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Adoption in the Age of Reproductive Technology

Susan Frelich Appleton*

I. PROLOGUE: TWO INTRODUCTORY STORIES

A. Organizing Family Law

A survey of family law casebooks published over approximately the last thirty years reveals two different organizational frameworks for exploring the topic of assisted reproductive technologies ("ARTs"). (Of course, thirty years ago, the topic barely existed, with artificial insemination by donor ("AID") the only ART in existence and just a few decided cases available for acquainting students with the handful of legal issues presented by AID.1) According to one organizational framework, assisted reproduction constitutes an aspect of reproductive autonomy and thus belongs in chapters about contraception and abortion, bearing titles such as "Reproductive Control,"2 "Decisions About Procreation: Private Beliefs and Individual Rights in Conflict,"3 or

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1 Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University School of Law, St. Louis, Missouri. With the usual disclaimers about their responsibility for the final version, the author thanks Rebecca Dresser, Barbara Flagg, Laura Rosenbury, Barbara Katz Rothman, and Nancy Staudt for their engaged discussions and insightful suggestions as well as Kimberly Busch, Elizabeth Jennings, Patricia McKiernan, and Jennifer Szczucinski for their terrific research assistance.

2 For example, the book I used as a student in 1971 and then as a first-time teacher of family law in 1975 covered only artificial insemination and used MacLennan v MacLennan, [1958] Sess Cas 105, [1958] Scots LTR 12 (Sess Ct Outer House), to introduce the topic. See Caleb Foote, Robert J. Levy, and Frank E.A. Sander, Cases and Materials on Family Law 575 (Little Brown 1966).

3 Walter Wadlington, Cases and Other Materials on Domestic Relations 365, 416 (Foundation Press Successor 1984).
simply "Procreation."\textsuperscript{4} Using a different framework, however, some books have envisioned assisted reproduction as an alternative to adoption—a way of adding children to an otherwise childless family. The chapters in these texts have names such as "Augmentation of Children"\textsuperscript{5} or simply "Adoption: Parent and Child."\textsuperscript{6}

Back in the 1990s, while working on a family law casebook which I co-authored with Kelly Weisberg, I chose the latter approach for two reasons.\textsuperscript{7} First, I thought that some of the more recent issues assisted reproduction has raised, such as the treatment of the surrogacy agreement in In re Baby M,\textsuperscript{8} would make the most sense for students to consider against a backdrop of adoption law, on which the court relied extensively.\textsuperscript{9} Second, although I had not experienced infertility myself, a number of colleagues and friends who had faced such difficulties considered adoption and assisted reproduction as two possibilities on a menu of choices to pursue in their quests for children. For them, each alternative offered advantages or disadvantages to weigh in


\textsuperscript{5} See note 2.

\textsuperscript{6} Ira Mark Ellman, Paul M. Kurtz, and Elizabeth S. Scott with Grace Ganz Blumberg, Family Law: Cases, Text, Problems 1389 (Lexis 3d ed 1998). The pertinent section of the chapter is entitled "Adoption Alternatives: Baby-Selling, Surrogate Mothers, and the New Biology." Id at 1474.


\textsuperscript{8} 537 A2d 1227 (NJ 1988).

\textsuperscript{9} Id. Applying adoption laws, the court declined to enforce the contract between the birth mother and the biological (and intended) father, even though the child in question would not have existed but for the agreement.
light of their ultimate personal goals. For this reason, I also included materials about infertility at the beginning of the proposed chapter.

An anonymous reviewer of an early draft of the casebook issued a sharp critique, however: The organization I had chosen obscured the child-welfare objectives of adoption. Because I found this critique on the mark, I moved the material about infertility and strengthened the emphasis on child welfare in the adoption context, but I left adoption and ARTs in the same chapter. The episode left me wondering, however, whether the availability of high tech "alternatives to adoption" had changed the social meaning (or at least my understanding) of adoption itself, so that it had become merely one of several ways for infertile adults to meet their own needs, instead of a practice designed to advance the best interests of children.

B. Speaker Hanaway's Choices

I come from Missouri, a conservative state with an anti-choice legislature. Enacting abortion restrictions has become a cottage industry in Missouri's capital, Jefferson City. In the election of November 2002, Republicans won the House of Representatives and Catherine Hanaway, age thirty-nine, became the first female House speaker in Missouri's history. Speaker Hanaway staunchly opposes abortion. In her speech during the House's opening session, she proclaimed to great applause: "We must work also to protect those children who would be killed even before they are born." Against this background, however, Speaker Hanaway's personal profile raises interesting questions about the contemporary understanding of adoption. Soon after her election, a feature story in the St. Louis Post-Dispatch high-

10 I moved this material to a much less prominent spot, the Notes and Questions in the subsection on in vitro fertilization. See Weisberg and Appleton, Modern Family Law at 1241 (1998) (cited in note 7); Weisberg and Appleton, Modern Family Law, 2d Edition at 1245 (2002) (cited in note 7).

11 See, for example, Planned Parenthood of Central Missouri v Danforth, 428 US 52 (1976) (challenging Missouri abortion restrictions); Planned Parenthood Association of Kansas City, Missouri v Ashcroft, 462 US 476 (1983) (same); Webster v Reproductive Health Services, 492 US 490 (1989) (same).


13 See Bill Bell, Jr., GOP Control of Missouri House Gives Optimism to Abortion Foes, St Louis Post-Dispatch B2 (Jan 10, 2003).
lighted her familial goal—to have a second child. The story further noted:

The odds are not good: Surgery for ovarian tumors left her with only part of an ovary after the birth of her daughter Lucy, now 4. . . . Despite repeated tries, extracting her eggs for in vitro fertilization didn’t work. Neither did implanting eggs donated by her sister. So Hanaway and her husband . . . are pursuing an international adoption.14

Given her asserted beliefs about prenatal life, why did Speaker Hanaway so matter-of-factly and openly pursue egg donation and in vitro fertilization ("IVF"), which, as the latter is practiced today, almost always entails the creation of a significant number of pre-embryos that will be destroyed or left indefinitely in frozen storage?15 Further, why did she consider only ARTs and international adoption?16 Why was a domestic adoption apparently not under consideration? Are there reasons specific to domestic adoptions themselves that diminish the appeal of this option, or has the availability of ARTs somehow displaced domestic adoption, in

14 Virginia Young, Passion, Pragmatism Drive New Speaker; In '98 Hanaway Homed in on Retaking Missouri House, St Louis Post-Dispatch A1 (Nov 10, 2002).

15 See, for example, Carl H. Coleman, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes, 84 Minn L Rev 55, 56 (1999) (noting that, as a result of IVF practice, “frozen embryos are now being accumulated at the rate of tens of thousands per year in the United States alone”); Sina A. Muscati, Biotechnology: Defining a New Ethical Standard for Human In Vitro Embryos in the Context of Stem Cell Research, 2002 Duke L & Tech Rev 26, 45 (2002) (noting how the IVF procedure typically creates many “spare” embryos, which are later discarded). See also The President’s Council on Bioethics, Reproduction and Responsibility: The Regulation of New Biotechnologies 35-36 (pre-publication version 2004) (listing possible dispositions of unused frozen embryos); id at 47-48 (noting loss of large numbers of embryos at all stages of the IVF process). But see id at 31 (stating that, although cryopreservation deemed essential to modern ARTs practice, in 2001, only 14 percent of all ARTs cycles involved the transfer of frozen embryos). As practiced in the United States, IVF usually entails several successive steps, including the administration of hormones to stimulate superovulation, the extraction of the mature ova thereby produced (sometimes as many as several dozen), the fertilization of such ova in vitro (that is, in a laboratory dish), the opportunity for the fertilized ova or preembryos to mature in a culture medium (several days), the transfer of a few of the preembryos to the woman’s uterus for hoped-for implantation, and the cryopreservation or freezing of the rest for her possible later use or for other disposition, such as destruction, indefinite storage, donation for research, or donation to other families. See Coleman, 84 Minn L Rev at 58-66. For the reasons that some users of IVF reject donation (which “would be like giving . . . children up for adoption”), see Melissa Moore Bodin, My Turn: The Eggs, Embryos and I, Newsweek 14-15 (July 28, 1997).

turn, changing the way Speaker Hanaway and the rest of us think about adoption?

II. THINKING ABOUT ADOPTION—NOW AND THEN

A. Public and Private Faces of Family Formation: Adoption and ARTs

How do we think about adoption today? How should we? Dramatic reforms in adoption law in recent years have changed contemporary understandings of adoption. Noteworthy developments that illustrate such change include the emerging legal recognition of open adoption,\(^\text{17}\) laws granting access to previously confidential adoption records,\(^\text{18}\) decrees of second-parent adoption,\(^\text{19}\) wrongful-adoption suits,\(^\text{20}\) statutes removing barriers to transracial\(^\text{21}\) and international adoptions,\(^\text{22}\) and high-profile litigation pitting birth parents against adoptive parents.\(^\text{23}\)

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\(^{17}\) See, for example, Neb Rev Stat §§ 43-162 et seq (1998) (communication between birth parents and adoptive parents); Wash Rev Code Ann §26.33.295 (West 1997) (open adoptions); Groves v Clark, 982 P2d 446 (Mont 1999) (enforcing visitation rights agreement on behalf of birth mother).


\(^{19}\) See, for example, Sharon S v Superior Court, 73 P3d 554 (Cal 2003); Adoption of Tammy, 619 NE2d 315 (Mass 1993; In re Jacob, 660 NE2d 397 (NY 1995). But see In re Angel, 516 NW2d 678 (Wis 1994).

\(^{20}\) See, for example, MH v Caritas Family Services, 488 NW2d 282 (Minn 1992); Mallette v Children’s Friend & Service, 661 A2d 67 (RI 1995).


\(^{23}\) See, for example, In re Adoption of Baby EAW, 658 S2d 961 (Fla 1995); In re Petition of Kirchner, 649 NE2d 324 (Ill 1995); In the Interest of BGC, 496 NW2d 239 (Iowa 1992). See also In re KAW and KAW, 133 SW3d 1 (Mo 2004).
The emergence of new rules governing adoption, moreover, has coincided with another significant contextual shift that results from an increasingly wide array of medical interventions known as ARTs. In addition to the now accepted use of IVF, AID, surrogacy arrangements, and ovum donation, consider recent stories in the popular press about the advent of ovarian transplants, the pros and cons of reproductive cloning, and the incipient practice of so-called “embryo adoption.” What impact have these developments had on the social meaning of adoption?

Adoption has been an established part of this country’s tradition, formally since 1851. By contrast, ARTs constitute one feature of the “brave new world” of the late twentieth and now twenty-first centuries. Because adoption preceded ARTs, it is tempting to consider ARTs through the more familiar lens of adoption—that is, to use the established institution of adoption to shed light on more modern techniques of family creation, including ARTs. For example, one question generating considerable attention today asks whether the trend toward opening adoption records ought to extend to give children conceived by assisted reproduction access to information about their genetic parents.

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26 See, for example, Suzanne Smalley, A New Baby Debate: As Pro-Lifers Adopt Embryos, Critics Raise Questions, Newsweek 53 (Mar 24, 2003); Sheryl Gay Stolberg, Some See New Route to Adoption in Clinics Full of Frozen Embryos, NY Times A1 (Feb 25, 2001).


28 Several contemporary scholars answer in the affirmative. See, for example, Mary Lyndon Shanley, Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents 99-101.
Although such inquiries yield useful insights, I hope to use the opposite approach: to consider how the rise of ARTs and the emerging legal responses have shaped our modern understanding of adoption. The juxtaposition of adoption and ARTs provides a particularly illuminating point of departure for exploring the theme of The University of Chicago Legal Forum Symposium, “The Public and Private Faces of Family Law,” the occasion when I first presented this paper.

My initial thoughts about how ARTs might have affected our understanding of adoption closely paralleled the views advanced by Elizabeth Bartholet in Family Bonds: Adoption, Infertility, and the New World of Child Production. The “punch line” of Bartholet’s book, which sings the praises of adoption (in particular international adoption), posits that “biologism” not only has stigmatized adoption and resulted in misguided adoption policies, but also has made invasive and even harmful “high tech” infertility treatments a more attractive option than adoption. Bartholet calls for a moratorium on the use of ARTs along with deregulation of adoption, arguing that “[i]f we genuinely cared about children’s interests, we would focus on finding adoptive homes for existing children in need rather than on creating new made-to-order adoptees for adults in need.” Despite our common starting point, my conclusions ultimately diverge from those of Bartholet. In the end, I question the conventional wisdom’s claims about the child-centered focus of adoption, I make clear that significant deregulation of adoption has already occurred, I
accept the fact that ARTs are here to stay, and I attempt to identify ways that our modern preoccupation with ARTs might support adoption advocates in advancing their objectives.

B. A Very Brief History of Adoption in America: Complementary or Conflicting Goals?

Most adoption historians agree on several key points: American adoption law has roots in ancient legal practices, including those underlying Roman law. The Romans developed adoption to benefit the adopter, preventing extinction of the adopter’s family and ensuring continuity of the adopter’s religion. Likewise, the frequently noted hostility to adoption in early English law, reportedly based on “the inordinately high regard for blood lineage,” reflects a focus on adults’ concerns, including a strict common law of inheritance and even xenophobia. Concern for child welfare remained insufficient to overcome these bases for resistance to adoption because the English institution of apprenticeship provided a response to the basic needs of homeless or parentless children. To the extent that adoption law embodies a legal fiction—creating a parent-child relationship as if there were a biological tie—the ancient Romans evidently had a need for this fiction, but the early English did not.

By contrast, American adoption laws, modeled on what most scholars describe as a path-breaking 1851 Massachusetts statute, were enacted “to provide for the welfare of dependent children.” (For the moment, I shall bracket what the term “child

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35 See, for example, Presser, 11 J Fam L at 446 (cited in note 27). See also Huard, 9 Vand L Rev at 745 (cited in note 34) (noting “the religious emphasis which lies at the very foundation of the practice”).
36 Presser, 11 J Fam L at 448 (cited in note 27).
37 Id at 448-52.
40 Id at 453. See Grossberg, Governing the Hearth at 271-72 (cited in note 38); Zainaldin, 73 Nw U L Rev at 1042-43 (cited in note 27). See also Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 50 (Columbia 1994) ("[T]he modern legal arrangement of adoption was developed to meet the newly recognized needs of children for family nurturing."). Naomi Cahn, however, questions the conventional wisdom, particularly the notion that the Massachusetts statute signaled groundbreaking change. Naomi Cahn, Perfect Substitutes or the Real Thing?, 52 Duke L J 1077 (2003). See note 51.
welfare” might mean. Child welfare was not merely a matter of individual or family concern during this period in the United States. Rather, as historian Elaine Tyler May notes, before the twentieth century Americans regarded childrearing as a community endeavor, a responsibility for the fertile and infertile alike, designed to produce good citizens for the future—not a route to personal satisfaction and private happiness for adults.

As adoption developed in the United States, it built on the institutions of “placing out” and apprenticeship, which had served a child-welfare function earlier in England. During the Progressive Era, a broad reformist movement embraced child welfare and provided a focus for the then-new profession of social work through “childsaving,” which saw adoption as the goal for children removed from their homes because of poverty, neglect, and abuse. The very term “childsaving” communicates a primacy for the interests of children, over and above the interests of parents or other adults.

