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Thomas B. James

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ASSISTED REPRODUCTION: REFORMING STATE STATUTES AFTER *OBERGEFELL V. HODGES* AND *PAVAN V. SMITH*

BY THOMAS B. JAMES*

Assisted reproduction provides a way for people to become parents other than through sexual intercourse. Some heterosexual couples turn to it when they are having difficulty conceiving children. For same-sex couples, it is the only way to conceive children. Many states have enacted statutes conferring parental status on couples who use assisted reproduction technology and shielding gamete donors from parental responsibilities. Statutes addressing only artificial insemination and not in-vitro fertilization leave the parental rights of couples who use donor eggs, and the parental responsibilities of egg donors, uncertain. The constitutionality of statutes authorizing only opposite-sex married couples to establish parental rights, limiting assisted reproduction to artificial insemination, and protecting only sperm donors from parental responsibilities is dubious at best. The Article describes the changes needed to bring these statutes current with modern science and into compliance with constitutional requirements.

I. INTRODUCTION

Section 5 of the 1973 Uniform Parentage Act (UPA 1973) provides:

> Artificial Insemination
> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be

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*Attorney in private practice in Minnesota; J.D., Southwestern University School of Law; B.A., University of California at Berkeley. Admitted to practice in the United States Court of Appeals for the Federal and Eighth Circuits, and Minnesota state and federal courts.

> kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[1]

This or a statute like it has been enacted and is still in effect in fifteen states.[2] In some states, it has remained unchanged for nearly forty years.[3]

In the decades that have passed since this law was enacted, many significant scientific, social, and legal changes have taken place.[4] Dramatic advancements have been made in assisted reproduction technology (ART).[5] Sexual intercourse and artificial insemination are not the only methods of conceiving children anymore.[6] In addition, the acceptance of parentage outside of marriage has increased significantly,[7]

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1 UNIF. PARENTAGE ACT § 5 (amended 2002) (UNIF. LAW COMM'N 1973).

2 *See* ALASKA STAT. § 25.20.045 (2016); ARIZ. REV. STAT. ANN. § 25-501(B) (2007); ARK. CODE ANN. § 9-10-201(b) (2002); GA. CODE ANN. § 19-7-21 (2015); IDAHO CODE § 39-5403 (2015); KAN. STAT. ANN. § 23-2301 (Supp. 2014); LA. CIV. CODE ANN. art. 188 (2009); MASS. GEN. L. ch. 46, § 4B (West 2009); MICH. COMP. LAWS § 333.2824(6) (2018); MINN. STAT. § 257.56 (West 2015); MO. ANN. STAT. § 210.824(1) (West 2010); MONT. CODE ANN. § 40-6-106(1) (2015); N.Y. DOM. REL. LAW § 73(1) (McKinney 2010); N.C. GEN. STAT. § 49A-1 (2015); WIS. STAT. ANN. § 891.40(1) (West Supp. 2016).

3 *Compare* Parentage Act, Minn. Laws ch. 589 § 6 (1980) *with* MINN. STAT. § 257.56 (West 2015).

4 *See* discussion *infra* Part II.

5 *Assisted reproduction* means conception other than by sexual intercourse. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(1) (2008). *Collaborative reproduction* is "assisted reproduction in which an individual other than an intended parent(s) provides genetic material or agrees to act as a gestational carrier." *Id*. at §102(5). *Assisted reproduction technology* (ART) is any method of causing pregnancy other than sexual intercourse. *Id*. at §102(2).

6 *See* discussion *infra* Section IV.A.

