm); Susan Page, *Gay Rights Tough to Sharpen into Political ‘Wedge Issue’: Shifting Attitudes Highlight Risks for Both Parties*, USA TODAY, July 28, 2003, at 10A, available at [http://www.usatoday.com/news/washington/2003-07-27-gay-politics\\_x.htm](http://www.usatoday.com/news/washington/2003-07-27-gay-politics_x.htm).

<sup>110</sup> GALLUP EUROPE, THE EUROPEAN OMNIBUS SURVEY: HOMOSEXUAL MARRIAGE, CHILD ADOPTION BY HOMOSEXUAL COUPLES: IS THE PUBLIC READY? 1, available at [www.ilga-europe.org/content/download/3434/20938/file/GALLUP%20Europe%202003%20report.pdf](http://www.ilga-europe.org/content/download/3434/20938/file/GALLUP%20Europe%202003%20report.pdf) (last visited Mar. 28, 2007).

<sup>111</sup> See *id.* at 1, 8.

<sup>112</sup> *Id.* at 8.

couples.<sup>113</sup> But in twenty-six nations (including eleven of the fifteen nations of Old Europe, both of the non-EU nations, and all thirteen of the New Europe countries), at least 50% of the population (up to 87% in the case of Greece) opposed legalization of adoption by same-sex couples throughout Europe.<sup>114</sup>

The Hague Convention on Intercountry Adoption has been endorsed by sixty-nine nations.<sup>115</sup> The Hague Convention on Intercountry Adoption does not contain any provision that explicitly addresses lesbian/gay adoption.<sup>116</sup> However, some scholars have noted that the strong emphasis throughout the Convention is on protecting the welfare of children and is directed at preventing the placement of children in situations that create a danger of abuse of the children.<sup>117</sup> If the provisions are observed and enforced, “it is impossible for the prospective parents to ensure which child will be given to them for adoption, as the national authority must first consider the national prospective adoptive parents and national candidates.”<sup>118</sup> There is growing concern about “fertility tourism”—the phenomenon of persons (such as gays and lesbians) unable to use ART or to adopt in their home countries (or finding opportunities for adoption easier and greater abroad) going to other nations to adopt children or to obtain access to ART services.<sup>119</sup> The concern is the unregulated nature of that phenomenon.<sup>120</sup>

Another growing concern is the deliberate, calculated violation of laws restricting adoption by persons (including, prominently, gays and lesbians) ineligible to adopt in the foreign country.<sup>121</sup> This includes filing of false documents, deception of investigators and social workers, or even worse,

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<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> Hague Conference on Private International Law, Status Table 33, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Mar. 28, 2007) (stating number of contracting countries to the Convention as of August 31, 2006).

<sup>116</sup> *See* Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. No. 105-51 (1998), 1870 U.N.T.S. 167 (1995), available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=69](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=69).

<sup>117</sup> *See, e.g.,* Marques, *supra* note 57, at 89–90.

<sup>118</sup> *Id.* at 90; *see also* Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 323–24 (2005).

<sup>119</sup> *See* Storrow, *supra* note 118, at 324.

<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.,* Etelka Lehoczky, *Rough Going Overseas*, ADVOCATE, July 19, 2005, at 47–48.

conspiring with such professionals to violate or circumvent the laws and policies of the foreign nation with which the prospective adopters and their hand-picked social workers disagree. Violation of the Chinese law forbidding adoption by gays and lesbians is widespread and has been documented by gay journals promoting the practice.<sup>122</sup> That illegal practice was also noted in a recent case from Colorado. In *In re E.L.M.C.*,<sup>123</sup> a lesbian couple desired to adopt a child from China.<sup>124</sup> The social worker who performed the background check for the adoption told the couple that China would not allow adoptions by same-sex couples, so the adoption papers were made out in only one woman's name, Clark.<sup>125</sup> The couple traveled together to China to pick up the six-month-old child.<sup>126</sup> After Colorado recognized Clark's adoption of the child, the couple filed a joint "Petition for Custody" recognizing both of the women as co-parents and the district court awarded joint custody of the child to the women.<sup>127</sup> The child's name was legally changed to include both last names of the women.<sup>128</sup> About six years after the adoption, the women's relationship failed, and a dispute over parenting time arose.<sup>129</sup> The court of appeals upheld the trial court's allocation of equal parental responsibilities even though it recognized that only Clark was the legal mother of the child.<sup>130</sup>

### III. THREE POLICY VALUES IMPLICATED BY THE REGULATION OF ART AND LESBIGAY ADOPTION

#### *A. Two Fundamental Policy Values That Distinguish the United States from Most Other Nations: Individualism and Innovation*

Comparison of the regulation of ART and adoption by gays and lesbians in the United States with that in the rest of the world must take into account two distinctive qualities of Americans that strongly influence the way we approach these issues in this country. The first distinctive quality that distinguishes Americans and American law regarding ART from the cultural values common in the rest of the post-industrial world is

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<sup>122</sup> *See id.*

<sup>123</sup> 100 P.3d 546 (Colo. Ct. App. 2004).

<sup>124</sup> *Id.* at 548–49.

<sup>125</sup> *Id.* at 549.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 549–50.

<sup>128</sup> *Id.* at 550.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 555, 565.

the high value accorded to individualism, including freedom (preference for nonregulation) in medical research, clinical work, and access to medical services.<sup>131</sup> As one report recently noted (commenting on sperm donors for ART), “Other than a federal requirement to screen for a vast array of diseases such as HIV and cystic fibrosis, the donor industry is totally unregulated. . . . [T]here are no legal limits.”<sup>132</sup> Some commentators (especially those working in the ART industry) disagree. For example, the head of a fertility clinic in California, who also teaches as a clinical professor at medical schools, recently opined, “There is a widely held perception that ART is unregulated in the United States. This is entirely inaccurate, since we have more regulation than most countries.”<sup>133</sup> However, even this disagreement itself reflects the assumption of nonregulation that is so highly cherished by Americans, especially by American health care providers. Moreover, as noted above, the number of regulations misses the point because regulation in the United States tends to address narrow issues not general issues, and regulation of the practice of ART (as distinct from whether ART is covered by insurance schemes) is very limited in the United States.<sup>134</sup> As Professor John A. Robertson, the dean of biomedical ethics and law professors, has noted, “[T]he United States has taken a largely hands-off approach to IVF, leaving it to the private market of doctors and patients to decide what services will be offered, subject to the laws of torts and contracts and an optional clinic reporting system.”<sup>135</sup>

“The ideals of autonomy and independence run deep in American culture.”<sup>136</sup> For that and other reasons, not only is there less internal direct regulation of the practice of ART in the United States than in most other countries, but “[t]he United States has generally been more reluctant than most other industrialized countries to enter into the kind of treaties that affect family law, biomedicine, and human rights.”<sup>137</sup> Thus, strong preference for independence in medical research, medical treatment, and patient ability to choose and obtain medical services he or she desires is a

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<sup>131</sup> See Schneider & Wardle, *supra* note 57, at 55–56, 58.

<sup>132</sup> Betsy Streisand, *Who's Your Daddy?*, U.S. NEWS & WORLD REP., Feb. 13, 2006, at 53, 55.

<sup>133</sup> Adamson, *supra* note 2, at 727–28.

<sup>134</sup> See *supra* Part II.A.

<sup>135</sup> John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT'L L. 189, 203 (2004).

<sup>136</sup> Schneider & Wardle, *supra* note 57, at 58.

<sup>137</sup> *Id.* at 62.

powerful cultural value that shapes the regulation of ART in the United States and distinguishes it from the regulation of ART in other countries.