Certainly, this focus on child welfare stands out when Mary Ann Mason concludes her study of the evolution of children’s rights by identifying as “the heroines of this shifting historical panorama . . . the social feminists and other child welfare advocates of the Progressive Era . . . [whose] efforts undeniably advanced the quality of life for children.” Later, the child-centered focus of adoption purportedly gained strength both from reforms attributed to a 1955 conference sponsored by the Child Welfare League of America and from the positive reaction of child wel-

41 See Part IV A.
43 See, for example, Presser, 11 J Fam L at 479, 485, 515 (cited in note 27). Mason explains that “placing out” entailed the placement of abandoned and indigent children primarily in rural homes, with the children providing labor in exchange for room, board, and education—in effect an arrangement amounting to an involuntary apprenticeship. Mason, From Father’s Property at 78 (cited in note 40).
44 See Mason, From Father’s Property at 87-92 (cited in note 40). Some authorities trace the childsaving movement to an earlier era. See, for example, Cahn, 52 Duke L J at 1089-97 (cited in note 40) (describing childsaving during early nineteenth century).
45 See Grossberg, Governing the Hearth at 278-80 (cited in note 38); Mason, From Father’s Property at 100-01, 109 (cited in note 40). See also Stephen O’Connor, Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed (Houghton Mifflin 2001).
46 Mason, From Father’s Property at 189 (cited in note 40).
fare workers to the 1973 publication of *Beyond the Best Interests of the Child*, which emphasized the importance to children's well-being of the continuity of care by "psychological parents." In short, the history of adoption in America has emphasized adoption's public face. To this extent, the anonymous reviewer of my casebook accurately recited the conventional wisdom about American adoption law: its objective is protecting and advancing child welfare. Yet, on closer inspection, one can detect cracks in this public face. Adoption's antecedents, placing out and apprenticeship, served the economic interests of adults while also providing care for children. Later, as the child-saving movement (and the children's aid societies that it established) worked to find nurturing families for children in need, child-savers learned to appeal to the emotional vulnerabilities of families that might adopt these children.

Historian Julie Berebitsky offers a revealing look at one such marketing effort when she details a successful campaign to place homeless children in adoptive families, undertaken from 1907-1911 by a popular women's magazine, the *Delineator*. Placements for over two thousand children resulted from the *Delineator*'s advertisement of individual children combined with larger messages about women's civic duty, an appeal to women's "rescue" impulses, and a celebration of motherhood as every fe-

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50 See Part I A. Notwithstanding this history, some authorities regard the child-welfare theme in adoption as a fairly recent development. See Madelyn Freundlich, *The Impact of Adoption on Members of the Triad* 17 (Child Welfare League of America 2001) ("Over the last 20 to 30 years, the definition of family has expanded; adoption has come to be viewed as a service for children; the 'best interests of the child' has become the guiding practice principle.").

51 See Grossberg, *Governing the Hearth* at 259-65 (cited in note 38). Naomi Cahn contends that under the Massachusetts statute, which "should be viewed as ratifying an existing situation, rather than creating a new status," "best interests" meant nothing more than protection of the child from economic exploitation—not a thoroughgoing child-centered approach to adoption. Cahn, 52 Duke L J at 1112-13 (cited in note 40).

52 The 1850s saw the establishment of the first private agencies "founded with the avowed purpose of placing younger children in a suitable family atmosphere." Presser, 11 J Fam L at 474 (cited in note 27). These children's aid societies continued to flourish years later. See id at 474-87.

male’s highest calling. These messages in turn helped women discover the “maternal longings” which all of them supposedly experienced and for which adoption promised a cure—even for unmarried women. Significantly, this campaign and the larger movement were highly racialized, envisioning adoption as an exclusively white institution. This fact suggests that the humanitarian aspirations animating the efforts to advance child welfare during this period, not surprisingly, reflected the limitations and biases of the predominant culture.

Adoption thus acquired a private face (a means of meeting the private needs of childless adults), but one constructed largely by adoption promoters and advocates. Of course, in analyzing adoption’s goals, one cannot completely divorce the objective of serving the interests of adopters from the objective of advancing child welfare. If adults cannot be persuaded—whether through the popular culture’s promotion of a particular brand of civic duty or the cultivation of “maternal instincts”—to want to adopt a child, then children’s needs for adoptive homes will remain unmet. “Selling” adoption to prospective adopters necessarily requires finding ways to make it personally attractive to them.

Over the years, as “adoption consumers” responded to such marketing efforts and sought to have children placed with them to fulfill their own emotional (rather than economic) needs, they demanded white children, usually under three years of age. The shift in focus from child welfare to the needs and interests of adopters began in earnest after World War II. May writes that at this time adoption became a service for infertile couples, who were responding to the stigma of childlessness in an era of “compulsory parenthood” (a version of what some contemporary

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54 See Berebitsky, Like Our Very Own at 51-74 (cited in note 53).
55 Compare id at 56 with id at 102-03.
56 See id at 9-10.
57 Using the word “private” here is purposely designed to reflect the persistent difficulty of maintaining a meaningful distinction between “public” and “private,” in this or any other context. See, for example, Frances E. Olsen, The Myth of State Intervention in the Family, 18 Mich J L Ref 835 (1985).
58 On the rise of the preference for placing such children in family settings instead of institutions, see Burton Z. Sokoloff, Antecedents of Adoption, 3 The Future of Children 17, 20-21 (1993).
59 Mason, From Father’s Property at 109 (cited in note 40).
60 May, Barren in the Promised Land at 141 (cited in note 42).
scholars call "repronormativity". As a response to infertility, adoption acquired its label as the "second best" route to parenthood.

In the years leading up to and following World War II, the regulatory aspect of adoption's public face became especially prominent. First, although early adoption campaigns had been very inclusive in their recruiting methods, appealing not only to married couples, but also to single women and female couples (cohabiting in so-called "Boston marriages"), later efforts treated married couples as the only suitable parents, thus making adoption a model for the normative family. In other words, families created by adoption embodied an ideal form for others to follow.

Second, placement agencies undertook to "match" infants with prospective adopters so that adoption could, insofar as possible, imitate nature. Race and religion, as well as physical and even intellectual characteristics, acquired great importance in the matching process, as social workers and other placement experts sought to create families that looked and functioned as if these parents and children shared a common genetic heritage.

Although matching efforts were sometimes rationalized as a means of serving the child's best interests, other factors were clearly at work, including racial prejudice, the lingering popularity of eugenic theories, and the desire to hide infertility by having adopted children "pass" as biological offspring.

Market analyses of adoption followed in the wake of all of these developments. For example, so-called "baby shortages"

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65 Berebitsky posits that social reformers used adoption to create a template for the family form that they thought everyone should have. See Berebitsky, *Like Our Very Own* at 6, 103 (cited in note 53).

66 On matching, see, for example, May, *Barren in the Promised Land* at 137-42 (cited in note 42); Kari E. Hong, *Parens Patric[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 Cal W L Rev 1, 30 (2003). In fact, the practice of matching began even earlier. See Grossberg, *Governing the Hearth* at 275 (cited in note 38) (referring to the late 1800s).

67 See, for example, Cahn, 52 Duke L J at 1148-49 (cited in note 40).

68 See, for example, *Crump v Montgomery*, 154 A2d 802, 805 (Md App 1959) (noting welfare board's objection to "over-placement" of child of below average intelligence with well-educated foster parents because of possible "pressure" he might experience).

69 See, for example, Shanley, *Making Babies* at 15-20 (cited in note 28) (detailing "the 'as if' family").
(when the number of adopters seeking infants available for adoption exceeded the number of such infants) were viewed not as a sign of the success of a system designed to make certain that every child had a home, but instead as a flaw in this means of supplying children to the childless.\textsuperscript{70} Of course, such characterizations ignored the plight of numerous "hard to place" children—older children, children with disabilities, or children of color—\textsuperscript{71} who were overlooked in these efforts to create virtually "natural" and ideal families.

III. ARTS AND THE RECONSTRUCTION OF DEMAND AND SUPPLY

A. "Missing Ingredients" and Beyond

To the extent that responding to the interests of the infertile made adoption flourish in America in the first half of the twentieth century, adoption also became vulnerable to both the vicissitudes of the market and technological advances. As the demand for adoptable children, specifically healthy white infants, outstripped the supply,\textsuperscript{72} medical efforts to treat infertility, usually procedures performed on the woman, acquired a new urgency.\textsuperscript{73} Although its use had reportedly begun long before,\textsuperscript{74} AID began

\textsuperscript{70} See, for example, May, \textit{Barren in the Promised Land} at 87 (cited in note 42).

\textsuperscript{71} See, for example, Judith K. McKenzie, \textit{Adoption of Children with Special Needs}, 3 The Future of Children 62, 63 (1993). Not only did the prevailing approach ignore children of color; it also made invisible adults of color with fertility problems. See Berebitsky, \textit{Like Our Very Own} at 9-10 (cited in note 53); May, \textit{Barren in the Promised Land} at 75 (cited in note 42). For descriptions of informal adoption practices in African-American communities, see Carol Stack, \textit{All Our Kin} 62-89 (Basic Books 1997). See also Cahn, 52 Duke L J at 1109 (cited in note 40); Allen P. Fisher, \textit{Still "Not Quite as Good as Having Your Own"? Toward a Sociology of Adoption}, 29 Ann Rev Sociol 335, 341 (2003).

\textsuperscript{72} Race has played a salient role in the politics and practice of adoption. See, for example, Shanley, \textit{Making Babies} at 16-17 (cited in note 28); Banks, 107 Yale L J at 940, 952, 954 (cited in note 21). Rickie Solinger explains the different treatment of white and African-American unmarried mothers from 1945 until 1973 (when abortion became legal) and the construction of the babies of the former as "valuable and adoptable." Rickie Solinger, \textit{Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States} 68-70 (Hill and Wang 2001). Then, too, many have shown how the birth control pill, the legalization of abortion, and the waning stigma of unmarried motherhood among whites all contributed to the rapidly shrinking supply of babies who might have served as surrogates for those the infertile could not produce themselves. Id at 22-23, 125. See also Madelyn Freundlich, \textit{The Market Forces in Adoption} 4-6 (Child Welfare League of America 2000).

\textsuperscript{73} May, \textit{Barren in the Promised Land} at 75-77 (cited in note 42).

to catch on in the 1930s and became even more popular in the period just after World War II. In addition, as a very “low tech” method of assisted reproduction, AID was often practiced by women themselves (who needed only a willing donor or sperm bank), allowing them to become single mothers or to create families headed by same-sex couples.

As everyone knows, AID no longer occupies the entire field of reproductive technology. In the 1980s, so-called surrogate-mother arrangements promised to provide for couples with infertile wives what AID had provided for those with infertile husbands. But with the advent of IVF, first used successfully in 1978, we have seen the eclipse of traditional surrogacy arrangements (in which the “surrogate” provides both the genetic material and gestational services), and even the demand for AID has decreased. IVF and the cryopreservation of the preembryos that IVF yields have paved new paths to parenthood. The technology has made it possible for many otherwise infertile men to father genetic children through intracytoplasmic sperm injection (“ICSI”); for couples with particular fertility impairments to have full genetic offspring with the help of a gestational surrogate; for others to use donor eggs; and for still others to be-

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75 See Garrison, 113 Harv L Rev at 845 (cited in note 28). See also May, Barren in the Promised Land at 75-78, 147-49 (cited in note 42).
78 See, for example, Baby M, 537 A2d at 1227. The process entails artificial insemination of the “surrogate” with the semen of the intended father.
79 For an explanation of the IVF process, see note 15.
80 See, for example, Mary Duenwald, After 25 Years, New Ideas in the Prenatal Test Tube, NY Times F5 (July 15, 2003) (surveying recent developments made possible by IVF, including ICSI). ICSI entails the injection of a single sperm into the center of an ovum; the process permits a man with a very low sperm count to father a child. Id. Sometimes the single sperm necessary is harvested directly from the man’s testes. Marcia C. Inhorn, Global Infertility and the Globalization of New Reproductive Technologies: Illustrations from Egypt, 56 Soc Sci & Med 1837, 1846 (2003). Given that about half of infertility results from males, ICSI (first used in 1992) represents a significant advance and decreases the need for some infertile men to rely on donor semen. See Duenwald, After 25 Years, NY Times at 5. See also President’s Council on Bioethics, Reproduction and Responsibility at 28-29 (cited in note 15) (reporting that, in 42.2 percent of cycles using ICSI, the couple had no male factor infertility).
81 See, for example, Johnson v Calvert, 851 P2d 776 (Cal 1993).
come parents through what Elizabeth Bartholet calls "technological adoptions" and what the popular press calls "embryo adoptions"—relying on donor sperm and donor eggs and in some cases a gestational surrogate as well. Preimplantation evaluation and diagnosis of preembryos enable those with genetic diseases to have biological children without the risk of passing on problematic traits. All of these, along with other controversial possibilities, such as cloning, germline therapies, and ovarian transplants, constitute the expanding world of ARTs.

Scientists tell us that the desire to "have one's own child" is irresistible because it expresses a biological imperative. But even if today's "childfree" or "childless by choice" population casts some doubt on this generalization, for heterosexuals who wish to have children, sexual reproduction surely provides the paradigm. Sexual reproduction, when it succeeds, makes procreation the expression of a physical union, with all the emotional and spiritual benefits of that expression. Sexual reproduction, when possible, is easy; it satisfies what many experience as a deep creative urge; it fosters prenatal bonding; and the process itself costs nothing. The resulting child, genetically related to both

82 See, for example, McDonald v McDonald, 608 NYS2d 477 (NY App 1994).
83 See Bartholet, Family Bonds at 219 (cited in note 29).
84 See, for example, Smallley, A New Baby Debate, Newsweek at 53 (cited in note 26); Stolberg, Some See, NYT Times at A1 (cited in note 26). See notes 276-301 and accompanying text.
85 See Duenwald, After 25 Years, NYT Times at F5 (cited in note 80) (surveying recent developments made possible by IVF, including preimplantation genetic diagnosis ("PGD")).
87 See, for example, Christopher H. Evans, Germ-Line Gene Therapy: Can We Do It, Do We Need It, Where Do We Start, and Where Might It Lead?, in Audrey R. Chapman and Mark S. Frankel, eds, Designing Our Descendants: The Promises and Perils of Genetic Modification 93 (Johns Hopkins 2003).
90 See May, Barren in the Promised Land at 181-209 (cited in note 42). See also Eun-Kyung Kim, Childless Adults Here Find Fun By Association, St Louis Post-Dispatch A1 (Nov 4, 2003) (describing activities of No Kidding!, an association of childfree families).
parents and nurtured in utero by the mother, emerges as the embodiment of these advantages.

One can concede that some turn to adoption first, for reasons of politics, altruism, humanitarianism, religion, or a particular notion of "public service." The position of adoption advocates such as Bartholet exemplifies this approach; she makes the case for preferring adoption over even sexual reproduction because adoption creates families for children who need them while also forging connections across familial, racial, cultural, and national boundaries. Certainly, there are wonderful families like Bartholet's own, which include both biological children and adopted children, sometimes with special needs and/or different racial or cultural backgrounds. But the fact that such examples stand out today emphasizes the exceptional nature of adoption as a first choice over sexual reproduction in the hierarchy of procreative choices.

Imagine a stereotypical couple who finds that sexual reproduction fails. Statistics indicate that approximately 6.1 million Americans experience fertility problems. What factors might influence whether this couple turns to adoption as their "second choice"—or to ARTs as their "second choice" and then to adoption only if assisted reproduction also fails?

It is tempting to assume that anyone who had initially preferred sexual reproduction would select a "second choice" that comes closest to offering the same advantages as sexual reproduction. As Lori Andrews has observed in a different context, many ARTs simply "supply a missing ingredient" whose absence prevents sexual reproduction. So viewed, "assisted reproduc-

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91 This rationale for adopting is reminiscent of an earlier view that saw rearing the next generation as a community responsibility. See also Freundlich, The Impact of Adoption at 134 (cited in note 50).
92 See Bartholet, Family Bonds at 186 (cited in note 29). Note, however, that she arrived at this conclusion after she had one biological child and her subsequent pursuit of infertility treatments and ARTs proved unsuccessful. See id at 25-27.
94 Lori B. Andrews, The Clone Age: Adventures in the New World of Reproductive Technology 256 (Henry Holt 2000) (contrasting "standard" ARTs, which "meet existing
tion" is just one ingredient (for example, viable sperm or the intimacy of a "natural" conception) removed from "the ideal," sexual reproduction, as the terminology itself suggests.