7 *See* Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2375 (2007) ("[I]llegitimacy-based discrimination against children of [opposite-sex] couples has largely faded from the legal (and social) landscape . . . ."); *cf.* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 211–12 (2009) (noting that the "legal doctrine of 'illegitimacy' had all but disappeared").

as has the number of children born to single women.[8] Among some populations, more children are conceived by unmarried women than by married women.[9] Finally, and most recently, the United States Supreme Court has held that states must grant same-sex couples the same marital rights that opposite-sex couples have.[10]

Assisted reproduction statutes have not kept pace with these changes.[11] In most states, they still protect only married persons.[12] Gendered language appears throughout them.[13] Thirteen states address artificial insemination but not egg donation.[14] Twelve states have no assisted reproduction statute at all.[15] "Throughout the United States, little

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8 In 1973, roughly 13% of births were to unmarried women. Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States 1940-99*, NAT'L VITAL STAT. REP., OCT. 18, 2000, at 1, *available at* https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf. In 2017, 39.8% of births in the United States were to unmarried women. Joyce A. Martin et al., *Births: Final Data for 2017*, NAT'L VITAL STAT. REP., Nov. 7, 2018, at 5, *available at* https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf.

9 Hispanic black women and 52.1% of Hispanic women who give birth are unmarried. Martin, *supra* note 8, at 5–6.

10 *See* discussion *infra* Section IV.B.

11 *See infra* text accompanying notes 10–15.

12 *See* ALASKA STAT. § 25.20.045 (2018); ARIZ. REV. STAT. § 25-501(b) (2018); ARK. CODE ANN. § 9-10-201(b) (2017); COLO REV. STAT. § 19-4-106 (2018); CONN. GEN. STAT. § 45a-774 (2018); FLA. STAT. § 742.11 (2018); GA. CODE ANN. § 19-7-21 (2017); IDAHO CODE § 39-5403 (2018); KAN. STAT. ANN. § 23-2301 (2016); LA. CIV. CODE ANN. art. 188 (2018); MASS. GEN. L. ch. 46, § 4B (2018); MICH. COMP. LAWS § 333.2824(6) (2018); MINN. STAT. § 257.56 (2018); MO. REV. STAT. § 210.824(1) (2017); MONT. CODE § 40-6-106(1) (2017); N.Y. DOM. REL. LAW § 73 (McKinney 2018); N.C. GEN. STAT. § 49A-1 (2018); OHIO REV. CODE ANN. §§ 3111.90, 3111.95 (2018); OKLA. STAT. tit. 10, §§ 551 to 556 (2018); OR. REV. STAT. § 109.243 (2017); TENN. CODE ANN. § 68-3-306 (2017); UTAH CODE ANN. § 78B-15-703 (2018); VA. CODE ANN. §§ 20-156, 20-158 (2018); WIS. STAT. § 891.40(1) (2018). New Jersey makes its statute applicable to partners in civil unions as well as spouses. N.J. STAT. § 9:17–44 (2019).

13 *See, e.g.*, COLO REV. STAT. § 19-4-106 (2018) (containing 20 male-gendered nouns and pronouns).

14 *See* ALASKA STAT. § 25.20.045 (2018); ARIZ. REV. STAT. § 25-501(b) (2018); ARK. CODE ANN. § 9-10-201(b) (2017); GA. CODE ANN. § 19-7-21 (2017); IDAHO CODE § 39-5403 (2018); KAN. STAT. ANN. § 23-2301 (2016); MASS. GEN. L. ch. 46, § 4B (2018); MINN. STAT. § 257.56 (2018); MO. REV. STAT. § 210.824(1) (2017); MONT. CODE § 40-6-106(1) (2017); N.Y. DOM. REL. LAW § 73 (McKinney 2018); N.C. GEN. STAT. § 49A-1 (2018); WIS. STAT. § 891.40(1) (2018). Sometimes a court can rescue a statute by imposing a gender-neutral construction on gendered language. *See, e.g.*, Torres v. Seemeyer, 207 F. Supp. 3d 905, 914 (W.D. Wis. 2016) (requiring "husband" to be construed to mean a spouse of either sex). It is doubtful that this approach could save statutes that use terms with necessarily gender-restricted meanings such as "semen." *See id.*