In the context of adoption, this independence value is expressed in the powerful tradition of respect for parental autonomy in childrearing, now enshrined in a long line of Supreme Court parents' rights decisions.<sup>138</sup> This parental rights tradition probably explains why so many states allow lesbian adoption and why opposition to lesbian adoption has not led to the eruption of laws forbidding it, as compared to the eruption of laws (in at least forty-four states) and constitutional amendments (in twenty-seven states) forbidding same-sex marriage.<sup>139</sup>

Thus, one difference between European and American attitudes about same-sex families is that European countries are more liberal about

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<sup>138</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (declaring unconstitutional as applied a Washington state child visitation statute that gave courts broad discretion to award visitation with any party over the objection of the fit custodial parent); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899 (1992) (upholding Pennsylvania parental consent requirement for abortions done on minors); *Hodgson v. Minnesota*, 497 U.S. 417, 423 (1990) (declaring unconstitutional the two parent notice requirement for those under eighteen seeking an abortion); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (vacating New York termination of parental rights order and holding that Constitution requires at least clear and convincing evidence for termination of parental rights); *H.L. v. Matheson*, 450 U.S. 398, 407, 413 (1981) (upholding pre-abortion parental consent “if possible” requirement); *Parham v. J.R.*, 442 U.S. 584, 604, 620–21 (1979) (finding constitutional a Georgia statute allowing parents to voluntarily commit a minor child to a psychiatric facility); *Quilloin v. Walcott*, 434 U.S. 246, 247–49, 256 (1978) (upholding a Georgia statute allowing step-parent adoption without approval of inactive biological father); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (overturning conviction of Amish parent for not sending son to school after age fourteen); *Stanley v. Illinois*, 405 U.S. 645, 658 (1971) (holding father of children born out of wedlock is constitutionally entitled to fitness hearing before children are taken by the state after mother dies); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (upholding conviction of aunt/guardian for violating Massachusetts child labor law for allowing nine-year-old niece to sell religious literature with her on public sidewalks); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 534–36 (1925) (invalidating Oregon compulsory public school law for interfering with parental rights); *Meyer v. Nebraska*, 262 U.S. 390, 400, 403 (1923) (overturning on basis of parental rights conviction of teacher for violating law prohibiting teaching foreign languages before eighth grade).

<sup>139</sup> See *supra* notes 50–56 and accompanying text; Nat’l Conference of State Legislatures, *Same Sex Marriage* (Jan. 2007), <http://www.ncsl.org/programs/cyf/samesex.htm>. See generally Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 FLA. COASTAL L. REV. 403, 403–04 (2005).

permitting and giving equal legal recognition to many forms of adult consenting relations, but when it comes to children, Europe (including the liberal Scandinavian countries) generally has more “conservative” regulation in the interests of children than America.<sup>140</sup> The EOS survey noted above partially validates that cultural dichotomy because it shows overwhelming opposition to legalizing adoption by homosexual couples in Europe, compared to the widespread (albeit possibly thin) support for gay couples adopting in the United States.<sup>141</sup>

Second, a strong preference for incremental development of regulations (rather than a desire for comprehensive regulations) in areas where there is the potential for beneficial development or invention, characterizes American medical regulation generally and the regulation of biomedicine in particular.<sup>142</sup> “[I]nnovation and progress are commonly valued more than conformity,”<sup>143</sup> and “public policy tends to develop case by case rather than through the early establishment of general pre-emptive regulations.”<sup>144</sup>

The recent recommendations from the President’s Council on Bioethics about regulation of ART provide a case in point. Despite finding significant gaps, lapses, and problems in the legal regulation of ART, the Council pointedly refrained from recommending any broad or “sweeping

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<sup>140</sup> Compare *supra* note 139 and accompanying text, with *supra* notes 110–14 and accompanying text.

<sup>141</sup> See Gallup Europe, *supra* note 110. Support for same-sex marriage was stronger in Europe, but showed the same difference between Old Europe and New Europe. *Id.* at 2. On the question of whether homosexual marriage should be allowed throughout Europe, the fifteen affluent nations of Old Europe strongly were in favor, 57% to 39% opposed; both of the nonaligned nations (also very affluent, postindustrial countries) were even more supportive (65% and 66% to 31%). *Id.* The New Europe nations, however, were more strongly *opposed* to same-sex marriage (70% to 23%). *Id.* A majority of those polled in nine of the fifteen nations of Old Europe favored European same-sex marriage, and in only three of those nations (Greece, Portugal, and Italy) did the majority oppose legalization. *Id.* Nearly two-thirds of those surveyed in both nonaligned nations favored legalizing same-sex marriage. See *id.* In twelve of the thirteen nations of New Europe, majorities opposed legalization of same-sex marriage. *Id.* Thus, of the total of thirty European nations surveyed, majorities in a majority—fifteen—of those nations oppose European legalization of same-sex marriage, but majorities in only eleven nations favor legalization of same-sex marriage. See *id.*

<sup>142</sup> See Schneider & Wardle, *supra* note 57, at 64.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

institutional reform or innovation” in legal regulation.<sup>145</sup> Rather, they suggested only improvements in data collection, self-regulation, and a few specific legislative proposals.<sup>146</sup> The legislative recommendations underscore the point made earlier—that federal (and state) regulation tends to focus on specific issues, responding to perceived threats or abuses rather than attempting comprehensive, inclusive, uniform, or thorough schemes or regulation of the field, area, practice, or discipline. Thus, the President’s Council proposed only nine specific legislative initiatives, such as to ban selling human embryos, bar patenting human embryos or fetuses, restricting experimentation on human embryos to the age of fourteen days, and prohibiting putting human embryos into the wombs of other animals.<sup>147</sup> No call for massive federal or state regulation was issued; to the contrary, the Council’s report acknowledged the incomplete nature of the data and cautiously recommended only a small number of “modest measures to alleviate some clear and significant present problems, including especially the lack of information on certain key practices and their consequences.”<sup>148</sup>

*B. One Fundamental Policy Value That Should Remain Constant Across Cultures: Priority for Protection of Children*

Not long ago, a fifteen-year-old boy whose single mother conceived him by ART (artificial insemination using anonymous donor sperm)

shocked the donor world . . . when he tracked down his biological father by using a DNA sample and one of several genetic databases on the Internet. The boy sent a swab of his cheek to Family Tree DNA, a privately owned registry of more than 45,000 DNA samples, to see if his Y chromosome . . . matched anyone on file. Several months later he was contacted by two men whose [samples] were a close match for his. The teenager then went to *OmniTrace.com* and used his donor’s birth date and birthplace (which his mother had obtained from the sperm bank . . .) to buy the name of every person born in the donor’s birthplace on that day. One man had the same last

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<sup>145</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at xlv.

<sup>146</sup> *Id.* at xlv, 206.

<sup>147</sup> *Id.* at xlvii–xlix.

<sup>148</sup> *Id.* at xlv.

name as one of the two from the DNA registry. The boy contacted him.<sup>149</sup>

As the President's Council on Bioethics noted in its landmark 2004 report, "[T]he health and well-being of the human subjects [are] directly affected by the [assisted reproduction technologies], not only the individuals or couples seeking their use but also and especially the children who may be born with their aid."<sup>150</sup> They spoke of "the necessity to protect the freedom of children from improper attempts to manipulate their lives through control of their genetic make-up or from unreasonable expectations that could accompany such manipulations."<sup>151</sup> They spoke of the need to protect "human dignity, including the dignity of the human body and its parts, the dignity of important human relationships (parent and child, one generation and the next), and the humanity of human procreation."<sup>152</sup>

Similar concerns for children underlie the recent Report on the Family and the Rights of Children of the French National Assembly.<sup>153</sup> The Report emphasized, "The best interests of the child must prevail over adults' [freedoms] . . . including when the child's rights conflict with the parents' lifestyle choices."<sup>154</sup> The French National Assembly Report rejected adoption by unmarried persons and by gays and lesbians because the purpose of adoption is to provide a family for the child, not a child for the adults, because of the need for familial continuity and analogy, and because given the trauma of parentlessness, the adopted child requires the judicial and emotional security that only married parents can provide.<sup>155</sup> The French Report also rejected use of ART by single women and same-sex couples.<sup>156</sup>

It is just a matter of time before the fascination with the novelty of adult procreative possibilities using ART and the emphasis on adult personal fulfillment that dominates the interest, activity, and discourse

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<sup>149</sup> Streisand, *supra* note 132, at 54–55.

<sup>150</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 4.

<sup>151</sup> *Id.* at 5.

<sup>152</sup> *Id.*

<sup>153</sup> PARLIAMENTARY REPORT, *supra* note 61, at 6.

<sup>154</sup> *Id.* at 9.

<sup>155</sup> *Id.* at 7.