With the wide variety of techniques to assist reproduction available today, however, the "missing-ingredient" analysis becomes an oversimplification. The notorious case of In re Marriage of Buzzanca\(^9\) from California offers a telling illustration. This case shows how ARTs can allow a couple to acquire a frozen embryo, created with donor sperm and a donor egg from anonymous strangers, and to produce, with the help of a "surrogate" mother, a child who shares neither genetic nor gestational bonds with the couple.\(^9\) In this case, all of the "ingredients" of sexual reproduction are "missing." But the ARTs used yielded a child for the couple to rear—just as adoption would have. Put differently, the Buzzancas' choice to pursue ARTs instead of adoption can hardly be explained by a "biological imperative." Of course, some insights emerge from assumptions that dominated adoption during the heyday of "matching": the Buzzancas could circumvent the very uncertain adoption market to obtain a white infant, a child whom they might present to the world as "their own" and rear from infancy, thus replicating the parenting experience of those who produce offspring sexually. Perhaps the key "ingredients" in the analysis, then, are not genes or gestation, but rather race and age.\(^9\)

Buzzanca might well constitute an extraordinary case—and, as such, an insufficient basis either for supporting generalizations about preferences and behaviors or justifying legal re-

\(^9\) The litigation began after John Buzzanca sought to dissolve his marriage with Luanne Buzzanca. Id at 282. He disclaimed financial responsibility for the child, Jaycee, on the theory that both he and Luanne were not her parents, given the absence of biological ties and adoption proceedings. Id. He argued that he never intended to be the child's father despite his signature on the surrogacy agreement. Id at 283. The trial court held that Jaycee had no legal parents (thus relieving John of support obligations), but the court of appeal reversed, ruling that John and Luanne were her lawful parents. Buzzanca, 72 Cal Rptr 2d at 293. For additional information about the case, see CBS News: 48 Hours (Aug 17, 2001) (available on LEXIS) (transcript of television broadcast about the case, including interviews with genetic parents, gestational surrogate, John Buzzanca, and Luanne Buzzanca). Madelyn Freundlich reports that, ultimately, Luanne did adopt Jaycee, but wonders from whom. Madelyn Freundlich, Adoption and Assisted Reproduction 17 (Child Welfare League of America 2001).

sponses. Still, this sort of "collaborative reproduction" demonstrates how far ARTs have transcended medical remedies designed to supply a "missing ingredient" needed for sexual reproduction. Buzzanca’s facts thus compel an analysis of the place of adoption in the era of ARTs.

B. The Legal Frameworks

An examination of existing law reinforces the intuitive impression that ARTs—including those which entail collaborative reproduction—"solve the problem" of unwanted childlessness more effectively than adoption might. Although the law of ARTs remains in transition and a state-by-state survey reveals several different approaches, the law does not hinder those seeking to add children to their families by way of ARTs. Indeed, the law often facilitates such choices. In addition, the law’s treatment of some ARTs has prompted the development of new techniques manifestly designed to evoke more supportive legal responses.

Imagine a continuum with sexual reproduction located at one extreme and adoption at the other. Both the traditional doctrine of family privacy and the constitutional right to privacy presumptively shield procreation from state intervention, so the end of the continuum occupied by sexual reproduction enjoys freedom from government control. When a woman and a man engage in sexual relations and produce a child, the law ordinarily makes such activities the exclusive business of the couple. The couple need not receive state certification for recognition as suitable parents, and the resulting child instantly "belongs" to them, with all attendant parental prerogatives and responsibilities.

At the other end of the continuum lies adoption, a highly regulated activity, with the state deeply involved not just in terminating biological parents’ rights but also in the screening

98 See Robertson, Children of Choice at 119-45 (cited in note 77) (including Chapter Six on “Collaborative Reproduction: Donors and Surrogates”).
99 See, for example, McGuire v McGuire, 59 NW2d 336 (Neb 1953) (declining to order support for wife in intact marriage).
100 See, for example, Roe v Wade, 410 US 113, 152-53 (1973) (recognizing that the constitutional right to privacy includes procreation and "a woman’s decision whether or not to terminate her pregnancy"). See also Lawrence v Texas, 539 US 558, 578 (2003) (holding that the Due Process clause invalidates criminal statute prohibiting private, sexual conduct of consenting gay adults).
101 See, for example, Troxel v Granville, 530 US 57, 65 (2000) (plurality) (recognizing a parent’s due process liberty interest in the care, custody, and control of her children).
102 See, for example, Santosky v Kramer, 455 US 745, 768-70 (1982) (holding that the
and approval of adoptive parents, who must endure home visits, waiting periods and the risk of adoption nullification based on defects in the consent procured from the biological parents (although step-parent adoptions, second-parent adoptions, and relative adoptions often bypass some of these requirements). Adoption always entails judicial proceedings and requires a court's decree. The contrast to sexual reproduction emerges with particular force in the "thought experiments" that propose mandatory state licensing for all parents. While the idea remains unsettling, despite a number of arguments advanced in its favor, in fact the state does require licensing of all adoptive parents. Across the states, this generalization holds true for both agency placements and independent or direct placements, at least according to the law "on the books." In essence, adoption signals the end of the original parent-child re-
relationship and the establishment of a new one in its place, under
the supervision of the state as \textit{parens patriae} and with official
records—often including an original birth certificate and an
amended one\textsuperscript{110}—to document the change in status. Even if one
rejects the understanding of families by adoption as “second
best,” still such families are necessarily “second” families, cre-
ated by law.\textsuperscript{111}

International adoptions must meet legal requirements in
addition to those of domestic adoptions.\textsuperscript{112} Yet critics of the high
rate of international adoptions attribute their popularity to the
exploitation of birth mothers in impoverished countries (which
increases the supply of “adoptable” babies); the less demanding
safeguards for assuring parental consent in the child’s country of
origin as compared to those in the United States; the decreased
likelihood of a birth parent’s challenge following the relinquish-
ment; and relaxed standards of adopter eligibility in contrast to
those used for domestic placements.\textsuperscript{113} Although the legal re-
quirements for international adoptions are not trivial, interna-
tional adoptions occupy a place not as far to the end of the con-
tinuum reflecting government regulation as domestic adoptions

\textsuperscript{110} For the history of laws on adoptees’ birth certificates, see Elizabeth J. Samuels,
\textit{The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Re-
cords}, 53 Rutgers L Rev 367 (2001) (emphasizing the historical distinction between access
to court records versus access to original birth certificates).

\textsuperscript{111} See note 63 and accompanying text. This status has emotional consequences. Con-
sider Nancy Hanner, \textit{My Turn: Demystifying the Adoption Option}, Newsweek 15 (Feb 10,
2003) (“[As an adoptive mother, I am] No. 2—[I] will never truly be No. 1 in our kids’
eyes, and that is one of the not-so-nice realities of adoption.”). Further, such “second fami-
lies” are perceived to face a risk of disruption by members of original families. See
Freundlich, \textit{The Impact of Adoption} at 96, 146-47 (cited in note 50).

\textsuperscript{112} International adoptions are governed by the foreign country’s relinquishment
requirements and federal immigration law, in addition to state adoption standards. See,
for example, Jordana P. Simov, Comment, \textit{The Effects of Intercountry Adoptions on Bio-
federal legislation, see note 22.

\textsuperscript{113} See, for example, Freundlich, \textit{The Market Forces} at 53 (cited in note 72); Solinger,
\textit{Beggars and Choosers} at 20-32 (cited in note 72). See also Rose M. Kreider, \textit{Adopted Chil-
dren and Stepchildren: 2000, Census Special Reports} 11-12 (US Census Bureau Oct
May 18, 2004) (noting adopting abroad is quicker than adopting domestically and report-
ing that in 2000 13 percent of all adopted children were foreign born); Erika Lynn
Kleiman, \textit{Caring For Our Own: Why American Adoption Law and Policy Must Change}, 30
Colum J L & Soc Probs 327, 328 (1997) (noting that “certain American laws and policies
force many prospective adoptive parents to look outside the United States to find children
... [by creating] disincentives to domestic adoption[s]”). Consider Sara Corbett, \textit{Where Do
Babies Come From?}, NY Times §6, 42 (June 16, 2002) (magazine cover story exploring
“baby laundering” and the “mysterious origins of Cambodian ‘orphans’—and the complex
ethics for Americans adopting them”).
occupy. While the critics’ assessment might well explain why Speaker Hanaway would turn to international adoption once ARTs failed, might the law also contribute to the reasons she turned first to ARTs, including egg donation and IVF?

The place of ARTs on the continuum evokes an affirmative answer. For ARTs, the law generally has followed a laissez-faire approach. For the most part, the law’s laissez-faire approach allows those who wish to use ARTs and who can afford the cost to try whatever services providers wish to offer; similarly, providers of most ARTs services (whether genetic contributions, gestational functions, or medical assistance) are free to offer their wares and skills to interested consumers. True, the novelty of ARTs might suggest that regulation will eventually follow when legislatures finally consider the subject or when courts confront ARTs cases requiring judge-made rules. But all present signs indicate that the current approach, leaving decisions about assisted reproduction largely (although not exclusively) to the individuals involved, has emerged by design, not from temporary inaction. John Robertson, the primary advocate of this laissez-faire approach, sees ARTs as emblematic of the private face of family law. Robertson locates ARTs within the ambit of reproductive choice and autonomy in medical decisionmaking, thus triggering the doctrine of constitutional privacy and a “hands-off” role for the law. The casebooks that consider ARTs along-


115 See, for example, Andrews, The Clone Age at 7 (cited in note 94) (“Virtually any reproductive or genetic technology is now available in the United States.”).

116 See, for example, Gina Kolata, The Heart’s Desire, NY Times F1 (May 11, 2004); Judith VandeWater, Fertility Doctors Use Advertising and Refund Offers to Woo Couples, St Louis Post-Dispatch at Business Plus 10 (Feb 5, 2001). The American approach contrasts with the approach followed in some other countries. See, for example, Freundlich, Adoption and Assisted Reproduction at 54 (cited in note 96) (noting that some European and Muslim countries prohibit egg donation); Robin Marantz Henig, Essay, On High-Tech Reproduction, Italy Will Follow Abstinence, NY Times F5 (March 2, 2004) (detailing predicted restrictions on ARTs under Italian law reforms, including prohibition of AID); Erik Parens and Lori P. Knowles, Reprogenetics and Public Policy: Reflections and Recommendations, Hastings Center Report Supplement S15-S17 (July-Aug 2003) (examining regulations in the United Kingdom and Canada). Consider John Gillott, Reprogenetics: Hype, Phobia and Choice, Conscience 11 (Winter 2003-04) (rejecting calls for more regulation). The President’s Council on Bioethics has taken some initial steps toward regulation, calling for the collection of empirical data about ARTs and their health consequences, as well as interim legislation in anticipation of likely innovations (such as reproductive cloning or the creation of chimeras). See President’s Council on Bioethics, Reproduction and Responsibility at 207-27 (cited in note 15).

117 Consider Robertson, Children of Choice (cited in note 77). Under his approach, only
side protected activities such as the use of contraceptives and the decision to terminate a pregnancy apparently use this analysis.\textsuperscript{118}

A survey of the laws of the fifty American states and the District of Columbia details the content of the laissez-faire approach. Today, most states have some legal authority regarding the parentage of children born as the result of ARTs.\textsuperscript{119} Although these parentage laws do not expressly aim to regulate assisted reproduction,\textsuperscript{120} by identifying the parents of the child who results from the arrangement, they have a regulatory effect. To the extent that these laws recognize the “intended parents”—those who commissioned the arrangement, regardless of biological ties—they enhance the privacy and autonomy of ARTs consumers by allowing them to achieve their goals without any involvement by the state. To the extent, however, that these laws recognize as the child’s parents participants other than the intended parents, these laws require legal intervention to transfer parental rights—often in the form of adoption or adoption-like proceedings. In either case, one might conclude that even schemes designed to enhance the autonomy of consumers of ARTs accommodate some child-welfare concerns, because parentage laws aim to provide certainty and stability for children by dispelling all doubt about who has the responsibility for their care and support.\textsuperscript{121}

Under the most pervasive legal treatment of ARTs, when a married woman uses AID with her husband’s consent, he is the legal father of the child and the semen “donor” has no legally compelling evidence of tangible harm to persons, not symbolic concerns alone, should justify restrictions on reproductive autonomy. See id at 141, 153.

\textsuperscript{118} See notes 2-4 and accompanying text.

\textsuperscript{119} Jurisdictions that seem not to have addressed the parentage of children of assisted conception include the District of Columbia, Hawaii, Iowa, Maryland, Mississippi, Nebraska, Rhode Island, and West Virginia. But see note 124 and accompanying text on the presumption of legitimacy.

\textsuperscript{120} See, for example, National Conference of Commissioners on Uniform State Laws (NCCUSL), Uniform Parentage Act (“new UPA”) §702 cmt (amended 2002), available online at <http://www.law.upenn.edu/bll/ulc/ulc.htm> (visited Apr 29, 2004) (stating statute addresses only parentage, not regulation of medical procedures or other matters). All references to the “new UPA” in this Article refer to the 2000 version of the Act, as amended in 2002, unless otherwise indicated. The “new UPA” supercedes, inter alia, the 1973 Uniform Parentage Act, which remains good law in several states. See note 122.

\textsuperscript{121} See \textit{Buzzanca}, 72 Cal Rptr 2d at 293 (“No matter what one thinks of [ARTs,] courts are still going to be faced with the problem of determining lawful parental. A child cannot be ignored.”); new UPA, Art 8 cmt (cited in note 120) (“Despite the legal uncertainties, thousands of children are born each year pursuant to gestational agreements. One thing is clear; a child born under these circumstances is entitled to have its status clarified.”).
recognized parental status.\textsuperscript{122} Automatic recognition of the husband as the legal father (precisely the result intended by the participants) obtains in many states because of explicit statutory provisions to this effect.\textsuperscript{123} Even in jurisdictions without such provisions, the traditional presumption of legitimacy and the principle of equitable estoppel apply to produce the same outcome.\textsuperscript{124} The former makes a husband who is cohabiting with his wife the legal father of the children she bears;\textsuperscript{125} the latter prevents one whose promise induced another's action from repudiating the resulting obligation.\textsuperscript{126} In either case, AID fits securely at the privacy end of the continuum because no state intervention is necessary to accomplish the intended result.\textsuperscript{127} The nonrecognition of the donor as a parent that follows when married women

\textsuperscript{122} See, for example, Idaho Code § 39-5405 (2003); Mo Ann Stat § 210.824 (West 2004); NM Stat Ann § 40-11-6 (Michie 2003). The 1973 version of the Uniform Parentage Act ("original UPA") provided the model for such statutes. See original UPA § 5 (1973), available online at <http://www.law.upenn.edu/blulact99/1990s/upa7390.htm> (visited May 18, 2004). Courts in some states use the same approach even without legislation. See, for example, Levin v Levin, 645 NE2d 601 (Ind 1994); In re Baby Doe, 353 SE2d 877 (SC 1987); Krambule v Krambule, 994 P2d 210 (Utah App 1999). Although statutes on the subject provide legal assurance to those who might contemplate using AID, the caselaw typically arises in response to a dispute about paternity or support obligations.

\textsuperscript{123} See note 122.