15 The states are Hawaii, Indiana, Iowa, Kentucky, Maryland, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, and West Virginia.

legislative or judicial attention has been paid to anticipating and resolving potential legal ramifications of physician-assisted reproduction."[16] This is not a trivial matter. Over a million people have turned to ART to conceive children.[17] It is the only way for monogamous same-sex couples to procreate.[18]

This article provides a framework for understanding and repairing assisted reproduction laws. Part II explains the historical development of parentage law, of which assisted reproduction law is part.[19] Part III describes the objectives of these laws and the stakeholder interests they serve.[20] Part IV identifies specific areas in which assisted reproduction statutes are deficient and suggests approaches for correcting them.[21]

II. HISTORICAL BACKGROUND

Under English common law, parentage was linked to marital status.[22] The husband of a married woman who conceived or gave birth to a child during the marriage was deemed the child's father, but children born to an unmarried woman were deemed to have no father; they were nullius filius ("kin of nobody.")[23] This principle carried over to the United States.[24] The father of a child conceived out of wedlock was not

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[16] Kerry S. Cork, Comment, *Test Tube Parents: Collaborative Reproduction in Minnesota,* 22 WM. MITCHELL L. REV. 1535, 1537 (1996); *see also* Jean M. Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 709 (1991); Anne R. Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 267 (1995).

[17] By 2015, more than 850,00 married women between the ages of 15 and 44 had used artificial insemination. Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2015*, 67 MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES 1 (Centers for Disease Control & Prevention, Feb. 16, 2018). In vitro fertilization and related procedures are performed on married women between the ages of 15 and 44 at a rate of 182,111 per year. *Id*.

[18] John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 325 n.9 (2004).

[19] *See* discussion *infra* Part II.

[20] *See* discussion *infra* Part III.

[21] *See* discussion *infra* Part IV.

[22] Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1658 (2015).

[23] ERNST FREUND, ILLEGITIMACY LAWS OF THE UNITED STATES AND CERTAIN FOREIGN COUNTRIES 9 (1919).

[24] *Id.*; Suzanne E. Miller, *Family Law—Support—The Natural Father of a Child Born Out of Wedlock May Not Assert as a Defense Against His Support Obligation the Mother's Deliberate Misrepresentation That She was Using Contraception,* 29 VILL. L. REV. 185, 189 n.19 (1984).

legally recognized as a parent unless he "legitimated" the child by marrying the mother..[25] French civil law, adopted in Louisiana, also linked parentage to marital status.[26]

The first parentage statutes were enacted for the purpose of shifting responsibility for the support of children born out of wedlock from the state to a child's biological parents.[27] They were also an exercise of a state's police power to regulate morals, the object being to deter the crime of fornication.[28] The result, in most states, was a legal system that treated unwed biological fathers as parents for purposes of the support obligation but as nonparents for inheritance, custody, and other purposes.[29]

By the middle of the twentieth century, many states had enacted laws codifying the principle that only the mother of a child born out of

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25 FREUND, *supra* note 23, at 12; *see also* Wright v. Bennett, 7 Ill. 587, 591 (1845) (holding that a father of a child born out of wedlock is not a parent); Friesner v. Symonds, 20 A. 257, 259 (N.J. Prerog. Ct. 1890) (denying a father custody of a nonmarital child upon the mother's death because only mothers are parents of children born out of wedlock); Bustamento v. Analla, 1 N.M. 255, 261–62 (1857) (granting a writ of habeas corpus to a mother for the release of her nonmarital child from the child's father); Timmins v. Lacy, 30 Tex. 115, 135, 137 (1867) (holding that only a mother, not the father, could authorize the apprenticeship of a child born out of wedlock).

26 JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 323, 328–29, 418–20 (Boston: Little Brown & Co. 4th ed., 1889).

27 Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1034–35 (2007); Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1124 (1999).