<sup>156</sup> *Id.* at 8.

today is overcome by concern for the welfare of children.<sup>157</sup> As the former Chairman of the President's Council on Bioethics (and current Director of the Center for Bioethics at the University of Pennsylvania) put it, "I have no doubt that children's interests will dominate, and the courts will break down the walls of privacy just as they did in adoptions."<sup>158</sup> Both children and responsible parents would have it no other way. Children conceived through ART and their parents wonder who the child's father is, "and what was lurking in his DNA that might be hiding in" the child's DNA.<sup>159</sup> The operator of a website that helps donor children, half siblings, and donors find each other stated, "When are the policies going to be based on the best interests of [the] people being born, and their right[s] . . ."<sup>160</sup> One of the recommendations of the President's Council was for professional self-regulation to "[t]reat the child born with the aid of assisted reproductive procedures *as a patient*."<sup>161</sup>

Concern for children as *children* requires us to prefer childrearing by a mother and a father whenever possible. "[A] committed, loving relationship facilitates childrearing. The burdens of providing income and childcare are lighter if two responsible adults share them. Children also benefit, both economically and emotionally, from stable, high-quality family relationships."<sup>162</sup> Dr. Daily wrote,

The complementary aspects of parenting that mothers and fathers contribute to the rearing of children are rooted in the innate differences of the two sexes, and can no more be arbitrarily substituted than can the very nature of male and female. Accusations of sexism and homophobia notwithstanding, along with attempts to deny the

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<sup>157</sup> For example, Dr. Adamson emphasizes, in his very informative and helpful article, three groups of interests that should have a voice in shaping the regulation of ART: the providers (listing many providers organizations), the patients (listing a couple of patient organizations and payors), and the public (listing various government agencies). Adamson, *supra* note 2, at 742. Left out were the children—the "products" of ART, the human lives created (and possibly erased or impaired) by the processes and results of ART.

<sup>158</sup> Streisand, *supra* note 132, at 54.

<sup>159</sup> *Id.* at 53.

<sup>160</sup> *Id.* at 55–56 (citing Wendy Kramer, operator of *donorsiblingregistry.com*, that has in just three years made more than 1,300 matches between donor siblings and donors and their children, commenting on the child's right to know).

<sup>161</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at xlvii (emphasis added).

<sup>162</sup> Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 165, 169 (2006).

importance of both mothers and fathers in the rearing of children, the oldest family structure of all turns out to be the best.<sup>163</sup>

Rutgers Professor Dr. David Popenoe has noted that there are few bodies of social science research where the evidence is so abundant or so clear as that showing that homes with a married father and mother provide the best environment for raising children.<sup>164</sup> Likewise, former Brigham Young University Law School Dean Bruce C. Hafen noted, “The most important causal factor of [recent declines in American] child well-being is the remarkable collapse of marriage, leading to growing family instability and decreasing parental investment in children.”<sup>165</sup> And University of Chicago demographer Linda Waite<sup>166</sup> wrote, “On average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings. Children with married parents are also more likely to escape some of the more common disasters of late-twentieth-century childhood and adolescence.”<sup>167</sup>

Somehow, we have slipped without thinking into practices involving the questionable use of ART to create children who are deliberately

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<sup>163</sup> Timothy J. Daily, *Homosexual Parenting: Placing Children at Risk*, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=IS01J3> (last visited Mar. 29, 2007).

<sup>164</sup> DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 8 (1996) (“Whatever the basis for children’s primal desire for a father and a mother, the weight of social science evidence strongly supports the rationality of their wish. In my many years as a functioning social scientist, I know of few other bodies of evidence whose weight leans so much in one direction as does the evidence about family structure: On the whole, two parents—a father and a mother—are better for the child than one parent.” (citation omitted)); see also David Popenoe, Op.-Ed., *The Controversial Truth: Two Parent Families Are Better*, N.Y. TIMES, Dec. 26, 1992, at 21.

<sup>165</sup> Bruce C. Hafen, *Bridle Your Passions: How Modern Law Can Protect the Family*, *Address to the World Congress of Families (Mar. 22, 1997)*, in 63 VITAL SPEECHES OF THE DAY 633, 635 (1997) (quoting Jean Elshtain and David Popenoe) (second alteration in original).

<sup>166</sup> Department of Sociology, The University of Chicago, Faculty Information Page, <http://sociology.uchicago.edu/faculty/waite.html> (last visited Mar. 29, 2007).

<sup>167</sup> LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 124 (2000). See generally Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 497–98 (1995) (discounting the theory that selectivity, rather than marriage, is responsible for all the positive benefits of marriage).

intended to be raised without the child's knowledge of or parental contact with his or her parent of one sex by allowing single women and men and same-sex couples to "procreate" by use of ART. Depriving a child of contact with one of his or her parents is a *very* serious and *very* disturbing practice punished or prohibited in almost all other contexts. Depriving a child of contact with one of his or her parents is *very* harmful to children, and such behavior is taken *very* seriously in American (and international) family law in many ways.<sup>168</sup> For example, if a child is born out of wedlock or if parents divorce when a child is an infant, the law still seeks to foster, protect, and promote the relationships between the child and his or her noncustodial parent by many presumptions, policies, and programs including joint-custody presumptions and preferences in effect in over forty states,<sup>169</sup> various presumptions in favor of parent-child contact, and

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<sup>168</sup> Monica K. Miller, *Through the Eyes of a Father: How PRWORA Affects Non-Resident Fathers and Their Children*, 20 INT'L J.L. POL'Y & FAM. 55, 60 (2006) ("Critics feel that neglecting fathers' access to their children is a major weakness in the system. Since father involvement has important impact on children's educational and economic attainment, delinquent behaviour and psychological well-being, development of programmes that increase parent-child visitations may benefit children." (citation omitted)).

<sup>169</sup> Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 337-38 (2005) ("In the area of custody, one of the first developments of this kind was the introduction of the concept of joint custody. The first joint custody statute was passed in 1979 in California, and most states eventually followed suit, either by joint custody statutes or through case law. While many scholars have critiqued the implementation of joint custody statutes, the enactment of such statutes reflects a legal recognition of fathers' roles as caretakers of their children." (citations omitted)) [hereinafter *Legal Images*]; *Id.* at 337 n.59 (listing forty-one states that permit joint custody and twelve states and the District of Columbia which have a presumption in favor of joint custody); Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint-Custody Presumption*, 35 WILLAMETTE L. REV. 601, 602-03 (1999) ("A presumption of joint custody, on the other hand, encourages both parents to initiate and continue parenting roles that help their children develop into healthy, stable, and happy adults. . . . [C]ourts should begin with the presumption that children and parents benefit most when both father and mother maintain physical, decisional, and authoritative presences while raising their children. Joint legal custody allows a father the opportunity to make important decisions regarding his children's daily lives, thereby fulfilling the father's need to remain involved in the children's lives while also enhancing the father-child bond. In addition, joint physical custody, when practical, prevents fathers from evolving into distant voices on the telephone or stereotypical weekend-activity planners. Joint custody may also increase fathers' compliance with child support orders. Joint legal and physical custody benefits mothers in several ways as well. By sharing child  
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centers designed and agencies set up to facilitate child-other-parent contact, even if the parents cannot get along.<sup>170</sup> Non-custodial-parent-and child-contact programs and policies are an integral part of the theory behind “parenting plan” policies and laws (in effect in nearly half of the states).<sup>171</sup> American custody law says to parents: if you do not want to have contact with each other, that is fine; but it is very important that the child and the other parent have the opportunity to develop a parental relationship, and neither of you incompatible parents has the right to

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care responsibilities with fathers, mothers can foster their own independence by working outside the home, advancing their education, and developing personal relationships.” (citations omitted); Brian J. Melton, Note, *Solomon’s Wisdom or Solomon’s Wisdom Lost: Child Custody in North Dakota—A Presumption That Joint Custody is in the Best Interests of the Child in Custody Disputes*, 73 NOTRE DAME L. REV. 263, 274 n.68 (1997) (“[J]oint custody provides the child with [the] love, attention, training, and influence of both parents.” (quoting David Miller, *Joint Custody*, 13 FAM. L.Q. 345, 362 (1979))); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 & n.2 (1984) (noting and critiquing the substantial body of literature favoring joint custody and the accelerating movement for joint custody presumption laws).

<sup>170</sup> Most major and many minor cities in most states have programs and agencies designed to provide a safe and neutral ground for transfer from custodial parent to visiting parent and to provide supervised visitation, even when there is a high-conflict relationship between the parents. I served as volunteer President of such an agency in Provo, Utah (population about 100,000), called the Family Support Center. See, e.g., Supervised Visitation Network, About SVN, <http://www.svnetwork.net/AboutSVN.html> (last visited Mar. 29, 2007); Lamoille Family Center, Supervised Child Access Program in Morrisville, Vermont, [http://www.visitationcoop.org/VT\\_Centers/Lamoille\\_Family\\_Center/lamoille\\_family\\_center.html](http://www.visitationcoop.org/VT_Centers/Lamoille_Family_Center/lamoille_family_center.html) (last visited Mar. 29, 2007); Maryland Judiciary, Family Services Program of the Circuit Court for Caroline County, <http://www.courts.state.md.us/family/caroline.html> (last visited Mar. 29, 2007). The Australian government has recently instituted a very sophisticated program of Family Resource Centres designed for, inter alia, this purpose. See Patrick Parkinson, *The Law of Postseparation Parenting in Australia*, 39 FAM. L.Q. 507, 513–14 (2005); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 216–21 (2006).