\textsuperscript{124} Early AID cases illustrate this point. See, for example, In re Adoption of Anonymous, 345 NYS2d 430 (NY Super 1973). Mississippi might be the one possible outlier. It has no authority directly addressing AID, although a statute in the "bastardy" chapter bases paternity determinations on blood tests—with the possible implication that genetics determine parentage in AID situations as well. Miss Code Ann § 93-9-27 (Supp 2003). Caselaw also looks to genetic evidence of paternity even in situations when other states might well apply the presumption of legitimacy. See, for example, Williams v Williams, 843 S2d 720 (Miss 2003). The approach that Mississippi follows is becoming increasingly common as the result of more accurate scientific methods for determining paternity and the decreased stigma of the unmarried status of one's parents. Consider Ira Mark Ellman, Thinking About Custody and Support in Ambiguous-Father Families, 36 Fam L Q 49 (2002). Of course, in the absence of a paternity dispute, a child born to a married woman would in fact be presumed to be her husband's child as well, regardless of the applicable rule; parents and their infants are not routinely subjected to genetic testing.

\textsuperscript{125} See, for example, Clark, The Law of Domestic Relations 191 (cited in note 107).

\textsuperscript{126} See, for example, Adoption of Anonymous, 345 NYS2d at 433. See also American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03 (2002) (defining "parent by estoppel").

\textsuperscript{127} One can find a few departures from this generalization. For example, New Hampshire requires screening of the woman, prohibiting insemination absent a medical evaluation of the woman and a determination of her "medical acceptability . . . to undergo the insemination." NH Rev Stat Ann § 168-B:12 (2003). Moreover, Virginia has caselaw suggesting that the husband might want to reinforce his parental status with an adoption decree. See Welborn v Doe, 394 SE2d 732 (Va App 1990). Virginia was one of only two states adopting the Uniform Status of Children of Assisted Conception Act, Va Code Ann § 20-156 et seq, a model law that the National Conference of Commissioners on Uniform State Laws withdrew once they developed a new model, the new UPA. See prefatory note to the new UPA (cited in note 120).
use AID also usually extends to situations in which unmarried women use AID,\textsuperscript{128} although a handful of jurisdictions have developed some exceptions.\textsuperscript{129}

Several states go further, treating other ARTs—particularly egg donation and so-called “embryo adoption”—just as they treat AID, so that in all of these situations the law makes the intended parents the child’s first and only legal parents without any state intervention.\textsuperscript{130} Although a number of jurisdictions either ban surrogacy arrangements\textsuperscript{131} or require adoption proceedings to transfer parental rights from the birth mother to the intended mother,\textsuperscript{132} a few explicitly exempt surrogacy from the usual prohibition on payment for the adoptive placement of a minor.\textsuperscript{133} Such exemptions serve to make the process more “private” and less regulated than adoption.

Indeed, as the variety of ARTs grows, “mixed” approaches will likely continue to emerge—laws explicitly “privatizing” some

\textsuperscript{128} See, for example, \textit{Lamaritata v Lucas}, 823 S2d 316 (Fla App 2002).
\textsuperscript{129} These exceptions always involve known, rather than anonymous, donors. See, for example, \textit{Jhordan C v Mary K}, 224 Cal Rptr 530 (Cal App 1986); \textit{LaChapelle v Mitten}, 607 NW2d 151 (Minn App 2000).
\textsuperscript{130} See, for example, Ark Code Ann § 9-10-201 (Michie 2003) (recognizing intended parents, whether married or single, for donated genetic material and surrogacy arrangements); Colo Rev Stat Ann § 19-4-106 (West Supp 2003) (using part of the new UPA to recognize recipients of donated genetic material as legal parents); Fla Stat Ann § 742.14 (West 2003) (donors of eggs, sperm, or preembryos relinquish parental rights). See also Garrison, 113 Harv L Rev at 897 (cited in note 28) (recommending treatment of egg donation like sperm donation).
\textsuperscript{132} See, for example, \textit{Doe v Doe}, 710 A2d 1297 (Conn 1998). Initially, those participating in surrogacy arrangements assumed that termination of the birth mother’s (“surrogate’s”) rights and adoption by the intended mother were required, as \textit{Baby M} illustrates. \textit{Baby M}, 537 A2d at 1241. But see Fla Stat Ann § 742.16 (West 2003) (providing for “expedited affirmation of parental status” in gestational surrogacy arrangements based on contract). Scholars agree that adoption provides the appropriate analogy for traditional surrogacy arrangements, but divide on the best way to address gestational surrogacy. See, for example, Janet L. Dolgin, \textit{An Emerging Consensus: Reproductive Technology and the Law}, 23 Vt L Rev 225, 258 (1998) (finding appropriate the adoption model in traditional surrogacy cases, but an intent-based or best-interests approach in gestational surrogacy); Garrison, 113 Harv L Rev at 898, 912-17 (cited in note 28) (advocating adoption model for traditional surrogacy and recognition of genetic parents in gestational surrogacy).
ARTs and regulating others. A few examples of such mixed approaches not only illustrate noteworthy differences among them, but also emphasize the number of options available to those who wish to pursue ARTs.

California's approach provides one example. For a child born to a married woman via AID, the law promotes privacy and intent by making the intended father the legal father without any legal proceedings. Further, under the state's recent legislation granting the benefits of marriage to same-sex couples, the same result obtains for the "second intended mother" of a child born to a woman in a registered domestic partnership. Similarly, for gestational surrogacy and ovum donation, California uses the "intended parenthood" doctrine, which applied in Buzzanca, as a "tiebreaker" to recognize the commissioning adults as the parents of a child born of such ARTs. In these cases, the state does not require termination of other parental rights, a waiting period, judicial approval, adoption decree, or an amended birth certificate. By contrast, California precedents use an adoption rubric for "traditional surrogacy" arrangements, that is, when the

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135 Cal Fam Code § 7613 (West 1994). Under California caselaw, an unmarried woman can achieve with certainty the same effect regarding the donor (no parental status) only if a physician performs the insemination. See Jhordan C., 224 Cal Rptr at 534.

136 Cal Fam Code § 297.5(d) (West Supp 2004) (making domestic partners' rights and responsibilities to a child of either of them the same as those of spouses, under 2003 amendments to domestic partnership law, effective Jan 1, 2005). See also Kristine H. v Lisa R., 2004 Cal App LEXIS 1045 (allowing biological mother's former partner to use gender-neutral application of paternity statute to establish parentage, even though child already had one mother). But see Elisa B. v. Superior Court, 13 Cal Rptr 3d 494 (Ct App 2004) (refusing to extend presumed-father statute to establish parentage in a mother's same-sex partner).

137 See Johnson, 851 P2d 776 (recognizing genetic, intended parents, instead of gestational "surrogate"). The court invoked intent as a "tiebreaker" because California law offered support to the competing claims of both the woman giving birth and the woman providing the ovum. Id at 782. For an important source of this approach, see Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis L Rev 297.

“surrogate” gestates her own genetic child. The intended result of such agreements cannot be achieved without the termination of parental rights and adoption.\textsuperscript{139}

Significantly, this adoption-like approach to traditional surrogacy in California and some other states has sparked the development of alternative reproductive arrangements expressly designed to avoid the restrictions and pitfalls that prospective adopters face and that the infamous Baby M case highlighted for those using surrogacy arrangements.\textsuperscript{140} The anguish that Mary Beth Whitehead experienced at the prospect of relinquishing “Baby M,” who was both her genetic and gestational offspring, has prompted assisted reproductive programs to develop arrangements that separate the gestational and genetic contributions, in the belief that the intended parents will confront fewer psychological and emotional objections to their parentage from a “surrogate” who is not a “full mother.”\textsuperscript{141} Further, such arrangements (in which one woman provides the ovum and another serves as a gestational “surrogate” for a third who is the intended mother) permit fewer legal objections, as demonstrated by the caselaw in California, where courts invoke “intent” to enforce disputed contracts when no woman can unequivocally claim maternity.\textsuperscript{142}

In contrast to California’s scheme, the new Uniform Parentage Act (“new UPA”)\textsuperscript{143} provides a different mixed approach that subjects some ARTs to state oversight and regulation, but leaves others to the choices of the adult participants and the market. Under the new UPA, the woman who gives birth to a child is the legal mother, regardless of the source of the genetic material used to create the child.\textsuperscript{144} Consequently, genetic material re-

\textsuperscript{139} In re Marriage of Moschetta, 30 Cal Rptr 2d 893, 894-95 (Cal App 1994) (declining to enforce a surrogacy agreement because of conflict with parentage and adoption statutes). But see In re Adoption of Matthew B.-M., 284 Cal Rptr 18, 27 (Cal App 1991) (denying traditional “surrogate’s” petition to withdraw consent to adoption, based on child’s best interests).

\textsuperscript{140} See Baby M, 537 A2d 1227.

\textsuperscript{141} See new UPA, Art 8 cmt (cited in note 120) (noting that a “majority of ART practitioners” now avoid use of one woman as “genetic/gestational mother”). Recent amendments to Texas law adopt the new UPA’s approach to gestational surrogacy, see id, but require that “the eggs used in the assisted reproduction procedure must be retrieved from an intended parent or a donor” and that “the gestational mother’s eggs may not be used in the assisted reproduction procedure.” Tex Fam Code § 160.754(c) (West 2003).

\textsuperscript{142} See Johnson, 851 P2d 776. See also Dolgin, 23 Vt L Rev 225 (cited in note 132).

\textsuperscript{143} See note 120.

\textsuperscript{144} New UPA § 201 (cited in note 120).
ceived from a donor is treated as the intended parents’ own, with the result that AID, ovum donation, and the use of donated embryos (so-called “embryo adoption”) can all be used to create a child without triggering adoption-like regulations and procedures. This law follows the model established by the traditional legal treatment of AID, whose extension to these other ARTs avoids sex-based discrimination. In other words, just as a man generally has parental rights when his wife bears a child conceived with another man’s donated semen, so too a woman has parental rights when she bears a child conceived with donated eggs or donated embryos.

Under the new UPA, only one reproductive arrangement evokes state supervision. For a gestational surrogacy arrangement ("gestational agreement"), parental status must be transferred from the woman giving birth to the intended mother. To accomplish this goal, the new UPA details rules for what amounts to a “preconception adoption” proceeding. A “validated” gestational agreement transfers parental rights to the intended parents after a required parental screening (including a home study), judicial approval, and a limited opportunity for the birth parent’s repudiation of the agreement—all before the pregnancy begins. (Nonvalidated agreements might suffice under the new UPA if all the parties wish to perform the contract’s terms, but then postnatal judicial intervention would become necessary both to terminate the parental rights of the birth mother ("surrogate") and decree an adoption for the intended parents.)

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145 See id at § 702 (refusing to recognize a donor as a parent).
146 See id at § 702 cmt.
147 See Baby M, 537 A2d at 1254-55 (rejecting equal protection arguments likening AID to traditional surrogacy but acknowledging that egg donation presents a more compelling comparison). See also Soos v Superior Court, 897 P2d 1356 (Ariz App 1994) (holding that a gestational surrogacy statute that fails to provide procedure for the genetic mother to prove maternity, while affording the father a procedure for proving paternity, violates equal protection); Shultz, 1990 Wis L Rev at 378-79 (cited in note 137).
148 See new UPA, Art 8 (cited in note 120) ("Gestational Agreement").
149 See id at § 807.
150 Id at §§ 801-03. This approach seems to undercut Garrison’s position that adoption-like regulations could not meaningfully apply to preembryo transfers. See Garrison, 113 Harv L Rev at 919 (cited in note 28).
151 New UPA § 806 (cited in note 120).
152 See id at § 809.
Four states (Delaware, Texas, Washington and Wyoming) have enacted at least parts of the new UPA, and undoubtedly other states will also adopt elements of the law. In fact, it was introduced in the legislatures of California, Illinois, Maine, and Utah in 2004.

With the checkerboard of approaches demonstrated by the survey of existing law and proposed reforms in the United States, however, intended parents from a new-UPA jurisdiction who seek to avoid the regulation that the law imposes on one procedure, gestational surrogacy, can easily seek assistance in a more hospitable state. As noted earlier, California decides such cases based on the parties' intent at the time of the agreement, and precedent from the Supreme Court of California recognizes the commissioning couple as the parents of a child born by a gestational surrogacy arrangement. A few other states (notably Massachusetts and Ohio) have recognized the genetic parents as legal parents in such cases. Indeed, in seeking more permissive legal regimes, intended parents need not limit their search to the United States, and a number of international surrogacy arrangements document this point.


155 In fact, the drafters of the new UPA expressly recognized that parties facing restrictions on assisted reproduction or gestational agreements in their home states might seek a more hospitable forum and then return with a child. See new UPA, Art 8 cmt (cited in note 120). Compare Adoption of Samant, 970 SW2d 249 (Ark 1998) (upholding thirty day presence requirement, without more, for petition to adopt a child born pursuant to surrogacy contract, despite absence of any other connections between the parties and the state), with In re S.G., 663 A2d 1215 (DC App 1995) (declining jurisdiction over adoptions of children born pursuant to surrogacy arrangements when the parties had no ties to the District of Columbia). See also Conn Gen Stat Ann § 45a-776 (West 1993) (providing a choice of law rule for children conceived by AID). Consider Susan Frelich Appleton, Surrogacy Arrangements and the Conflict of Laws, 1990 Wis L Rev 399; Anastasia Grammaticaki-Alexiou, Artificial Reproduction Technologies and Conflict of Laws: An Initial Approach, 60 La L Rev 1113 (2000).

156 See note 137 and accompanying text.

157 See Culliton v Beth Israel Deaconess Medical Center, 756 NE2d 1133 (Mass 2001).

158 Belsito v Clark, 644 NE2d 760 (Ohio Com Pl 1994).

159 Garrison would reach this result too. See Garrison, 113 Harv L Rev at 912-17 (cited in note 28).

160 See, for example, Philip Britton, Gay and Lesbian Rights in the United Kingdom: The Story Continued, 10 Ind Intl & Comp L Rev 207, 214 (2000) (noting wealthy gay
In short, for those intent on adding a child to the family without sexual reproduction and without adoption's difficulties and intrusions, the law of ARTs should not present an obstacle. In the main, the existing legal treatment of ARTs across the United States makes adoption a less attractive alternative for meeting the interests of those with fertility problems and a desire to have children.

C. The Market

The operation of the market reinforces the apparent attractiveness of ARTs and the comparative disadvantages of adoption. Despite the expense and the less than perfect success rates for IVF and other ARTs that build on IVF (ICSI, egg donation, and gestational surrogacy), infertility treatment continues to be big business. As the President's Council on Bioethics recently noted in a related context, "[e]ntrepreneurs [in the field of biotechnology] not only resist governmental limitation of their work or restrictions on the uses to which their products may be put[,] [t]hey also promote public demand." Physicians, clinics, and programs providing infertility services not only advertise, but often catch the public's collective eye through mostly cheery human interest stories in medical school magazines and the

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161 See Duenwald, After 25 Years, NY Times at F5 (cited in note 80) (reporting IVF success rate of 25 percent for 2000, as compared to 12 percent in 1988). See also 42 USC §§ 263a-1 to 263a-7 (2000) (requiring ARTs programs to report pregnancy success rates).

162 President's Council on Bioethics, Reproduction and Responsibility at 155 (cited in note 15) (reporting gross revenues of four billion dollars per year for ARTs services and listing costs for specific services); Kolata, Heart's Desire, NY Times at F1 (cited in note 116); VandeWater, Fertility Doctors, St Louis Post-Dispatch at Business Plus 10 (cited in note 116).


popular press. About a dozen states mandate insurance coverage of infertility treatments, easing the path to pursuing such choices. Moreover, RESOLVE (a nationwide infertility support group) offers information about special payment plans designed to make costs manageable, while some treatment centers have begun "egg sharing" arrangements under which patients with means subsidize the treatment costs of others in exchange for their ova. Some authorities credit the "fertility industry" with the promotion of an understanding of parenthood based on intent, not biology, because this understanding helps attract consumers.