<sup>171</sup> See, e.g., *Legal Images*, *supra* note 169, at 338–39 (“Another development over the last decade that has promoted involvement of fathers in children’s lives when parents live apart is the growing use of court-ordered ‘parenting classes’ in custody cases. ‘Parenting plans’ emphasize the importance of both parents in caretaking of children by requiring the parties to delineate each parent’s responsibilities for the care of the children and decisions about education, health care, and discipline. About thirteen states currently require parties to submit proposed parenting plans prior to a grant of custody. Another nine states and the District of Columbia have statutes that give judges discretion to require parenting plans in custody cases.” (citations omitted)).

deprive the child of that. That policy is reflected in a variety of laws, from laws about standing, paternity, visitation, child support, and interstate jurisdiction, to policies governing custodial parent relocation out of state and with agencies and services designed to encourage, protect, and facilitate visitation, even if the parents do not get along with each other.<sup>172</sup> If the custodial parent interferes with visitation by the noncustodial parent, or vice versa, that is taken very seriously, and courts may even switch which parent has custody to ensure that the child is allowed to have a parental relationship with the other parent.<sup>173</sup> Various tort claims have been recognized to provide relief against the parent interfering with the other parent's parent-child relationship.<sup>174</sup> Courts can and sometimes do

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<sup>172</sup> See *supra* notes 168–71 and accompanying text. See generally *Legal Images*, *supra* note 169, at 335–41 (discussing the expansion of rights for legal fathers, joint custody laws, and parenting plans).

<sup>173</sup> Many jurisdictions conclude that interference with visitation is grounds for a change of custody. Edward B. Borris, *Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody*, 8 *DIVORCE LITIG.* 1, 1–2 (1997) (reviewing cases and finding that most states consider interference with visitation appropriate grounds for a change in primary custody); see, e.g., IOWA CODE ANN. § 598.41(1)(c) (West 2001) (“[T]he denial by one parent of the child’s opportunity for maximum continuing contact with the other parent, without just cause, [shall be considered] a significant factor in determining the proper custody arrangement.”); KAN. STAT. ANN. § 60-1616(e) (2005) (“Repeated unreasonable denial of or interference with visitation rights . . . may be considered a material change of circumstances which justifies modification of a prior order of legal custody . . . .”); MINN. STAT. ANN. § 518.18(c) (West 2006) (“The time limitations prescribed [in other subsections] shall not prohibit a motion to modify a custody order or parenting plan if the court finds that there is persistent and willful denial or interference with parenting time . . . .”); MONT. CODE ANN. § 40-4-219(1) (2005) (allowing the court to consider whether one parent has willfully and consistently frustrated contact between the child and the other parent in determining whether to modify a parenting plan); WASH. REV. CODE ANN. § 26.09.260(2)(d), (3) (West 2005) (stating the court can modify a parenting plan or custody decree only if the nonmoving party has been found in contempt of court at least twice in the past three years for failing to comply with residential time provisions in the parenting plan or has been convicted of custodial interference in the first or second degree).

<sup>174</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 700 (1977) (“One who . . . otherwise compels or induces a minor child to leave a parent legally entitled to its custody . . . is subject to liability to the parent.”); Jesse E. Weisshaar, Note, *Does Loss of Custody of a Child Resulting from Attorney Negligence Cause Damage?*, 70 *MO. L. REV.* 1333, 1351 (2005); Celia Guzaldo Gamrath, *Visitation Abuse v. Unlawful Visitation Interference—Is There Comfort for Noncustodial Parents?*, 91 *ILL. B.J.* 450, 450 (2003); Linda L. Berger, (continued)

impose contempt sanctions for interference with visitation or custody.<sup>175</sup> Similarly, if the noncustodial parent interferes with custody or visitation by keeping the children longer than allowed or absconding with the child, the law takes those behaviors very seriously, and criminal prosecution may result because our laws recognize how important it is for the child to have the opportunity to develop a parental relationship with both of his or her parents.<sup>176</sup> That concern about parents depriving children of a relationship with the other parent was, of course, a major part of the motivation behind enactment of the federal Parental Kidnapping Prevention Act of 1980

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*Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deciet that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 508 (2000); Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIMONIAL LAW. 271, 275, 278 (1994); William L. Hill, Note, *Tort Recovery for Internal Interference with Visitation Rights: A Necessary Alternative*, 32 U. LOUISVILLE J. FAM. L. 657, 657–58 (1993–1994); *Recent Case: Family Law—Child Support Orders—Court May Terminate Child Support Order If Custodial Parent Intentionally Interferes With Visitation Rights—In re Marriage of Boundreaux*, 201 Cal. App. 3d 447, 247 Cal. Rptr 234 (6th Dist. 1988), 102 HARV. L. REV. 920, 920 (1989); Eve Kahao Gonzalez, Note, *Intentional Interference With Visitation Rights: Is This a Tort?: Owens v. Owens*, 47 LA. L. REV. 217, 221–23 (1986).

<sup>175</sup> E.g., Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 981 & n.300 (2005) (“Sanctions imposed to punish violation of a family court’s visitation orders can include fines, forfeiture of child support, and sometimes incarceration.” (citing JEFFERY M. LEVING, FATHERS’ RIGHTS: HARD-HITTING & FAIR ADVICE FOR EVERY FATHER INVOLVED IN A CUSTODY DISPUTE 7 (1997))); MO. ANN. STAT. § 452.400.7 (West 2003) (providing for application of court’s powers of contempt when a parent interferes with custody or visitation); *Morgan v. Foretich*, 528 A.2d 425, 428–29 (D.C. 1987) (upholding a judgment of civil contempt when the mother refused to comply with a visitation order); *Smith v. Smith*, 434 N.E.2d 749, 753 (Ohio Ct. App. 1980) (affirming as not grossly excessive a five-day civil contempt sentence against a mother for interfering with visitation).

<sup>176</sup> See, e.g., FLA. STAT. ANN. § 787.03 (West 2000) (interfering with custody is a felony offense); GA. CODE ANN. § 16-5-45 (2003) (making custodial interference a criminal offense); 720 ILL. COMP. STAT. ANN. 5/10-5(d) (West 2002) (stating child abduction is a felony offense); IND. CODE ANN. § 35-42-3-4 (West 2004) (criminalizing violations of custody orders by hiding, kidnapping, or taking a child out of state); VA. CODE ANN. § 18.2-49.1(B) (2004) (making willful violations of custody and visitation orders a class III misdemeanor and the second conviction within twenty-four months a class I misdemeanor); see also MODEL PENAL CODE § 212.4 (2001). See generally Nancy Levit, *Matrimonial Torts and Crimes: An Annotated Bibliography*, 19 J. AM. ACAD. MATRIMONIAL LAW. 117, 181 (2004) (discussing articles on matrimonial torts, including interference with custody and child abduction, from 1995–2000).

(PKPA)<sup>177</sup> and the many iterations of the Uniform Child Custody Jurisdiction (and Enforcement) Act, adopted in one form or another by every state.<sup>178</sup> “Currently, almost every state criminally forbids custodial interference by parents or relatives of the child.”<sup>179</sup> If one parent attempts to alienate the child from the other parent, courts respond very powerfully, sometimes modifying or removing custody.<sup>180</sup> Unilateral efforts by one parent to deprive a child of a relationship with the other parent are clearly against public policy in every American state. So serious is our concern about depriving the child of the chance to develop a filial relationship with the other parent, if a parent crosses state lines, federal criminal and civil laws as well as many state laws may come into play.<sup>181</sup> The federal PKPA

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<sup>177</sup> Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3568 (codified as amended at 28 U.S.C. § 1738A (2000)).

<sup>178</sup> Uniform Law Commissioners, A Few Facts About the Uniform Child Custody Jurisdiction & Enforcement Act, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uccjea.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp) (last visited Mar. 29, 2007). At one time the Uniform Child Custody and Jurisdiction Act (UCCJA) was in effect in fifty-two American jurisdictions. *See id.* It was recently updated, revised, and renamed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is currently in effect in forty-five jurisdictions. *Id.*

<sup>179</sup> Catherine F. Klein, Leslye E. Orloff & Hema Sarangapani, *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines With Their Children*, 39 FAM. L.Q. 109, 117 (2005). *See generally* Susan Kreston, *Prosecuting Parental Kidnapping*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 533, 533 (2001) (“Parental kidnapping is a crime, recognized as such in the United States by every state, the District of Columbia, and the federal government.”)