My cousin's story provides a telling example of existing practices and values, while also showing how ARTs seem to beget the need for additional ARTs: When my cousin and her husband learned about his infertility, they turned to donor insemination, AID. The process succeeded, and soon after the birth of their daughter, the couple decided that they wanted to have three additional children and they wanted these children to be conceived with semen from the same anonymous donor who helped conceive their daughter. They liked the idea that all their children would be full siblings, and they reasoned that this relationship

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165 See, for example, John G. Carlton, Born into a Gray Area, St Louis Post-Dispatch B1 (Jan 31, 1999); Michael Ryan, Countdown to a Baby: How Hard Could it Be to Get Pregnant?, The New Yorker 68 (July 1, 2002).

166 See, for example, 215 Ill Comp Stat § 5/356m (West 2004); Md Ins Code Ann § 15-810 (2003). See also Bartholet, Family Bonds at xiii (cited in note 29); President's Council on Bioethics, Reproduction and Responsibility at 157 (cited in note 15) (citing fourteen states that regulate insurance coverage of infertility treatment).


169 See Freundlich, Adoption and Assisted Reproduction at 15 (cited in note 96). Consider notes 135-38 and accompanying text (summarizing California's development of a legal rule recognizing "intended parents").

170 Recipients of donor semen often have specific preferences. See, for example, Harnicher v University of Utah Medical Center, 962 P2d 67 (Utah 1998) (rejecting claim for damages for defendant's use of wrong donor semen, which resulted in birth of children who did not physically resemble mother's husband).
could prove beneficial in case one of the children should ever suffer an illness requiring bone marrow or organ transplantation. But only a few vials of semen from the original donor remained available at the clinic that originally helped them. When my cousin failed to become pregnant a second time after insemination, her physician recommended IVF and ICSI as a way to make the best use of the small remaining supply of frozen semen from the chosen donor.

Although I readily concede that I cannot feel the emotions that fertility problems evoke in affected families, this story surprised me. After all, my cousin could become pregnant without undergoing the grueling and chancy process of IVF, and the semen in question came from an anonymous donor, not her husband. Yet my cousin seemed just as drawn to trying every means of having all her children be full siblings as some infertility patients are drawn to trying every means of having "their own" children. My point is not to question her decisions but rather to wonder to what extent the availability of technology, no matter how invasive and expensive, played a role in constructing her preferences.

Finally, the fertility specialists' interest in attracting consumers is not the only market force at work. Prospective parents can bid for the genetic material of their choice, as demonstrated by the now common advertisements in college newspapers for egg donors and the seemingly endless variety of personal pro-

\[171\] See Fisher, 29 Ann Rev Sociol at 355 (cited in note 71) (explaining how medicalization of infertility pushes patients to pursue all possible treatments). Barbara Katz Rothman speculates that my cousin might have been seeking a sense of control, because "it has to be very weird to be pregnant by a stranger." Using the same donor for successive children allows a woman conceiving by AID to say, "I'm not pregnant by a stranger, but by little Johnny's father." Email from Barbara Katz Rothman, Professor of Sociology, Baruch College, City University of New York, to Susan Frellich Appleton,Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University School of Law (Apr 30, 2004) (on file with author).

\[172\] See President's Council on Bioethics, Reproduction and Responsibility at 29 (cited in note 15) (indicating that preference for ICSI, even in the absence of male factor infertility, "has to do with the wish to increase control over, and success rates for, fertilization"). See id at 38 (noting how emotional vulnerability of infertility patients may lead them to take undue risks).

files detailed on the website of the Sperm Bank of California.\textsuperscript{174} To the extent that prospective adopters worry about the risk of pre-placement environmental factors (both prenatal and following birth), certainly ARTs provide a way to control such influences. Even if the intended mother does not carry the pregnancy (as she would had she used AID, egg donation, or even embryo donation), she might be able to select a gestational “surrogate” in whose behavior she feels confident.\textsuperscript{175}

The advent of prenatal genetic diagnosis as part of the IVF process not only helps “prospective parents realize their own dreams of having a disease-free legacy,”\textsuperscript{176} but also allows them actively to pursue desirable genetic traits (including those necessary to create a “savior sibling” to help a seriously ill child\textsuperscript{177}) and sex selection.\textsuperscript{178} The larger mindset, of course, makes prospective parents feel the obligation to choose the best for the child before birth—or even before conception. This mindset also fuels heightened expectations of consumer control, as powerfully illustrated by a well-publicized California case in which the commissioning couple tried to force “selective reduction” on an unwilling “surrogate” because they had ordered only one child and she had become pregnant with twins.\textsuperscript{179}

All of these possible “advantages,” including the heightened sense of consumer control, present a sharp contrast to the distinctive characteristics of adoption. First, adoption law has a long tradition of prohibiting the exchange of valuable considera-

\begin{footnotesize}

\textsuperscript{175} See, for example, Belviso, 644 NE2d 760 (involving an intended mother’s sister who served as a gestational “surrogate”).

\textsuperscript{176} The President’s Council on Bioethics, \textit{Beyond Therapy} (cited in note 163) (quoting Chapter 2, § 1C4, which quotes a transcript of remarks by G. Schatten at the Council’s meeting in December, 2002).

\textsuperscript{177} See, for example, Gillott, Conscience at 13 (cited in note 116).


\end{footnotesize}
tion for the placement of a child,\textsuperscript{180} consistent with adoption's emphasis on child welfare. Despite suggestions that adults willing to spend huge sums on adoption are likely to treat the child well,\textsuperscript{181} the more adults are willing to pay, the more unmistakable the signal that they are serving their own interests, not those of the child. In other words, adults seeking to serve child welfare, even for a particular child, have no reason to become the highest bidders once they know that other acceptable placements are available for this child. Further, the higher the price, the more questionable the voluntariness of the birth parents' relinquishment becomes.\textsuperscript{182}

Certainly, in practice the wall between commerce and adoption is not completely impenetrable, as Adam Pertman and other observers of the modern scene have documented.\textsuperscript{183} Adoption fees vary dramatically, and distinguishing legitimate expenses from more questionable charges has become increasingly difficult.\textsuperscript{184} Indeed, to the extent that there is a "going rate," some adoptions cost more than some ARTs.\textsuperscript{185} Nonetheless, the tradition of adoption as an institution that exists outside the market produces a very different context than the explicitly commercial realm of ARTs. In adoption, even those with the financial capacity to "buy" what they want cannot easily do so.

Second, although present adoption practices seem to reflect a racial ranking, with white infants at the top of the hierarchy and biracial babies close behind,\textsuperscript{186} adopters can at best choose among

\begin{footnotes}
\item[180] Indeed, it was precisely this rule, codified in a New Jersey statute, that made the surrogacy agreement in \textit{Baby M} unenforceable as a violation of public policy. \textit{Baby M}, 537 A2d at 1240-42.
\item[182] See Freundlich, \textit{The Market Forces} at 23 (cited in note 72).
\item[183] Adam Pertman, \textit{Adoption Nation: How the Adoption Revolution is Transforming America} 185-208 (Basic Books 2000). See also Bartholet, \textit{Family Bonds} at 73-74 (cited in note 29); Freundlich, \textit{The Market Forces} at 11, 34-35 (cited in note 72); Melinda Lucas, \textit{Adoption: Distinguishing Between Gray Market and Black Market Activities}, \textit{34 Fam L Q} 553 (2000).
\item[184] See Freundlich, \textit{The Market Forces} at 18-19 (cited in note 72).
\item[185] See id at 14 (estimating domestic adoptions range in cost from four thousand dollars to thirty thousand dollars); Freundlich, \textit{Adoption and Assisted Reproduction} at 50-55 (cited in note 96) (citing some evidence of payments of one hundred thousand dollars for adoption of a newborn); Inhorn, 56 Soc Sci & Med at 1844 (cited in note 80) (estimating cost of each live IVF birth in U.S. at fifty thousand dollars and in developing countries at one hundred thousand dollars).
\end{footnotes}
existing children rather than designing or commissioning "products" according to their individual preferences. This is so even with respect to private placements, considered the "most consumer-driven" among the various paths to adoption today (where "private adoption attorneys can abide by what the client wants"). Even here, however, adopters often agree to take an available child, compromising an original "wish list" of characteristics in favor of the living, breathing realities of available children. Further, although a number of emerging legal doctrines, including disclosure laws (requiring birth parents to reveal at relinquishment the child's medical and genetic history) and causes of action for "wrongful adoption," serve as incentives for providing information about the child's background to adoptive parents, still such measures fall far short of the opportunities to select and often to control the prospective child's genes and environment that some ARTs promise.

D. The (Little) Empirical Data

The scant existing data tell a number of different stories about the motivations, preferences, and attitudes of those who consider adoption. In general, attitudes towards adoption have been growing more positive, even though the number of Americans adopting is steadily decreasing. Adoptions from foster care are rising (no doubt because of recent legal changes, such as the enactment of the Adoption and Safe Families Act); yet in recent years most adoptions of these children have been undertaken by foster parents and relatives, with the number of adopters, American boys).

189 See, for example, Jackson v State, 956 P2d 35 (Mont 1998); M.H. v Caritas Family Services, 488 NW2d 282 (Minn 1992) (recognizing cause of action by adopters against adoption agency for negligent misrepresentations about a child in securing adoptive placement).
190 See Fisher, 29 Ann Rev Sociol at 335 (cited in note 71) (noting the little attention that sociologists have paid to adoption).
191 See id at 352. See also Tyzen Tyebjee, Attitude, Interest, and Motivation for Adoption and Foster Care, 82 Child Welfare 685, 704 (2003).
tions by others declining. Not all adopters have experienced infertility. Religious, humanitarian, or altruistic motives prompt about half the adoptions from public agencies and, to a lesser extent, other adoptions. Nonetheless, infertility provides the most commonly cited reason for adoption, with one study showing about two-thirds of adopters attributing their decision to infertility.

Among the infertile, empirical evidence shows that most couples turn to medical treatment when first experiencing a fertility problem, reinforcing the "second best" or "last resort" status of adoption. Half of these couples are then able to have a biological child; the others remain childless or seek adoption. One study found that only 15 percent of women treated for infertility ever attempted adoption. In a Dutch study, 95 percent of the infertile couples examined considered medical help, with adoption and "other life goals" as the options most considered after reproductive technology, but only 5 percent ultimately chose adoption. A series of in-depth interviews of adoptive par-

194 See Freundlich, The Impact of Adoption at 134 (cited in note 50); Fisher 29 Ann Rev Sociol at 338 (cited in note 71).
197 See van Balen, 31 Patient Ed & Counseling at 19 (cited in note 196). See also Freundlich, Adoption and Assisted Reproduction at 4 (cited in note 96) (citing evidence that one half of those adopting newborns seek ARTs services first); Fisher, 29 Ann Rev Sociol at 352 (cited in note 71) (noting stigma associated with adoption).
198 See Brodzinsky, in Infertility at 247 (cited in note 196). See also Daniuk and Hurtig-Mitchell, 81 J Counseling & Dev at 389 (cited in note 93) (citing estimates that for "30% to 40% of infertile couples, adoption is their only option for becoming parents").
199 See Fisher, 29 Ann Rev Sociol at 353 (cited in note 71) (relying on large national survey reported in 2000). See also Freundlich, Adoption and Assisted Reproduction at 2 (cited in note 96) (stating that only about 11 percent of infertile couples adopt); Brodzinsky, Infertility at 247 (cited in note 196) (stating that approximately 25 percent of infertile couples eventually turn to adoption).
The preference for medical treatment, including ARTs, also emerges in statistics showing that 93 percent of the couples who unsuccessfully attempted IVF said that, if another medical procedure were available, they would try it to have a biological child. One might interpret such data to indicate that, for the infertile, adoption offers an inherently unattractive option. Perhaps the most cogent evidence of this anti-adoption view comes from those developing countries whose laws and culture insist on "purity of lineage" and "known" parenthood. In these societies, developments such as IVF and ICSI do not compete with adoption because adoption never presented an acceptable response to infertility.

But according to a different interpretation of the data, the current preference for ARTs (at least in Western societies) results not from negative attitudes about the essential nature of adoption but from specific disadvantages of contemporary adoption practice, including the shortage of healthy white infants available for adoption, the costs of adoption, and fears of disruption or intrusion by birth parents. Writing in 1999, Lori An-

201 Daniluk and Hurtig-Mitchell, 81 J Counseling & Dev at 392 (cited in note 93).
203 Inhorn, 56 Soc Sci & Med at 1843 (cited in note 80). Inhorn explains how Islamic religious tenets prohibit adoption and how cultural anxieties reinforce such opposition. Id. These attitudes recall the early English rejection of adoption. See notes 36-37 and accompanying text.
204 Inhorn emphasizes the gendered effects of such developments in Egypt. Infertile husbands, whose wives could have conceived while young but have become too old to bear children, are leaving these wives and remarrying women of reproductive age, now that ICSI will allow these men to father children. Inhorn, 56 Soc Sci & Med at 1846 (cited in note 80).
205 See Fisher, 29 Ann Rev Sociol at 354-55 (cited in note 71) (citing costs of adoption and fears about birth parents); Linda S. Williams, Adoption Actions and Attitudes of Couples Seeking In Vitro Fertilization: An Exploratory Study, 13 J Fam Issues 99, 105, 106, 107, 109 (1992) (noting that some couples in study in Ontario, Canada, simultaneously pursued IVF and adoption because of long waiting lists for adoption and difficulty finding healthy white infants to adopt; couples planning another IVF attempt said they would take an adopted child if available); Charlene E. Miall, Reproductive Technology vs. the Stigma of Involuntary Childlessness, Social Casework, J of Contemp Social Work 43, 47 (Jan 1989) (including a survey of seventy-one infertile Canadian women who strongly supported AID and surrogacy because of, among other things, long waiting lists and race issues). See also Fisher, 29 Ann Rev Sociol at 355 (cited in note 71) (noting demographic changes in children available for adoption); Myrna L. Friedlander, Adoption: Misunderstood, Mythologized, Marginalized, 31 Counseling Psych 745, 748 (2003) (criticizing “the myth of the ‘adopted child syndrome,’” which leads prospective adopters to fear mental health problems in adoptees).
Andrews reported annual figures of approximately sixty thousand donor insemination births, fifteen thousand births from in vitro fertilization, and one thousand births from surrogacy arrangements—but only thirty thousand healthy infants available for adoption.\textsuperscript{206} Another analysis focusing on donor insemination states that most infertile couples considered adoption but in the end opted for donor insemination because of both their dissatisfaction with adoption regulations and their satisfaction with AID, specifically the opportunity to experience pregnancy, childbirth, and the mother's genetic relationship with the child.\textsuperscript{207} Although 52 percent cited the wife's desire to experience pregnancy as the major reason for choosing donor insemination, almost the same percentage (47 percent) cited the ease of having a child as the major reason for choosing donor insemination, with frustration about the adoption process as the next most significant reason.\textsuperscript{208} Yet, 78 percent of the couples in this study did not even begin the adoption process,\textsuperscript{209} so their dissatisfaction must have been anticipatory or vicarious. Breaking down into its component parts this dissatisfaction with adoption as compared to ARTs, one finds not only references to a shortage of same-race, healthy adoptable infants and resulting long waiting lists, but also concerns about onerous parental selection procedures and fears about new disclosure rules and possible intrusion by biological parents.\textsuperscript{210} In general, adoption is perceived as more risky than having a child through ARTs.\textsuperscript{211}

\textsuperscript{206} Andrews, The Clone Age at 220 (cited in note 94).
\textsuperscript{207} Ken R. Daniels, Adoption and Donor Insemination: Factors Influencing Couples' Choices, 73 Child Welfare 5, 7-9 (1994) (based on interviews with fifty-eight of the seventy-five couples who gave birth during period from 1984 to 1990 following treatment at a New Zealand infertility clinic).
\textsuperscript{208} Id.
\textsuperscript{209} The 78 percent figure represents those who merely thought about adoption (33 percent), those who contacted an agency but did not pursue adoption (17 percent), and those who did not consider adoption at all (28 percent). Of the others, 15 percent began adoption procedures and 7 percent began such procedures but abandoned them after having a negative experience. Id at 7.
\textsuperscript{210} Id. See also Braverman and Corson, 63 Fertility & Sterility, at 547 (cited in 196) (finding a preference for the nondisclosure available with AID); Deborah I. Frank, Factors Related to Decisions about Infertility Treatment, 19 J Obst Gyn Neo Nurs 162, 166 (1990) (noting "legal factors" important for treatments with legal ambiguities, such as surrogacy, and for options "where legal status is a prominent aspect of the option, as in the case of adoption"); Miall, J Contemp Social Work at 47 (cited in note 205) (citing access to adoption records and registries as a reason to prefer AID and surrogacy over adoption).
\textsuperscript{211} See Freundlich, Adoption and Assisted Reproduction at 3 (cited in note 96) (citing perceived health risks, risks of intrusion by birth parents, and risks of difficulty for child in coping with adoption).
A cross-sectional study of 275 white and middle-class married couples in southeastern Michigan in 1988 included both couples with fertility problems and those presumed to be fertile—thus avoiding the sample bias infecting those studies whose subjects come only from patient lists at fertility clinics. Face-to-face interviews were conducted with each spouse in 185 infertile and ninety fertile couples. When asked about eleven different types of interventions, infertile couples responded more favorably toward all interventions, except adoption (which they ranked seventh) than did fertile couples, who considered adoption the most acceptable alternative. Although infertile couples sometimes pursued adoption, they ranked it as the least acceptable of the interventions they felt they could use. In other words, those who were actually confronting the available options after the failure of sexual reproduction found adoption much less attractive than fertile couples addressing such questions hypothetically, although the infertile couples were willing to consider adoption as a last resort.