<sup>180</sup> *See* Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents with “Rights of Access” Get No Rights to Access Courts, 30 BROOK. J. INT’L L. 641, 678 (2005) (“it is enough [for contempt] to engage in behavior that undermines or alienates a child’s relationship with his or her noncustodial parent”). *See generally* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001) (reviewing cases and critiquing diagnostic theory of parental alienation syndrome); Andrew Schepard, *Editorial Notes*, 42 FAM. CT. REV. 607, 608 (2004) (noting recent debate over validity of diagnosis of parental alienation syndrome).

<sup>181</sup> *See, e.g.*, Klein et al., *supra* note 179, at 112 (noting that the UCCJA, the UCCJEA, the federal PKPA, state criminal custody or visitation interference laws, and state civil custody or visitation interference statutes may all be implicated); Kreston, *supra* note 179, at 537–40 (describing role of the Federal Bureau of Investigation in responding to domestic parental kidnapping and the role of the Office of Children’s Issues of the Department of State in dealing with international parental kidnapping).

denies interstate full faith and credit recognition to custody decrees obtained by a parent who has abducted his or her child to another state.<sup>182</sup> Congress also amended the Fugitive Felon Act<sup>183</sup> to make it applicable to parents who abduct or retain their children in violation of state law<sup>184</sup> and extended the Federal Parent Locator Service to abducted children.<sup>185</sup> Congress additionally enacted the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act),<sup>186</sup> which establishes criminal liability for attempting to remove a child from the United States with the intent to interfere with another person's legal custody of the child.<sup>187</sup> Internationally, many nations (including the United States) have adopted the Hague Convention on the Civil Aspects of International Child Abduction,<sup>188</sup> designed to deter or remedy the wrongful removal by one parent of children from the place where they have resided with the other parent.<sup>189</sup> Article 7 of the Convention on the Rights of the Child (CRC) specifically recognizes the right of every child, "as far as possible, . . . to know and be cared for by his or her parents."<sup>190</sup> Article 8 of the Convention further protects "the right of

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<sup>182</sup> 28 U.S.C. § 1738A (2000).

<sup>183</sup> Ch. 271, 47 Stat. 326 (1932) (no currently effective sections).

<sup>184</sup> 18 U.S.C. § 1073 (2000).

<sup>185</sup> 42 U.S.C. § 663(a) (2000).

<sup>186</sup> Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in 18, 28, and 42 U.S.C.).

<sup>187</sup> 18 U.S.C. § 1204 (Supp. III 2003).

<sup>188</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 97; U.S. Dep't of State, 2004 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, [http://travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_568.html](http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html) (last visited Mar. 29, 2007). As of July 1, 2006, seventy-six countries had acceded to the Convention. Hague Conference on Private International Law, Status Table 28, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 29, 2007); see Kreston, *supra* note 179, at 543-45 (describing Hague Convention procedures for responding to international parental kidnapping).

<sup>189</sup> The federal implementing legislation governs proceedings in the United States for return of the child in accordance with a foreign custody decree of any signatory country. 42 U.S.C. §§ 11601-10; see, e.g., Deborah M. Zawadzki, Note, *The Role of Courts in Preventing International Child Abduction*, 13 CARDOZO J. INT'L & COMP. L. 353 (2005).

<sup>190</sup> Convention on the Rights of the Child, G.A. Res. 44/25, at 166, 168, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), *reprinted in* 28 I.L.M. 1456 (1989), *available at* <http://www.ohchr.org/english/law/pdf/crc.pdf>. Of course, the United States, one of the few nations to treat such treaties as "hard law" as distinct from merely aspiration and hortatory, has not acceded to the CRC. See Office of the United Nations High Commissioner for

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the child to preserve his or her identity, . . . including family relations.”<sup>191</sup> Article 16 of the CRC also guarantees to children “the right to the protection of the law” against any “arbitrary or unlawful interference with his or her privacy, family, [or] home.”<sup>192</sup> Likewise, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides explicit protection of “private . . . family life,”<sup>193</sup> which has been interpreted to include the right of children to know their family origins and identity.<sup>194</sup> All these, and many other state, federal, and international laws emphasize the message of the importance of preserving the right of the child to grow up and develop a sound parental relationship with both his or her mother and father.

Yet in the context of ART, we seem to have forgotten all of this, and when a single woman or single man or a same-sex couple seeks to obtain a child by ART, we only ask: can we do it technically (is it possible medically, physically, and financially)? If we can do it, we think no

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Human Rights, Convention on the Rights of the Child, New York, <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited Mar. 29, 2007) (listing that the United States has not acceded to the CRC as of November 1, 2006).

<sup>191</sup> G.A. Res. 44/25, *supra* note 190, at 168.

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

<sup>193</sup> “Everyone has the right to respect for his private and family life, his home and his correspondence.” The European Convention for the Protection of Human Rights and Fundamental Freedoms, Section I, Art. 8 (Nov. 4, 1950), <http://www.hri.org/docs/ECHR50.html>.

<sup>194</sup> See Jacqueline A. Laing & David S. Oderberg, *Artificial Reproduction, the ‘Welfare Principle’, and the Common Good*, 13 MED. L. REV. 328, 339 & n.28 (2005). But see Ya’ir Ronen, *Redefining the Child’s Right to Identity*, 18 INT’L J.L. POL’Y & FAM. 147, 159–60 (2004); David D. Meyer, *The Modest Promise of Children’s Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1135 (2003). A similar proscription of arbitrary or unlawful interference with privacy, family, or home (to the ICHR) is contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). G.A. Res. 2200, at 52, 55, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force March 23, 1976), available at <http://www.ohchr.org/english/law/pdf/ccpr.pdf>. One hundred forty-eight nations, including the United States, have acceded to the ICCPR. See Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Mar. 29, 2007) (listing the ratification status of the ICCPR as of November 1, 2006). See generally D. Marianne Blair, *The Influence of International Conventions on Municipal Adoption Law: The Disclosure Debate*, 96 AM. SOC. INT’L L. PROCEEDINGS 193, 195 (2002) (acknowledging the recognition and importance that European courts have placed on the right to identifying information).

further. Thus, our laws are schizophrenic. Where we go to great lengths to protect the child's right to a filial relationship with both parents in all other conceivable circumstances, we simply ignore that right and that need of children in the ART context.

The yearning of children to know about, to connect to, and to have a real relationship with their parents and progenitors is very real and very important to the development, identity, happiness, and well-being of children (including many adult children).<sup>195</sup> The search by many adopted children for their biological parents is just one manifestation of that. Alex Haley's *Roots* raised the consciousness of the importance of family connection, progeny, history, and legacy for an entire generation.<sup>196</sup> One of the bitter, terrible incidents of slavery was the disconnection of children from their families, or at least half of their parents, and the loss of family history and heritage for the enslaved. The Thirteenth Amendment outlawed not only slavery, but also the "badges" and "incidents" of slavery,<sup>197</sup> including the deprivation of parental relationships and ancestral heritage.<sup>198</sup> The use of ART to create children that will be deprived of association and relationship with their other parent imposes a modern scientific version of one of the badges of slavery for those children.<sup>199</sup>

#### IV. CONCLUSION: REGULATING ART AND PARTNER ADOPTION TO PROTECT THE WELL-BEING OF CHILDREN

A few years ago, a deaf, lesbian woman, Dr. Candace A. McCullough, and her deaf, lesbian partner intentionally used sperm from a deaf donor to create two deaf children, which she considered desirable because "deafness [is] an identity, not a disability."<sup>200</sup> That incident crystallizes

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<sup>195</sup> See, e.g., *supra* note 149 and accompanying text.

<sup>196</sup> ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* (Gramercy Books 2000) (1976); see also James A. Hijiya, *Roots: Family and Ethnicity in the 1970's*, 30 AM. Q. 548, 549-50, 553 (1978) (identity is created by ancestry).

<sup>197</sup> See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Memphis v. Greene*, 451 U.S. 100 (1981); *Palmer v. Thompson*, 403 U.S. 217 (1971).

<sup>198</sup> See E. Wayne Carp, Book Review Essay, *Adoption, Blood Kinship, Stigma, and the Adoption Reform Movement: A Historical Perspective*, 36 L. & SOC'Y REV. 433, 443-44 (2002); Wendy L. Weiss, Note, *Ohio House Bill 419: Increased Openness in Adoption Records Law*, 45 CLEV. ST. L. REV. 101, 105-06 (1997).

<sup>199</sup> See Carp, *supra* note 198, at 444.

<sup>200</sup> David Kupelian, *U.S. Psychologist Group Following "Gay Activists"*, WORLDNETDAILY, Aug. 2, 2004, <http://www.worldnetdaily.com/news/article.asp?>  
(continued)

the concerns about lesbigay ART and adoption—it seems to give priority to the wishes and ideologies of adults over the needs and welfare of children.<sup>201</sup>

The President's Council on Bioethics 2004 Report stated, "For many of the ethical matters of concern to this Council, beginning with the well-being of children, existing procedures for monitoring, data collection, or investigation [of ART] are not adequate."<sup>202</sup> Indeed, concerns about the well-being of children go to the very heart of growing concerns about the explosive (and largely unregulated) practice of ART. Perhaps there should be some limit to the American culture's infatuation with unrestricted independence (of adults desiring children and medical providers willing to accommodate them for a fee).<sup>203</sup> Perhaps there should be a limit on Americans' laissez faire attitude about developing technologies that imperil by public neglect generations yet unborn and children born to be raised as semi-orphans.<sup>204</sup>

No one has the "right" to create a child by ART. Children are not objects. They are not property. They are not consumer items. They are not toys or dolls. As Article 3 of the UN Convention on the Rights of the Child declares: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>205</sup> Human reproduction requires the union of a man and a woman, and childrearing requires a man and a woman for its most beneficial, effective, child-protective, and advantageous

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ARTICLE\_ID=39741 (quoting the Advocate report); *see also* Liz Mundy, *A World of Their Own: In the Eyes of His Parents, If Gauvin Hughes McCullough Turns Out to be Deaf, That Will be Just Perfect*, WASH. POST MAG., Mar. 31, 2002, at 22, 24–25. *See generally* Jill King Greenwood, *Pa. Legislators Ponder Laws for Egg, Sperm Donors*, PITT. TRIB.-REV., June 5, 2005, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_341035.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_341035.html) (discussing possible changes in the laws for egg and sperm donors in light of controversial reproductive rights cases).

<sup>201</sup> *See* Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage and Family: Same Sex Marriage and Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 189 (2005); Mundy, *supra* note 200, at 24–25; Kupelian, *supra* note 200.

<sup>202</sup> REPRODUCTION AND RESPONSIBILITY, *supra* note 17, at 78.

<sup>203</sup> *See supra* Part III.A.

<sup>204</sup> *See supra* Part III.A.

<sup>205</sup> G.A. Res. 44/25, *supra* note 190, at 167.

functioning.<sup>206</sup> The misuse of ART to create half-orphaned children for the pleasure of adults is a terribly selfish and harmful practice.<sup>207</sup>

Individuals do not have the same right to procreate as couples because alone, as individuals, they are sterile; they cannot reproduce alone.<sup>208</sup> The increasing use of ART to produce children to be raised deliberately without a mother and a father raises serious concerns for all persons interested in child welfare and public policy. The use of ART by single persons, unmarried heterosexuals, and same-sex couples to “obtain” children has the potential to “create a class of ‘mothers’ who must not care for the children they have borne and of ‘fathers’ who need not support and may not raise the offspring they have sired.”<sup>209</sup> Eventually, we must address those issues.

To some extent, those issues are arising collaterally in legislative debates and judicial disputes over legalizing lesbian adoption by same-sex couples and partners. They deserve careful consideration rather than superficial sloganeering. The resolution of these issues should put protection of the welfare of the children generated by ART as the top priority over the adult interests of persons who want to raise children and over the group interests of popular political movements as well. Where that will take us remains to be seen.

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<sup>206</sup> See *supra* notes 162–67 and accompanying text.

<sup>207</sup> See Alvaré, *supra* note 201, at 171–82 (discussing the disproportionate attention gay rights proponents give adult desires while disregarding or ignoring the effects on ART children of same-sex parent(s)).

<sup>208</sup> Jennifer Roback Morse, *First Comes Marriage*, TOUCHSTONE MAG., Jan. 1, 2006, at 13, 13–15, available at <http://touchstonemag.com/archives/article.php?id=19-01-013-v>.

<sup>209</sup> Schneider & Wardle, *supra* note 57, at 84.

## APPENDIX I

**LAW REVIEW ARTICLES, COMMENTS, NOTES, AND  
ESSAYS ABOUT LESBIGAY ADOPTION AND CUSTODY  
JANUARY 1, 2004–DECEMBER 31, 2005 (24 MONTHS)**

ZACHARY STARR, RESEARCH ASSISTANT FOR  
PROFESSOR LYNN D. WARDLE  
J. Reuben Clark Law School

(revised version, January 23, 2006)

Total Articles: 157  
Pro: 102 (65.0%)  
Con: 25 (15.9%)  
Neutral: 30 (19.1%)  
Ratio = nearly 4:1 articles pro:con LesbiGay Adoption/Custody

LESBIGAY ADOPTION, VISITATION, AND CUSTODY: *JANUARY 2004  
THROUGH DECEMBER 2005*

A. *Favoring*

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APPENDIX II

STATE REGULATION OF ART AND ADOPTION IN THE UNITED STATES

Prepared by Student Research Assistants at BYU Law School, in part based upon and updating Cornell's compilation of adoption laws at [http://www.law.cornell.edu/topics/Table\\_Adoption.htm](http://www.law.cornell.edu/topics/Table_Adoption.htm).

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
Alabama	Title 26, Chapter 10	Ala. Code § 26-17-21 <ul style="list-style-type: none"> <li>If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>Semen donor not the father if donation provided to licensed physician.</li> </ul>		
Alaska	Chapter 23, §§ 5-240	Alaska Stat. § 25.20.045 <ul style="list-style-type: none"> <li>If AI is under supervision of licensed physician and both H &amp; W sign consent, H &amp; W are natural parents.</li> </ul>		
Arizona	Title 8, §§ 8-101 to 8-173	Ariz. Rev. Stat. § 25-501 <ul style="list-style-type: none"> <li>A child born as a result of AI is entitled to support from the mother and her spouse if the spouse is the biological father or consented in writing to the insemination either before or after it occurred.</li> </ul>		
Arkansas	Title 9, Subtitle 2, Chapter 9	Ark. Code Ann. §§ 9-10-201 to 202 <ul style="list-style-type: none"> <li>Child produced by AI under the supervision of licensed physician when both H &amp; W sign consent is natural child of both H &amp; W.</li> <li>Child produced by AI by an unmarried woman is the child of the woman giving birth.</li> </ul>	<i>In re</i> Adoption of K.F.H., 844 S.W.2d 343 (Ark. 1993).	



State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
				the other partner during the partnership, even though the other partner did not relinquish all of her parental rights.”
<b>Colorado</b>	Title 19, Article 5, Part 2	<p>Colo. Rev. Stat. § 19-4-106</p> <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor (other than H for his W) is not the father of resulting child.</li> <li>• Woman who undergoes AI with donated egg and H's consent is natural mother, if not a surrogate.</li> <li>• Spousal consent not necessary to donate egg/sperm for AI by other persons.</li> <li>• Special rules for death and divorce prior to placement of eggs/sperm/ embryos.</li> </ul>		
<b>Connecticut</b>	HB 5349, 5843, 5966, 6607, 7035, 70076, SB 1274. See also Chapter 803, Sections 45a-706 to 45a-770	<p>Conn. Gen. Stat. Ann. § 45a-771 to 45a-779</p> <ul style="list-style-type: none"> <li>• AI of a woman may <b>only</b> be performed by licensed physician, and requires consent of H &amp; W.</li> <li>• Child produced by AI under the supervision of licensed physician when both H &amp; W sign consent is natural child of both H &amp; W.</li> <li>• Semen donor not the father and has no rights or claims to child.</li> <li>• Status of child is determined by jurisdiction at birth.</li> </ul>		
<b>Delaware</b>	Title 13, Chapter 9	<p>Del. Code Ann. tit. 13 § 8-702 to 8-707</p> <ul style="list-style-type: none"> <li>• A donor is not a parent of a child conceived by assisted reproduction.</li> </ul>		