In-depth narrative interviews with thirty-nine infertile couples who adopted disclose in detail their perceptions of the "structural factors" that burden the adoption process today. These adopters recalled the sense of powerlessness they felt, the invasiveness of the close scrutiny they endured, and their disillusionment with a process they experienced as "baby-selling," as well as the absence of post-adoption support and a sense of stigma and less-than-full legitimacy about their parental status. Although these couples had vigorously pursued medical treatments for their infertility before turning to adoption, they explained this course of action as protection against possible fu-

213 The study by Braverman and Corson cited in note 196 also includes groups from both infertility and obstetrics-gynecology practices.
214 This list included: male hormones, AIH, AID, IVF, and surrogacy, as well as female hormones, tying the woman's cervix, and ovulation-stimulating drugs. See Halman, 82 Am J Pub Health at 192 (cited in note 212).
215 See id at 193.
216 Id.
217 Id.
ture regrets—an ability to take comfort in the knowledge that they had tried everything to have "their own child." Yet after adopting, some of these couples expressed regrets about having invested so much time and emotional energy in medical treatments instead of more promptly beginning the adoption process. Further, both this study and a review of the empirical literature find high satisfaction among adoptive parents.

Not surprisingly, the empirical data reflect gender differences. Infertility takes a more serious emotional toll on females than males. No consistent pattern of gender-based preferences for interventions emerges, however. For example, in one study wives expressed more positive attitudes toward adoption than did their husbands, who often preferred not to have children at all than to adopt, while both spouses ranked adoption as the last resort. But another study shows that most males and females (85 percent and 86 percent respectively) viewed biological and adoptive parenthood as essentially the same. And assisted reproduction involving donor gametes elicits different responses from males and females. Although more females than males support ARTs not involving donors over childlessness and adoption, the majority of females prefer ARTs with donors over adoption, while males are significantly more likely than females to support adoption over ARTs with donors. Another study, however, shows no significant differences by gender in the rank ordering of interventions (donor gametes, adoption, or child-free living) among a sample of patients in an infertility practice; in the ob-gyn group in the same study, however, men were more likely than women to choose adoption over ARTs with donor gametes, regardless of the source of the fertility problem. Further, more

221 Daniluk and Hurtig-Mitchell, 81 J Counseling & Dev at 392 (cited in note 93).
222 Id at 396.
223 Id; O'Brien and Zamostny, 31 Counseling Psych at 681, 687, 690-91 (cited in note 220).
224 See, for example, Daniluk and Hurtig-Mitchell, 81 J Counseling & Dev at 392 (cited in note 93); Inhorn, 56 Soc Sci & Med at 1842 (cited in note 80); Su Ann Arnn Phipps, A Phenomenological Study of Couples' Infertility: Gender Influence, 7 Holistic Nurse Prac 44 (1993). See also Laurie Tarkan, Fertility Clinics Begin to Address Mental Health, NY Times F5 (Oct 8, 2002) (citing study that found women seeking infertility treatment suffer levels of emotional distress equal to those of cancer and heart patients).
225 See Williams, 13 J Fam Issues at 103, 107 (cited in note 205).
227 See id at 314-15.
228 See Braverman and Corson, 63 Fertility & Sterility at 545-46 (cited in note 196).
men than women found unacceptable the use of family members and friends as donors.\footnote{See id at 546.} According to a different study, both infertile and fertile couples viewed most unfavorably interventions they deemed inequitable between the two spouses, specifically those procedures such as AID or traditional surrogacy, through which only one parent shares a genetic relationship with the child.\footnote{See Halman, 82 Am J Pub Health at 193 (cited in note 212).}

Despite the bias in the samples used in several of these studies,\footnote{For example, some investigators focus on infertility patients and others on those who have successfully adopted. Such differences complicate an effort to draw a consistent set of inferences from the data.} they support the inference that most infertile couples pursue ARTs before adoption.\footnote{See Daniluk and Hurtig-Mitchell, 81 J Counseling & Dev at 392 (cited in note 93); van Balen, 31 Patient Ed & Counseling at 24-25 (cited in note 196).} This behavior is reinforced by the practice of some adoption agencies that refuse to consider applicants who are pursuing medical treatment or who have not yet "come to terms" with their infertility.\footnote{See, for example, Williams, 13 J Fam Issues at 100 (cited in note 205).} In other words, by rejecting prospective adopters who are simultaneously exploring medical interventions to have a child, agencies compel even those with favorable views of adoption to save it for last if they wish to try \textit{all} possible options.\footnote{See note 222 and accompanying text (reporting evidence that eventual adopters wish they had not spent so much time and energy pursuing medical treatments for infertility).}

Nonetheless, another factor arguably is at work as well. Medical treatment for infertility focuses exclusively on the needs and interests of the patients—the prospective parents. Indeed, the "medicalization of infertility" and the marketing of ARTs have constructed a sense of personal responsibility for unwanted childlessness that fuels the drive to pursue treatment after treatment.\footnote{See Fisher, 29 Ann Rev Sociol at 355 (cited in note 71) (quoting female respondent in one study who compared infertility to alcoholism and remarked, "You don't quit [trying to conceive] until you've hit bottom.").} Adoption, in contrast, focuses primarily on child welfare, at least according to the conventional wisdom.\footnote{See Freundlich, \textit{Adoption and Assisted Reproduction} at 19 (cited in note 96).} The legal rules governing the two practices reflect this difference.\footnote{See Part III B.} Yet, when infertile couples adopt, they forthrightly acknowledge that they are satisfying their own needs to parent, not attempt-
ing to rescue a child. It should come as no surprise, then, that adults would turn first to the service that explicitly and publicly gives priority to their own agendas.

Two possible reforms might follow from this analysis. First, the empirical literature supports the suggestion that couples and the institution of adoption might benefit from inserting a discussion of adoption at the outset of medical treatment for infertility. Second, perhaps combining the rhetoric of child welfare with more attention to the parenting desires of the infertile—as the Delineator's campaign did in an earlier era—would help level the playing field for adoption and ARTs.

IV. A CLOSER LOOK AT ADOPTION'S PUBLIC FACE

A. What Precisely Do We Mean by “Child Welfare” as Adoption’s Goal?

Under the conventional view and my casebook critic’s assessment, the child-centered character of American adoption law stands out as its distinctive feature, in sharp contrast to the rules and norms of ARTs. Given its importance, this feature merits a closer examination especially because of the many possible meanings of “child welfare” or children’s “best interests.” (Certainly, however, something is awry if a shortage of babies looms as a problem for an institution that professes child-centered goals.) The objective here does not require deciding whether adoption regulation of some sort is justified, but rather determining whether “child welfare” can deliver what it promises as the defining mission for adoption.

238 Daniluk and Hurtig-Mitchell, 81 J Counseling & Dev at 393 (cited in note 93).
240 See note 53 and accompanying text. See also notes 321-38 and accompanying text. But see Tyebjee, 82 Child Welfare at 705 (cited in note 191).
241 See notes 9-10 and accompanying text.
242 See, for example, note 40 and accompanying text.
243 See, for example, Carol Sanger, Separating from Children, 96 Colum L Rev 375, 461-62 (1996) (noting that “the altruism in surrogacy, unlike the altruism in adoption, is directed at the wrong target[.] . . . the infertile couple”).
244 Naomi Cahn has already challenged one aspect of the conventional wisdom about American adoption law. According to her analysis, crediting the 1851 Massachusetts statute with introducing and codifying adoption’s focus on the child’s well-being overstated the facts. Cahn, 52 Duke L J at 1103 (cited in note 40). She writes that the statute did not mention “best interests,” it specified no procedures for evaluating the appropriateness of an adoptive placement, and it contemplated an understanding of “suitability” that “varied according to the class and condition of the adoptee’s parents.” Id at 1114.
First, the traditional emphasis on adoption's child-welfare goal does not always carefully distinguish between furthering the interests of children as a class versus serving the needs of individual children. Although the ubiquitous "best interests of the child" test claims to represent a fact-based, individualized assessment in all the contexts in which it governs, broad generalizations often prevail in applications of this standard. For example, Julie Berebitsky posits that adoption became a template for the normative family as single women or female couples (so-called Boston marriages) found their one-time suitability as adoptive parents under attack beginning in the 1940s. Note how this understanding turns the notion of adoption's purported imitation of nature on its head, by suggesting that adoption practice sought to create ideal families that biological families could then use as models. Although the social forces underlying this idea might rest on a belief that children generally benefit from a certain kind of family—whether acquired by birth or adoption—still, Berebitsky notes how this (misguided) approach threatened some individual children by disqualifying particular beneficial placements.

A similar tension pervades many facets of modern adoption policy. Consider as an example the way that the debate about transracial adoption has evolved, with broad social goals often pitted against the asserted needs of individual children. In one of the early, well-publicized struggles of a white foster family to

Although the Massachusetts statute aimed to protect adoptees from economic exploitation, it left ample room for a child's work obligations within the new family, and hence for financial benefits to adopters (benefits that biological children were expected to produce as well). Id at 1112.


246 See, for example, Adoption of Vito, 712 NE2d 1188, 1193 (Mass App 1999); Scarpetta v Spence-Chapin Adoption Service, 269 NE2d 787, 790-91 (NY App 1971); In re Adoption of M.J.S., 44 SW3d 41, 49 (Tenn App 2000).

247 Consider Berebitsky, Like Our Very Own (cited in note 53).

248 Id at 102-27. See notes 64-65 and accompanying text.

249 See notes 66-69 and accompanying text (describing "matching").

250 Berebitsky, Like Our Very Own at 157-60 (cited in note 53) (detailing the story of the Yunick case). For a contemporary illustration, see Lofton v Secretary of the Dept of Children and Family Services, 358 F3d 804 (11th Cir 2004) (upholding Florida's adoption disqualification of gay and lesbian foster parents).
adopt an African-American child who had lived with the family. Judge Julia Cooper Mack rejected her colleagues’ reliance on generalities about racial matching to emphasize a focus on “the best interest of THE child.” Elizabeth Bartholet contends that opposition to transracial placements, based on generalizations about the needs of minority children, leaves stranded many individual children of color who could find homes with white parents. Richard Banks argues that disallowing adoptive parents to choose the race of the child to be placed with them would bring adoption law into line with constitutional nondiscrimination values. He views the best-interests standard as “almost wholly indeterminate with regard to race,” and he observes that in the present system “[t]he preferences of adoptive parents are recast as the ‘needs’ of black children.” Banks’s critics fear that implementing his proposal would harm the particular children who happen to be placed with parents not prepared for or committed to life in a multiracial family.

The foregoing analysis highlights ambiguities in the meaning of “child welfare” in the selection of adoptive placements. Full consideration of “child welfare” also requires examination of the “supply side”—how well children are served by the policies that determine their eligibility for adoption in the first place. Examining adoption during several different historical periods, critics have raised powerful questions about the premise that many children need adoptive homes. Unmasking the value judgments that construct the impetus for many adoptions, these critics show how society’s changing attitudes about single-parent and poor families might expand or contract the number of children requiring placement.

For example, Naomi Cahn reviews the social engineering implicit (or, indeed, explicit) in the early phases of the child-saving movement. Rickie Solinger examines the intense and

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251 In re Petition of R.M.G., 454 A2d 776 (DC App 1982).
252 Id at 795 (Mack concurring).
254 Consider Banks, 107 Yale L J 875 (cited in note 21).
255 Id at 947.
256 Id at 921.
257 See Elizabeth Bartholet, Correspondence, Private Race Preferences in Family Formation, 107 Yale L J 2351, 2355 (1998). See also Kennedy, Interracial Intimacies at 436 (cited in note 253).
258 Cahn, 52 Duke L J at 1089-97 (cited in note 40).
relentless social and familial pressures—really, coercion—that led single white birth mothers to relinquish babies for adoption from the 1950s through the early 1970s. Simultaneously, the glorification of the “needs” of childless middle-class married couples sent the message that these couples would make more deserving and more successful parents for these babies. The politics and social meaning of such child-transfer policies became clear later as unmarried individuals began to adopt children, in spite of the earlier certainty that a mother’s unmarried status itself should prompt relinquishment. Solinger notes the replication of such norms today as Americans adopt children from poor countries, in turn prompting careful thought about whether claims of child welfare justify this increasingly popular practice. She contends that privileged adults seeking children will find the path that presents the fewest obstacles and that, today, this path leads to certain foreign countries. Another critic of contemporary practices, Dorothy Roberts, argues that better support and respect for poor and at-risk families would allow more children to stay in their families of origin and thus would make placements with others unnecessary.

The plasticity of the “need” for adoptive homes also plays out in changing federal statutory standards. For example, in the 1980s the Adoption Assistance and Child Welfare Act emphasized the importance of maintaining the child’s birth family, as reflected in requirements for state agencies to make reasonable

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259 Solinger points out how unmarried mothers of color usually kept their children and remained with their families, often receiving public assistance. Similarly situated white women, however, were treated as unfit and mentally disturbed, and they were pressured to relinquish for adoption their “valuable” babies. Solinger, *Beggars and Choosers* at 68-80 (cited in note 72). See also Sanger, 96 Colum L Rev at 446-47 (cited in note 243).

260 Compare id at 70 with id at 129. See also Berebitsky, *Like Our Very Own* at 171 (cited in note 53).

261 Solinger, *Beggars and Choosers* at 69-70 (cited in note 72). See also Freundlich, *The Market Forces* at 63 (cited in note 72) (reviewing some international adoption agencies’ efforts to provide in-country services); John Sayles, *Casa de Los Babys* (2003) (recent film providing varied perspectives on efforts by wealthy and middle-class women from U.S. to adopt in a South American country).


efforts to prevent removal from the home and to provide family reunification services. By contrast, the Adoption and Safe Families Act, which became the law in 1997, tilts in favor of adoption by de-emphasizing efforts to preserve the family of birth and by requiring quick termination of parental rights in some cases.

In Elizabeth Bartholet’s comparison of ARTs and adoption, she calls for deregulation of adoption. Yet this argument overlooks the fact that significant deregulation of adoption has occurred in recent years on the “supply side,” diminishing the role of state agents and vesting new authority in birth parents. Strengthened safeguards for protecting the birth father’s right to withhold consent, the growing practice of private placements in which birth parents select adoptive parents, and birth parents’ increasing ability to negotiate relinquishment bargains that include continued contact (open adoption) all signal more private control over adoption, at the expense of the freedom and power of adoptive parents. Indeed, the general public became acquainted with birth parents’ enormous control in the selection of adoptive parents during a television show that followed a

265 Section 15 of the statute specified that in order to be eligible for federal funds, a state plan for foster care and adoption assistance must provide “that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.” See 42 USC § 671(a) (2000) (noting statutory history of § 671(a)(15)).


267 The statute requires the state to seek termination of parental rights for children in foster care for fifteen of the past twenty-two months, 42 USC § 675(5)(E) (2000), and removes the previous “reasonable efforts” requirements, see note 265, if the child has been the victim of aggravated circumstances, such as torture, abandonment, or sexual abuse; the parent has killed or attempted to kill another child; or the state has terminated the parent’s rights with respect to a sibling. In addition, the law permits permanency planning for adoption concurrently with reasonable efforts to preserve the family of origin. 42 USC § 671(a)(15)(D), (F) (2000). The law, as extended by President Bush in 2003, amended other provisions to provide greater incentives to states to place foster children for adoption. Adoption Promotion Act, Pub L No 108-145, 117 Stat 1879 (Dec 2, 2003), codified at 42 USCA §§ 673b, 674 (West Supp 2004).

268 See note 32 and accompanying text.


271 See, for example, Annette Ruth Appell, The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?, 30 Fam L Q 483 (1996).

272 But see Freundlich, The Impact of Adoption at 119 (cited in note 50) (questioning whether birth parents have gained control of adoption).
pregnant sixteen-year-old, as she considered five couples competing for her expected baby and ultimately chose one of them, based on promises of a continuing, open relationship.\(^{273}\)

Most authorities regard such consequences of deregulation as positive developments for children in general\(^{274}\) (even if the end result is additional privilege for biological ties). Yet, these same developments bring complexities to domestic adoptions that might lead adults to regard international adoptions and ARTs as more attractive by comparison.\(^{275}\) Contrary to Bartholet’s argument, then, adoption deregulation will not necessarily facilitate adoption although such deregulation might serve the objective of child welfare.

As this brief survey demonstrates, “child welfare” remains a highly contested touchstone. Today’s sensibilities repudiate earlier understandings of the term, while those now embracing and implementing a child-centered view of adoption disagree about not only the best way to serve this goal but also the perspective from which to approach the issue. Even a stripped-down formulation that says “adoption creates new families for children who need them” leaves room for debate. Is the common ground simply a shared rhetoric that appears to distinguish adoption from ARTs?

B. Putting the Rhetoric to the Test: “Embryo Adoption”

If the focus on child welfare—however understood—purportedly distinguishes adoption from ARTs, then what should we make of the increasing publicity about “embryo adoption”? Although most experts use the term “embryo donation” to refer to one’s use of genetically unrelated frozen embryos, usually left over after others pursuing IVF decided to stop,\(^{276}\) the term “embryo adoption” is catching on.\(^{277}\)


\(^{274}\) For example, on the benefits to children of open adoption, see Shanley, Making Babies at 20-24 (cited in note 28).

\(^{275}\) The empirical data support this hypothesis with regard to ARTs. See notes 205, 210-11 and accompanying text.

\(^{276}\) See note 15.

\(^{277}\) See, for example, Richard Jerome, et al, Last Chance Family: Couples Plagued with Infertility Find a New Path to Parenthood: Adopting Frozen Embryos, People 44 (Jan 21, 2002); Smalley, A New Baby Debate, Newsweek at 53 (cited in note 26); Stolberg, Some See, NY Times at A1 (cited in note 26); NBC News, Today, Controversy surrounds
Critics, who prefer the term "embryo donation," point out that the term "embryo adoption" is calculated to advance an anti-abortion position, in particular to prevent embryonic stem-cell research. As one critic asks: "If you can adopt embryos, how can you do stem-cell research on them?" In fact, parents of children born of so-called "embryo adoption" testified in Congress against the use of left-over frozen preembryos for scientific research.

Yet why are those who embrace a "pro-life" view trafficking in frozen embryos in the first place? Wouldn't efforts to halt IVF and other practices that deliberately create excess embryos—many of which will never have the chance to develop—reflect a more coherent position? In fact, precisely such questions sparked my interest in the story about Missouri House Speaker Catherine Hanaway and her IVF attempts.

Not long ago in an op-ed piece in the New York Times, Michael Sandel cited the inconsistency in the stance of many opponents of stem-cell research who support IVF as it is practiced in the United States. Given this inconsistency, however, I suspect something more than "pro-life" politics at work in the promotion of "embryo adoption." I discern one more marketing effort that uses a public mask (I cannot even call it a "face") to disguise private motivations and desires; this campaign invites adults who use ARTs to feel that they are performing a socially beneficial act by contributing to child welfare and providing a family for a child.

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frozen embryos stored in fertility clinics around the nation and whether arrangements for them should be called adoption or donation (Oct 20, 2003) (available on LEXIS). See also, for example, Naomi D. Johnson, Note, Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?, 68 Brooklyn L Rev 853 (2003); Paul C. Redman II and Lauren Fielder Redman, Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption The Answer?, 35 Tulsa L J 583 (2000).

278 For a critique that explains why "embryo donation" is better terminology than "embryo adoption" (including the reasons that many existing adoption laws cannot apply), see Charles P. Kindregan, Jr. and Maureen McBrien, Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos, 49 Vill L Rev 169 (2004). See also Freundlich, Adoption and Assisted Reproduction at 69-74 (cited in note 96).


280 See id (quoting attorney Susan Crockin).

281 Sheryl Gay Stolberg, Stem Cell Debate in House Has Two Faces, Both Young, NY Times A1 (July 18, 2001).

282 See note 15 and accompanying text.

(or embryo) in need. As one “adoptive mother” of three former frozen embryos recently said of her triplets on the Today Show: “These babies are here, and they’re loved and they’re cared for, and they wouldn’t be otherwise.”284 This rationalization depicts the procedure used in a case like Buzzanca285 as a humanitarian endeavor.

Even adoption advocate Elizabeth Bartholet appears to stumble into this rhetorical trap when she criticizes what she calls “technological adoptions.”286 Likewise, Marsha Garrison’s interpretative approach, which looks to guiding principles of family law and existing legal rules that she would apply by analogy to new situations, finds adoption the appropriate rubric for embryo donation.287 This approach receives reinforcement from the recommendations of the President’s Council on Bioethics. In calling for a ban on the purchase and sale of embryos, while accepting the existing commerce in eggs and sperm, the Council suggests that adoption—with its traditional rejection of a “baby market”288—provides a better model than ARTs for embryo transfer.289

Yet why should we think of such cases as adoptions at all? My concern stems not from a rejection of all child-protective measures when applied prenatally or preconceptually. Indeed, I have no problem with banning thalidomide,290 for example; similarly the new UPA’s preconception screening and judicial approval for “gestational agreements”291 make sense to me, whether or not I would endorse these particular safeguards. When a pro-

285 Buzzanca, 72 Cal Rptr 2d 280. See notes 95-98 and accompanying text.
286 See Bartholet, Family Bonds at 219 (cited in note 29).
287 Garrison, 113 Harv L Rev at 917 (cited in note 28). She goes on, however, to note that the rules governing adoption “adapt poorly to the preembryo context.” Id at 919. Consider also Kindregan and McBrien, 49 Vill L Rev (cited in note 278).
288 See notes 180-82 and accompanying text.
291 See notes 148-52 and accompanying text.
A procedure is undertaken for the explicit and sole purpose of producing a child, measures that look ahead to the future child's well-being are certainly rational.\footnote{Hence, the recommendations of the President's Council on Bioethics for data collection to assess ARTs' effects on the health and well-being of the resulting children rest on a sensible foundation. See President's Council on Bioethics, \textit{Reproduction and Responsibility} at 39-44, 195-98, 210-11 (cited in note 15). See also Philip G. Peters, Jr., \textit{How Safe Is Safe Enough?: Obligations to the Children of Reproductive Technology} (Oxford University Press 2004).}

Rather, the notion of adopting an embryo, for the sake of the embryo, strikes me as incoherent\footnote{Compare La Rev Stat Ann § 9:131 (West 2004) (applying the "best interest of the in vitro fertilized ovum" standard in disputes over frozen embryos) with \textit{Davis v Davis}, 842 SW2d 588, 594 (Tenn 1992) (rejecting the trial court's treatment of preembryos as "children in vitro" and its conclusion that the best interests test dictated their implantation).}—just as incoherent as the claim of a couple that they have purposefully conceived a pregnancy for the sake of the resulting child.\footnote{The reasoning in some of the wrongful life cases arguably challenges this intuition. See, for example, \textit{Turpin v Sortini}, 643 P2d 954, 961 (Cal 1982) (rejecting a child's claim for general damages because, but for defendant's alleged negligence, she would not have been born at all); \textit{Berman v Allan}, 404 A2d 8, 12-13 (NJ 1979) (declining to recognize injury in child's being brought into existence with handicaps when alternative is nonexistence). But see Mark Strasser, \textit{Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?}, 64 Missouri L Rev 29 (1999).} Adults make such reproductive choices because of their own interests and desires. Even the stripped down formulation of child welfare—providing families for children who need them—makes no sense when applied to embryos.\footnote{Those who equate such frozen preembryos with children (espousing the "pro-life" position) ought to be making some effort to ban IVF as it is practiced today in the United States, instead of promoting "embryo adoption." See notes 15, 283, and accompanying text. Certainly, this group includes political activists, as shown by various anti-abortion efforts. See, for example, Partial Birth Abortion Ban Act of 2003, Pub L No 108-105, 117 Stat 1201 (Nov 5, 2003), codified at 18 USCA § 1531 (West Supp 2004).}

In addition, the term "embryo adoption" signals that parenthood's essential meaning rests on the "seed concept"\footnote{Barbara Katz Rothman, \textit{Recreating Motherhood} 15-26 (W.W. Norton 2000) (rejecting patriarchal "seed concept" to determine a uniquely female status, maternity). See also Leslie Bender, \textit{Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law}, 12 Colum J Gender & L 1 (2003) (rejecting genetic essentialism to determine parentage).} and that the defining characteristic of adoption lies in the absence of genetic connection between parent and child.\footnote{See Robertson, \textit{Children of Choice} at 142-44 (cited in note 77) (noting how collaborative reproduction, including arrangements in which there is no biologic connection, challenges foundations of adoption law).} Consider, in contrast, the treatment of donated embryos under the new UPA. This law recognizes the woman giving birth as the mother and
her husband as the father, despite the absence of genetic connection and without any state intervention, transfer of parental rights, or adjustment of the birth certificate. In other words, donated genetic material is treated as if it is one's "own," with no adoption-like proceedings necessary. Buzzanca takes this analysis a step further, expressly rejecting an "adoption default" model that would require state oversight of collaborative reproduction and concluding that the children so produced are the intended parents' own:

[T]he adoption default model ignores the role of our dependency statutes in protecting children. Parents are not screened for the procreation of their own children; they are screened for the adoption of other people's children. . . . The adoption default model is essentially an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning.

Although the new UPA would have required a "gestational agreement" for arrangements like the one in Buzzanca, both the model statute and the case share an emphasis that makes intent, planning, and function—not "seed"—the critical elements in identifying parents in the first instance.

CONCLUSION: THE END OF INFERTILITY? THE END OF ADOPTION?

Throughout adoption's history, serving the interests of the infertile has helped promote the perceived interests of children who need new families. Although we might wonder why child welfare, a community concern, should be the special burden of the infertile, some adoption advocates have expressed alarm

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299 See notes 144-47 and accompanying text.

299 Buzzanca, 72 Cal Rptr 2d at 291. But see Kristine H., 2004 Cal App LEXIS 1045, *60 (using a limited reading of Buzzanca, but reaching a result consistent with reliance on "intended-parent doctrine"); Freundlich, Adoption and Assisted Reproduction at 17 (cited in note 96) (indicating that Luanne Buzzanca eventually adopted Jaycee).

300 See notes 148-52 and accompanying text.

301 The two differ in that the new UPA, unlike Buzzanca, views gestation as the performance of a parental function. See also Rothman, Recreating Motherhood at 57-67 (cited in note 296) (explaining "pregnancy as a relationship").

302 See Robertson, Children of Choice at 277 n 27 (cited in note 77) (claiming that pro-adoption critics of ARTs "never state why infertile couples alone and not all persons who
that ARTs necessarily detract from adoption—a problem exacerbated by this country’s laissez-faire approach to the former and regulation of the latter. Nonetheless, I cannot advocate a halt to ARTs or even the enactment of restrictions designed to discourage their use, given my consistent support for the right of women to turn freely, unfettered by the state, to their medical providers for reproductive health care. I accept that ARTs are here to stay and perhaps in my own mind, if not in my casebook, I do organize ARTs under the heading of reproductive autonomy.303 So, then, what will become of adoption as ARTs proliferate, perhaps ultimately offering a “cure” for all infertility?

Despite bleak views of the ARTs critics, the trajectory of ARTs reveals several adoption-promoting advances—which suggest, in turn, that ARTs’ effect on our understanding of adoption has some positive aspects. First, the use of ARTs and the law’s response to them have facilitated the creation of nontraditional families, including single-parent families and families headed by same-sex couples. Initially, the simplicity of AID, which is easily self-administered,304 as well as the inclusive practices of some sperm banks305 allowed unmarried women to become mothers by AID; thanks to the absence of regulation of ARTs, often their children have no legal father.306 Now, some jurisdictions recognize single fatherhood achieved by ARTs.307 Such developments have made nontraditional families more familiar to us,308 in turn reproduce have the obligation to adopt kids in need of parents”). Consider Thomas Sobirk Petersen, The Claim from Adoption, 16 Bioethics 353 (2002) (examining philosophical justifications for claim that resources spent on ARTs should be devoted instead to adoption and care of existing children).

303 See notes 7-10 and accompanying text. The President’s Council on Bioethics has recognized the powerful tradition of privacy, including constitutional protections, for matters of reproduction. President’s Council on Bioethics, Reproduction and Responsibility at 9-10 (cited in note 15).

304 See note 76 and accompanying text.

305 The Sperm Bank of California, which opened in 1982, was the first American Sperm Bank to serve single women and lesbians. See Sperm Bank of California, About Us, available online at <http://www.thespermbankofca.org/about.html> (visited May 9, 2004).

306 At least since the Supreme Court invalidated most illegitimacy laws, see Clark, The Law of Domestic Relations at 149-72 (cited in note 107), in no other situation is a child born without any legal father. See Garrison, 113 Harv L Rev at 903-12 (cited in note 28) (criticizing the nonexistence of a legal father in such AID cases).


308 “Nontraditional families” might include a number of very different groupings. For example, the term might refer to situations in which adults seek to become parents although they do not fit the norm of a married male-female couple of reproductive age (for
challenging the barriers that such prospective parents previously faced when seeking to adopt.  

At one time, legal publicity about gay and lesbian parents arose primarily in post-divorce custody struggles, in which courts evaluated such parents' fitness—and often found it wanting. A notable difference separates those cases, on the one hand, and many of the more recent cases about gay and lesbian parents, on the other. Consider the depiction of the parent-child relationship in cases like Adoption of Tammy, in which the court analyzed in detail the interests of the child, who had been conceived by artificial insemination, and authorized adoption by the biological mother's partner, based in significant part on extensive evidence about the "healthy, happy, and stable family unit" formed by the three. As Adoption of Tammy illustrates, ARTs have helped nontraditional families form and flourish and have pushed legal decisionmakers to acknowledge such families.