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
		<ul style="list-style-type: none"> <li>A man who provides sperm for, or consents to, AR with the intent to be the parent of the woman's child is the parent of the resulting child.</li> <li>A signed consent between man and woman for AR is required for all except the donor if the man is to become the parent of the resulting child</li> <li>Rules for withdrawal of consent, divorce, death prior to AR.</li> </ul>		
<b>Florida</b>	Title VI, Chapter 63	Fla. Stat. Ann. § 742.11 <ul style="list-style-type: none"> <li>Irrebuttable presumption of parenthood of H &amp; W for any child produced during wedlock by AI, IVF, donated eggs, preembryos.</li> <li>Exceptions for gestational surrogacy.</li> </ul>		
<b>Georgia</b>	§§ 16-1501 to 16-1515	Ga. Code Ann. §§ 19-7-21, 43-34-42. <ul style="list-style-type: none"> <li>Child produced by AI during wedlock or the usual gestational period thereafter when both H &amp; W sign consent is natural child of both H &amp; W.</li> <li>AI of a woman may <b>only</b> be performed by licensed physician, anyone else who attempts or performs it is guilty of a felony, 1-5 year sentence.</li> </ul>		
<b>Hawaii</b> <b>Idaho</b>	Chapter 578 §§ 16-1501 to 16-1515	Idaho Code Ann. § 39-5401 to § 39-5408 <ul style="list-style-type: none"> <li>AI of a woman may <b>only</b> be performed by licensed physician or person under M.D. supervision and requires consent of H &amp; W.</li> <li>Semen donation not permitted by anyone with known genetic or venereal disease or other defect.</li> </ul>		

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>Illinois</b>	Chapter 750, Act 50	<ul style="list-style-type: none"> <li>• Semen donor is not the father and has no rights or claims to child.</li> <li>• Child produced by AI under the supervision of licensed physician when both H &amp; W sign consent is natural child of both H &amp; W.</li> </ul>		
<b>Indiana</b>	Title 31, Article 19	<p>Ill. Comp. Stat. Ann. § 750/40-1 to 40-3</p> <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor not the father if donation provided to licensed physician.</li> </ul> <p>Ind. Code Ann. § 16-41-14-1 to 16-41-14-20</p> <ul style="list-style-type: none"> <li>• Requires medical testing for semen by donors other than husbands.</li> </ul>	<p>Levin v. Levin, 626 N.E.2d 527 (Ind. Ct. App. 1993)</p>	<p>Child conceived during marriage through AI of mother by third-party donor with H's fully informed consent was a "child of the marriage" under Dissolution of Marriage Act.</p> <p>Because Indiana legislature had not yet acted, court held that when two women involved in domestic relationship agree to bear and raise a child together by AI of one of the partners with donor semen, both women are the legal parents of the resulting child.</p>
			<p><i>In re A.B.</i>, 818 N.E.2d 126 (Ind.)</p>	

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>Iowa</b>	Chapter 600	<p>Opinion of Attorney General (Readinger, July 7, 1975):</p> <ul style="list-style-type: none"> <li>Human AI by a donor (A.I.D.) is legal in Iowa, and A.I.D. is not adultery.</li> </ul>	<p>Ct. App. 2004, later case denying partner's claim for parenting rights upon separation vacated by King v. S.B., 837 N.E.2d 965, 967-73 (Ind. 2005) (Dickson, J. dissenting) (arguing that the ruling permitted third parties to circumvent Indiana's adoption laws, and that same-sex parent adoptions were not permitted by Indiana law, contrary to two Court of Appeals cases not on review that permitted same-sex partner to adopt). See <i>In re Adoption of M.M.G.C.</i>, 785 N.E.2d 267 (Ind. Ct. App. 2003); <i>In re Adoption of K.S.P.</i>, 804 N.E.2d 1253 (Ind. Ct. App. 2004). One same-sex adoption case is pending transfer to Indiana Supreme Court. See <i>Mariga v. Flint</i>, 822 N.E.2d 620 (Ind. Ct. App. 2005).</p>	
<b>Kansas</b>	Chapter 59, Article 21	<ul style="list-style-type: none"> <li>A child born of AI is the natural child of both H &amp; W if both consent to the insemination.</li> </ul>		
<b>Kentucky</b>	Title XVII, Chapter 199		<p>Surrogate Parenting Associates v. Kentucky ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986)</p>	

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>Louisiana</b>	Children's Code, Title XII	La. Civ. Code Ann. art. 188 <ul style="list-style-type: none"> <li>• A husband may not disavow a child of his wife created through assisted reproduction to which he consented.</li> </ul>		
<b>Maine</b>	Title 19, Chapter 21			
<b>Maryland</b>	Family Law, §§ 5-301 to 5-4B-12	Md. Code Ann., Est. & Trusts § 1-206 <ul style="list-style-type: none"> <li>• A child conceived by AI of married woman with consent of husband is a child of both. Consent of H is presumed.</li> </ul>		
<b>Massachusetts</b>	Chapter 210, §§ 1-14	Mass. Gen. Laws ch. 46, § 4B <ul style="list-style-type: none"> <li>• Any child born to a married woman as a result of artificial insemination with the consent of her husband, is considered the legitimate child of the mother and such husband.</li> </ul>	T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004).	Lesbian partner was not natural parent of child created by AI of biological mother under state AI law.
<b>Michigan</b>	Chapter 722, §§ 722.951-722.960 (Act 203 of 1994)	Mich. Comp. Laws Ann. § 333.2824 <ul style="list-style-type: none"> <li>• A child conceived by married woman with consent of H following utilization of assisted reproductive technology is considered the legitimate child of both.</li> </ul>		
<b>Minnesota</b>	Chapter 259	Minn. Stat. Ann. § 257.56 <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor not the father if donation provided to licensed physician.</li> </ul>		
<b>Mississippi</b>	Title 93, Chapter 17			
<b>Missouri</b>	Chapter 453	Mo. Ann. Stat. § 210.824 <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor other than H not the father if donation provided to licensed physician.</li> </ul>		
<b>Montana</b>	Title 42	Mont. Code Ann. § 40-6-106		

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>Nebraska</b>	Chapter 43	<ul style="list-style-type: none"> <li>If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>Semen donor other than H not the father if donation provided to licensed physician.</li> </ul>	<i>In re</i> Adoption of Luke, 640 N.W.2d 374 (Neb. 2002).	Lesbian companion of biological mother of child conceived by anonymous donor AI was not permitted to obtain a second-parent adoption of child under Neb. adoption laws. Biological mother would have had to give up her rights to the child for partner to adopt.
<b>Nevada</b>	Chapter 127	<p>Nev. Rev. Stat. § 126.061</p> <ul style="list-style-type: none"> <li>If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>Semen donor other than H not the father if donation provided to licensed physician.</li> </ul>		
<b>New Hampshire</b>	Chapter 461 (Repeated), Other: Title 10, Chapter 126D	<p>N.H. Rev. Stat. Ann. §§ 168-B: 1 to 32</p> <ul style="list-style-type: none"> <li>Semen may not be used for AI w/o medical evaluation and approval of donor's medical fitness.</li> <li>A woman may not undergo AI w/o medical evaluation and documented approval of medical fitness.</li> <li>Unmarried semen donor not the father unless specified statute complied with, donor liable for support only if signs agreement.</li> <li>IVF may only be performed on woman &gt; 21 years old, after medical evaluation and</li> </ul>		

State	Adoption Code	ART/AI/IVF Codes, if any counseling, and if married, husband receives counseling and consents. • Gamete donor must pass medical evaluation prior to IVF or embryo transfer.	Cases	Case Rules
<b>New Jersey</b>	Title 9	<p>N.J. Stat. Ann. § 9:17-44</p> <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor other than H not the father if donation provided to licensed physician, unless contracted otherwise with woman.</li> </ul>	<i>In re</i> Parentage of Robinson, 890 A.2d 1036 (N.J. Sup. Ct. Ch. Div. 2005).	Court held that under the statute, the same-sex partner of a birth mother, who conceived the child through alternative insemination, was presumed to be the parent of the child. Mother and partner were married in Canada and registered as domestic partners under N.Y. law, AI statute held only to require commitment to be a "spouse" and a "parent."
<b>New Mexico</b>	Chapter 40, Articles 7A, 7B, 14	<p>N.M. Stat. Ann. § 40-11-6</p> <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor other than H not the father if donation provided to licensed physician, unless written consent to become the father was given.</li> </ul>		
<b>New York</b>	Chapter 14, Article 7	<p>N.Y. Dom. Rel. Law § 73</p> <ul style="list-style-type: none"> <li>• Any child born to a married woman by means of AI performed by persons duly authorized to practice medicine, and with written consent of H &amp; W, is the natural child of the H &amp; W.</li> </ul>	<i>In re</i> Jacob, 660 N.E.2d 397 (N.Y. 1995).	The unmarried same-sex partner of a child's biological parent (including child produced by AI) has standing to adopt the child under N.Y.