The emerging recognition of second-parent adoptions in many family arrangements that began with AID reinforces adoption law's traditional concern for child welfare. This recognition emphasizes child welfare by prompting courts and legislators to, for example, single parents, same-sex couples, or older individuals or couples). Alternatively, the term might refer to situations in which a married male-female couple of reproductive age seeks to become the parents of a child who could not "pass" for their biological offspring (for example, a child of a different race or ethnic background or a child who maintains continuing ties to birth parents or siblings through an open adoption). Some "nontraditional families" are formed through ARTs and some through adoption. Despite these significant differences, however, several modern scholars emphasize how all of these variations expand our understanding of "family." Consider, for example, Shanley, Making Babies (cited in note 28); Cahn, 52 Duke L J 1077 (cited in note 40).


619 NE2d at 317 (Mass 1993). See also In re Jacob, 660 NE2d 397 (NY 1995). Of course, same-sex couples sometimes have post-dissolution custody disputes. See, for example, Alison D. v Virginia M., 572 NE2d 27 (NY 1991) (in visitation dispute, female partner of child's mother was not a "parent" under the statute although both women planned that one would bear a child by AID and agreed that they would share parental rights and responsibilities); K.M. v E.G., 13 Cal Rptr 3d 136 (Ct App 2004) (relying on intent, court recognizes as mother the woman who gestated the twins, not her former partner who provided eggs); Pam Belluck and Adam Liptak, Split Gay Couples Face Custody Hurdles, NY Times A1 (Mar 24, 2004).

Adoption of Tammy, 619 NE2d at 317. At the time of this case, the two women could not marry. In February, 2004, however, they married in San Francisco. See Weddings/Celebrations: Helen Cooksey, Susan Love, NY Times § 9, 12 (Feb 22, 2004).
replace some of the more restrictive adoption rules with new approaches that emphasize the realities of children's emotional lives and material well-being. Such cases help adoption law break free from old norms and stereotypes that sought to "imitate nature" or to convey messages about socially preferred family forms. Surely, it is no coincidence that nontraditional adoptions (including transracial placements, adoptions by single parents and same-sex couples, adoptions of older children, and open adoptions) seem to be increasing at the same time that ARTs are also making contemporary society more accustomed to nontraditional families. These developments, in turn, open new opportunities for children whom adoption seeks to serve.

Second, the success of ARTs (not necessarily in producing babies, but in attracting patients to fertility centers) suggests some intriguing paths for rethinking adoption. Adoption advocates have criticized the disincentives created by existing adoption laws and regulations, a position some of the empirical data support. The path ARTs have followed lends strength to this claim, as new "user-friendly" ARTs have developed, designed explicitly to take the place of those burdened by legal complexities and risks. Witness the way both fertility clinics and newer statutory schemes have left behind "traditional surrogacy" and now focus instead on arrangements that divide gestational and ge-

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313 See Adoption of Tammy, 619 NE2d at 316-17.
314 See, for example, Shanley, Making Babies at 15-20 (cited in note 28) (explaining "the 'as if' family").
315 See Berebitsky, Like Our Very Own at 6 (cited in note 53) (describing the "normative family").
316 Of course, in some jurisdictions restrictions on adoptions by single persons, gays, and lesbians persist. Consider Lofton, 358 F3d 804 (upholding Florida's disqualification of gays); Hong, 40 Cal W L Rev 1 (cited in note 66).
317 On the changing norms of adoption, consider Pertman, Adoption Nation (cited in note 183); Shanley, Making Babies (cited in note 28). True, important differences distinguish families that get lumped under the label "nontraditional." See note 308. My point is not that ARTs have "caused" the emergence of nontraditional adoptive placements; rather, the two have concurred and, together, have given us both more expansive understandings of "family" and legal responses that support these new understandings.
318 See Evan B. Donaldson Adoption Institute, Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes (Oct 29, 2003), available online at <www.adoptioninstitute.org/whowe/ExecSummary%20Lesbian%20-and%20Gay%20Adoption.doc> (visited Apr 29, 2004) (concluding that "from a child-centered perspective, the willingness of adoption agencies to accept gay and lesbian adults as parents means more and more waiting children are moving into permanent, loving families"). Experts say making gays and lesbians ineligible to adopt means that some children, especially those with special needs, will have no parents at all. See Fisher, 29 Ann Rev Sociol at 349 (cited in note 71).
319 See notes 205-11 and accompanying text.
How might adoption best respond to the disincentives imposed by its legal regulation?

Further, just as ARTs have borrowed adoption's emphasis on child welfare to promote "embryo adoption," adoption might gain from borrowing some of ARTs' explicit attention to addressing (and even constructing) the needs of adults who wish to become parents. To the extent such adult interests long have lurked behind adoption's public face of child welfare, can we imagine a repetition today, a hundred years later, of the Delineator's successful campaign to find homes for children in need? My own answer would be no, if the promoters again sought to use as the selling point the celebration of motherhood.

This old approach to marketing adoption would miss new opportunities to reach other prospective parents and parental figures who are fighting fiercely for social legitimacy and external recognition of the family roles that they are ready, willing, and almost always able to play. Consider both the battle for the recognition of fathers as capable primary caregivers and the struggles of many same-sex couples for treatment equal to that accorded their married counterparts. The most nontraditional of family forms, the gay male couple, has reinvigorated a very traditional familial division of labor, in which one parent works as breadwinner and the other stays home with the children. Given empirical evidence showing that adoption remains socially devalued among all prospective parents except gays, lesbians, and single persons, should we not look beyond mere tolerance for nontraditional adoptions? Rather, shouldn't agencies actively recruit single persons (including single men) and gays and lesbians to adopt—perhaps just what is needed to reprise the suc-

320 See notes 140-42 and accompanying text.
321 See note 53 and accompanying text.
322 See, for example, William C. Smith, Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrung Them as Full-Time Parents, 89 ABA J 38 (Feb 2003).
323 See Lofton, 358 F3d 804 (rejecting constitutional challenge to ban on adoptions by gays); Goodridge v Department of Public Health, 798 NE2d 941 (Mass 2003) (holding that exclusion of same-sex couples from civil marriage and its benefits violates state constitution). The Goodridge majority devotes a substantial portion of its opinion to the benefits for children of permitting same-sex marriage, rejecting the state's arguments that restricting marriage to male-female couples is necessary to protect children. See id at 962-64.
324 See Bellafante, Two Fathers at A1 (cited in note 309).
326 For recent statistics on adoptions by gays and lesbians, see Evan B. Donaldson Adoption Institute, Adoption by Lesbians and Gays (cited in note 318) (stating that only 16 percent of agencies sought out gays and lesbians as adoptive parents, with outreach
cess of the earlier *Delineator* adoption campaign? Adoption advocates should seize this moment as new definitions of "family" take shape. The existing literature, albeit limited, fails to support the arguments of those who reject such placements as necessarily harmful.\(^{327}\)

The idea of marketing adoption to nontraditional families merits consideration within a larger context in which we have already begun to see the marketing of adoption.\(^{328}\) True, much of the publicity has focused on either international adoptions, often presenting the drama of a trip to a foreign land and the rescue of children from oppressive orphanages;\(^{329}\) or celebrity adoptions.\(^{330}\) And who can overlook a prime-time television broadcast, described as the "ultimate reality show," that showed a birth mother's interviews of five couples competing to adopt her baby and her ultimate selection of one?\(^{331}\)

More generally, we should acknowledge that there is an adoption market, even today, as shown by the key role that money plays. The ability to pay makes a difference, with costs and fees widely varying, especially in independent placements.\(^{332}\) While still firmly rejecting the notion that children may be bought and sold, reform measures designed to make adoption more attractive provide subsidies, tax credits,\(^{333}\) and employment leaves,\(^{334}\) as well as special financial assistance for adoptions of

\(^{327}\) See Fisher, 29 *Ann Rev Sociol* at 348-49 (cited in note 71) (reviewing literature). See also generally Hong, 40 *Cal W L Rev* 1 (cited in note 66). But see *Lofton*, 358 *F3d* at 825 (finding rational basis to support ban on adoptions by gays).


\(^{329}\) See, for example, Kim Clark and Nancy Shute, *The Adoption Maze*, US News & World Rep 60 (Mar 12, 2001); Todd C. Frankel, *Christmas Wishes*, St Louis Post-Dispatch C1 (Dec 26, 2003) (reporting adoption of Russian twins by Missouri couple); Adam Wil-


\(^{331}\) See note 273 and accompanying text.

\(^{332}\) See notes 183-87 and accompanying text.


\(^{334}\) Family and Medical Leave Act, 29 USC § 2612(a)(1) (2000) (equating births with adoptive placements as bases for leaves).
children with disabilities. Further, the availability of specific adoptees is marketed through "adoption fairs," "adoption days," and television profiles, which introduce available children to the public at large.

The lessons from the marketing of ARTs, however, should draw our attention not just to demand, but also to supply. A single-minded focus on increasing adoptions would overlook the historical reality that adoption has been used to cultivate particular family norms, not just in the selection of suitable placements, but also well before the need to place children in new families arises. Our understanding of what particular parental failures merit removal of a child from the home of origin reflects cultural influences and value judgments that change over time. Dorothy Roberts has emphasized this issue when she argues that the problem of finding homes for children awaiting placement is really the problem of having unjustifiably removed too many children from their birth parents in the first instance. Rickie Solinger makes analogous arguments in examining the current popularity of international adoption in countries with significant poverty. How many children would need placements if the money spent by adopters and used for adoption subsidies were redirected to the children's original homes?

From this perspective too, ARTs might help us rethink adoption in a positive way. If ARTs' detractors correctly claim that infertility treatments have taken the place of adoption for many childless adults, in turn leaving many adoptable children awaiting permanent homes, perhaps such developments will prompt us to consider seriously the charges of the supply-side critics.

336 See, for example, Community Adoption Council, Adoption Expo, available online at <http://www.adoptionaccess.org/adoptionaccess_002.htm> (visited Apr 29, 2004) (website for a recent “adoption expo” in St. Louis, Missouri).
339 See note 263 and accompanying text.
340 See notes 113, 262, and accompanying text.
341 See Solinger, Beggars and Choosers at 183-85 (cited in note 72).
342 See note 33 and accompanying text (quoting Bartholet).
After all, a central principle of child welfare requires ensuring the “least detrimental alternative,” and providing support for fragile families of origin to remain intact should meet that objective. Hence, ARTs’ asserted impact on the demand for adoption might usefully trigger a closer look at supply.

Finally, ARTs offer some surprising challenges to what Elizabeth Bartholet condemns as “biologism” and Dorothy Roberts criticizes as our preoccupation with “the genetic tie.” While use of ARTs solidifies racial preferences (not a trivial problem, as Richard Banks explains) and ARTs, as originally practiced, always meant that the child would be the genetic offspring of at least one of the intended parents, increasingly the situations that are receiving attention are those that involve no such genetic relationship. The scenario contemplated by “embryo adoption,” despite the problematic rhetoric, provides one telling example. Such scenarios help accustom us to the ease with which families can grow and flourish in the absence of both genetic ties and burdensome state regulation. Even the most intimate parental function, gestation, can succeed without genetic ties. As Buzzanca forcefully demonstrates, such ARTs require us to rethink what we mean when we talk about parenting one’s “own” children versus the children of “another.” Thus these newer ARTs in fact undercut “biologism”—including the traditional stigma of adoption—by upsetting the social significance of genetic ties and emphasizing a functional understanding of parentage.

343 Goldstein, Freud, and Solnit, Beyond the Best Interests at 6 (cited in note 48).
344 Bartholet, Family Bonds at 93 (cited in note 29).
346 See Banks, 107 Yale L J 875 (cited in note 21). See also Bender, 12 Colum J Gender & L 1 (cited in note 296).
347 See Part III A (describing “missing ingredients”).
348 See Robertson, Children of Choice at 142-45 (cited in note 77).
349 See Bartholet, Family Bonds at 34 (cited in note 29). In challenging biologism, Elizabeth Bartholet writes about the stigma and distrust that adoption regulation imposes on those who would raise a “child born to another” or who seek to parent “someone else’s child.” See id at 69.
350 Id.
351 This conclusion might evoke an interesting debate about whether the importance of genetic ties is “hard-wired” or socially constructed and whether the answer varies based on gender. I would speculate that the experience of parenting plays a significant role, so that as one lives life as a parent, the importance of genetics wanes (regardless whether the child is genetically related or not)—simply because day-to-day interactions loom so large. Genetically related children often seem like surprising strangers to their parents (as I often think when wondering about how my genetically related sons turned out to be Republicans!). Correspondingly, adoptive parents often say they feel their children are wholly “theirs.” This emphasis on lived experience as a parent might explain the
The functional approach highlighted by the newer ARTs and their legal consequences recently received two important boosts. The American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* expressly recognizes certain rights and responsibilities for "parents by estoppel" and "de facto parents," based on planning, intent, and function; some of the *Principles'* supporting illustrations rely on situations initiated by the use of ARTs. Although the *Principles'* doctrines arguably reduce the need for formal adoption, they do so by classifying as parents or quasi-parents those who have assumed parental responsibilities—regardless of genetics. This trend will gain force from a second development, as more states follow Vermont's (and then California's and Massachusetts's) lead in giving same-sex couples the benefits of marriage, including a rule that operates like the presumption of legitimacy to results of those studies in which adoptive parents expressed both satisfaction with adoption and regret about spending so much time pursuing infertility treatments beforehand. See notes 222-23 and accompanying text. This hypothesis might also help explain why fertile couples expressed favorable views of adoption. See notes 216, 218 and accompanying text. I thank Barbara Katz Rothman for prompting these observations. Email correspondence, Rothman to Appleton (cited in note 171). Finally, to the extent that parenting experience might diminish the perceived importance of genetic ties, we might expect to see gender differences, given that mothers, including those with jobs outside the home, still shoulder a larger share of the childcare responsibilities than do fathers. See, for example, Arlie Hochschild with Ann Machung, *The Second Shift* 1-10 (Penguin Books 2003); Karen Czapaniski, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L Rev 1415 (1991). Indeed, some of the newer ARTs are designed to help men have genetic children, sometimes at women's expense. See, for example, note 204.

Having advanced all of these speculations about parental experiences, however, I do not suggest similar conclusions about adoptees and the importance that they attach to the absence of genetic ties, even when they have had a very satisfying childhood. See, for example, Robert S. Andersen, *Why Adoptees Search: Motives and More*, 67 Child Welfare 15 (1988). Do children conceived by ARTs experience a similar sense of loss? For a glimpse of the perceptions of some offspring of collaborative reproduction, see Peggy Orenstein, *Looking for a Donor to Call Dad*, NY Times § 6 at 28 (July 18, 1995).


353 American Law Institute, *Principles* at § 2.03 (cited in note 126) (defining "parent by estoppel" and "de facto parent").

354 See id at 115 (including illustration 9 in which Stephanie is likely both a "parent by estoppel" and a "de facto parent" to the child born by her domestic partner, Marlene, after AID and the couple's plan to rear the child together); id at 116 (providing illustration 12, likely recognizing the intended mother as a parent by estoppel to the child born from the surrogacy arrangement). See also, for example, *CEW v DEW*, 845 A2d 1146 (Me 2004) (affirming grant of parental rights and responsibilities to de facto parent, former partner of biological mother, who conceived by AID); *ENO v LMM*, 711 NE2d 886 (Mass 1999) (upholding visitation order, over objection of biological mother, of de facto parent who had planned birth with former partner, who then conceived the child by AID).
make a same-sex partner (or spouse) the child's second parent by operation of law.\textsuperscript{355}

These developments reveal how, perhaps paradoxically, ARTs help bring us to an understanding of parenting that comes very close to the one adoption advocates long have urged—in which one's "own" child refers to a relationship created by care and function, and not determined by biology or genetics. In doing so, ARTs show that private family arrangements can change the public face of family law.

\footnotesize{\textsuperscript{355} 15 Vt Stat Ann § 1204(f) (2002); Cal Fam Code § 297.5(d) (West Supp 2004) (effective Jan 1, 2005). See also Goodridge, 798 NE2d 941.}