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>North Carolina</b>	Chapter 48	N.C. Gen. St. Ann. § 49A-1 <ul style="list-style-type: none"> <li>Child born to H &amp; W who consented to AI is natural child of both H &amp; W.</li> </ul>		Domestic Relations Law § 110.
<b>North Dakota</b>	Chapter 14-11 (Repealed), New Statute: Chapter 14-15	N.D. Cent. Code §§ 14-20-59 to 14-20-66 (S.L., 2005, ch. 135 §11) <ul style="list-style-type: none"> <li>Semen donor is not the parent unless he provides sperm for, or consents to, assisted reproduction by a woman with the intent to be the parent of the child.</li> <li>Presumption of H's paternity with various rules for rebuttal.</li> <li>Special rules for death and divorce prior to placement of eggs/sperm/ embryos.</li> </ul>		
<b>Ohio</b>	Title 31, Chapter 3107	Ohio Rev. Code Ann. §§ 3111.88-3111.96 <ul style="list-style-type: none"> <li>Nonspousal AI must be performed under supervision of a physician.</li> <li>Donor must undergo physical examination and semen must pass laboratory testing.</li> <li>A married woman must have written consent of husband for nonspousal AI.</li> <li>Any child born to a married woman by means of AI with the consent of H &amp; W is the natural child of the H &amp; W w/o any further action.</li> <li>An unmarried woman is not subject to the legal fatherhood of the donor, the donor has no right or claim to the child.</li> </ul>	<i>In re Bonfield</i> , 780 N.E.2d 241 (Ohio 2002).	Lesbian partner of woman who gave birth to children through AI by mutual consent could not use AI statutes in gender neutral way to establish parentage. Second-parent adoption was not available in Ohio as it would have terminated biological mother's rights. Court did remand, however, to consider joint custody.
<b>Oklahoma</b>	Chapter 10, §§ 7001-7501	Okla. Stat. Ann. tit. 10, § 551-556 <ul style="list-style-type: none"> <li>AI may only be performed by authorized medical personnel and with the consent of both H &amp; W.</li> <li>Consent must be acknowledged by</li> </ul>		

State	Adoption Code	ART/AI/IVF Codes, if any licensed physician and judge w/ jxn. adoptions.	Cases	Case Rules
<b>Oregon</b>	Chapter 109, Title 11	<ul style="list-style-type: none"> <li>Any child born of such AI as consented by H &amp; W is the legal natural child of the H &amp; W.</li> </ul> Or. Rev. Stat. §§ 109.239–109.247, 677.360, 677.365, 677.990. <ul style="list-style-type: none"> <li>Only licensed physicians may select donors and perform AI. Violation is a class C misdemeanor.</li> <li>AI may only be performed on a woman by physician with her written consent, and husband's, if married.</li> <li>If H consented to AI, child is the natural child of H &amp; W.</li> <li>Semen donor other than H not the father and has no rights or claims to child.</li> </ul>	McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989).	Statute barring donor from rights w/ respect to child applied even though physician did not perform AI, mother knew donor and she was unmarried.
<b>Pennsylvania</b>	Title 23, Part 2		L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002).	In a child support action by mother against her former lesbian partner, equitable principles demanded that where both parties decided to have children together through AI, and both were responsible for emotional and financial needs of children, and where former partner acted as co-parent for 8 years and maintained in loco parentis status after separation, former partner was obligated to pay support.

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>Rhode Island</b>	Chapter 15-7		<i>In re</i> Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002).	In this consolidated appeal of both gay and lesbian couples, some of whose children were conceived by artificial reproductive techniques, the court interpreted the Pa. adoption provisions to give courts discretion to decide whether a second-parent adoption could occur without terminating the biological parent's rights.
<b>South Carolina</b>	Title 20, Chapter 7, Article 11, Subarticle 7		<i>Rubano v. DiCenzo</i> , 759 A.2d 959 (R.I. 2000).	Family Court made determination of "mother and child relationship" for former lesbian partner and child produced by AI of biological mother on the basis of an alleged de facto parental relationship.
<b>South Dakota</b>	Title 25, Chapter 6		<i>In re</i> Baby Doe, 353 S.E.2d 877 (S.C. 1987).	H who consents for W to conceive child through AI, with understanding that child would be treated as their own, is legal father.
<b>Tennessee</b>	Title 36, Chapter 1	Tenn. Code Ann. § 68-3-306 • A child born to a married woman as a result of AI, w/ consent of H, is the legitimate child of H & W.		
<b>Texas</b>	Family Code, Title 5, Chapter 162	Tex. Fam. Code Ann. § 160.701–160.706 • A donor is not a parent of a child conceived by assisted reproduction.		

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>Utah</b>	Title 78, Chapter 30	<ul style="list-style-type: none"> <li>If H provides sperm or consents to assisted reproduction of W, he is the legal father. Both H &amp; W must consent in writing.</li> <li>Procedures for withdrawal of consent, death, and divorce.</li> </ul> <p>Utah Code Ann. § 78-45g-701 to 78-45g-707</p> <ul style="list-style-type: none"> <li>Donor is not the parent of a child conceived by assisted reproduction.</li> <li>If H provides sperm or consents to assisted reproduction of W, he is the legal father. Both H &amp; W must consent in writing.</li> <li>Procedures for withdrawal of consent, death, and divorce.</li> </ul>		
<b>Vermont</b>	Vt. Stat. Ann. tit. 15A, § 102 “If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection.” Title 63.1, Chapter 11			
<b>Virginia</b>	Title 63.1, Chapter 11	<p>Va. Code Ann. §§ 20-156 to 165</p> <ul style="list-style-type: none"> <li>A donor is not the parent of a child conceived by assisted reproduction, unless donor is gestational mother’s husband.</li> <li>H who consents to assisted reproduction is father of resulting child of W.</li> <li>Gestational surrogacy permitted only when intended parents are married H &amp; W.</li> </ul> <p>Wash. Rev. Code Ann. § 26.26.705–740</p> <ul style="list-style-type: none"> <li>Donor is not a parent of a child conceived by assisted reproduction.</li> </ul>		
<b>Washington</b>	Title 26, Chapter 33		<i>In re</i> Parentage of L.B., 122 P.3d 161 (Wash. 2005).	Former lesbian partner of biological mother of child conceived through AI

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
<b>West Virginia</b>	Chapter 48, Article 4 Chapter 48.43-48.835	<ul style="list-style-type: none"> <li>• If H consents to assisted reproduction or provides sperm, he is father of resulting child of W.</li> <li>• Consent required by H &amp; W, in writing.</li> <li>• Procedures for posthumous conception and divorce.</li> <li>• A woman who provides ovum to licensed physician for conception by another woman, and agrees with said woman in writing that the donor will be a parent, is also a natural parent of a resulting child. The agreement must be signed by the women and any other intended parent.</li> </ul>		donated by a friend was held to be "de facto" parent under common law, as UPA did not cover this situation.
<b>Wisconsin</b>		<p>Wis. Stat. Ann. § 891.40</p> <ul style="list-style-type: none"> <li>• If AI is under supervision of licensed physician and both H &amp; W sign consent, H is natural father.</li> <li>• Semen donor not the father if donation provided to licensed physician.</li> </ul>		
<b>Wyoming</b>	Title 1, Chapter 22	<p>Wyo. Stat. Ann. §§ 14-2-901 to 907</p> <ul style="list-style-type: none"> <li>• Donor is not the parent of a child conceived by assisted reproduction.</li> <li>• If H provides sperm or consents to assisted reproduction of W, he is the legal father. Both H &amp; W must consent in writing.</li> <li>• Procedures for withdrawal of consent, death, and divorce.</li> </ul>		
<b>District of Columbia</b>	Division 2, Title 16, Chapter 3		Welborn v. Doe, 394 S.E.2d 732 (Va. Ct. App. 1990).	Adoption procedure was available to husband of woman to whom child was born by means of AI of third-party anonymous sperm donor; adoption

State	Adoption Code	ART/AI/IVF Codes, if any	Cases	Case Rules
				procedure terminated any rights of natural father and established parent-child relationship.