28 *See, e.g.*, Bake v. State, 21 Md. 422, 424 (1864); Dominik Lasok, *Virginia Bastardy Laws: A Burdensome Heritage*, 9 WM. & MARY L. REV. 402, 412 (1967) ("…[T]he parish could improve its funds by collecting the fine for fornication from the putative father and purge the public scandal by having him whipped"); W. Logan MacCoy, *Law of Pennsylvania Relating to Illegitimacy*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 505, 512 (1916–1917).

29 "[T]he duty of parents to their bastard children, by our law . . . is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved." 1 BLACKSTONE *458. "[A child born out of wedlock] can inherit nothing, being looked upon as the son of nobody…. All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father." 1 BLACKSTONE *459. *See also* SCHOULER, *supra* note 26, at 418. Under early English common law, children born out of wedlock were said to be *filius populi*, children of the state, in the sense that the community was responsible for their support. Lawrence Gabriele, *Domestic Relations—Right of Putative Father to Visit His Illegitimate Child,* 15 DEPAUL L. REV. 192, 192 n.2 (1965). The Elizabethan Poor Law of 1576 empowered courts to impose a support obligation on fathers of children born out of wedlock, while customary law continued to assign responsibility for the daily care of a child primarily to the mother (and then to the state, if she was not able to do so). Act for the Setting of the Poor on Work and for the Avoiding of Idleness, 1576, 18 Eliz. ch. 3 (Eng.); Act for the Relief of the Poor, 1601, 43 Eliz. ch. 2 (Eng.); Miller, *supra* note 24, at 189 n.16. Constitutions and statutes in most American states adopted this framework. FREUND, *supra* note 23, at 9; Miller, *supra* note 24, at 189 n.19.

wedlock is a parent.[30] The consensus at the time was that "the overwhelming percentage of fathers of out-of-wedlock children are not interested in their children, in recognizing them, in supporting them, in legitimating them, or especially in seeking their custody."[31] Since the United States Supreme Court had declared parental rights to be liberty interests protected by the Fourteenth Amendment,[32] a parent would have a right, under the Due Process Clause, to notice and an opportunity for a hearing before parental rights could be terminated.[33] Excluding unwed biological fathers from the definition of parent ensured that mothers could place children born out of wedlock in the care of third parties (through adoption or a transfer of custody) expeditiously and without resistance.[34] State supreme courts generally upheld the constitutionality of these enactments.[35] The United States Supreme Court put an end to that in 1972, however.[36] In *Stanley v. Illinois*, the Court held that both parents of a child have constitutionally protected parental rights and that statutory schemes that unreasonably discriminate against parents on the basis of marital status are unconstitutional.[37]

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[30] *See, e.g.*, 1951 FLA. LAWS 187 (codified with different language at FLA. STAT. § 39.01(56) (2019)) ("'Parent' means the father or mother of a child or the natural mother but not the natural father of an illegitimate child"); GA. CODE ANN. § 74-203 (1964) (codified with different language at O.C.G.A. § 19-7-25 (1982)) ("The mother of an illegitimate child . . . [b]eing the only recognized parent, . . . may exercise all the paternal power"); N.D. CENT. CODE § 32-36-35 (1960) (repealed 1975); S.D. COMP. LAWS § 25-8-46 (1967) (repealed); TENN. CODE ANN. § 36-236 (1970) (repealed); WIS. STAT. § 48.02 (1967) (amended 1973); WYO. STAT. ANN. § 14-53 (1967) (repealed). The Illinois statute simply omitted unwed fathers from the definition of "parent," stating that "[p]arents" means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." ILL. REV. STAT. ch. 37, para. 701–14 (1967) (current version at 705 Ill. COMP. STAT. ANN. 405/1–3 (West 2015)).

[31] *In re* Brennan, 134 N.W.2d 126, 131 (Minn. 1965).

[32] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923).

[33] *Cf.* Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (invalidating a statute that presumed all unwed fathers unfit to parent without providing an opportunity for a hearing); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (observing that the fundamental right of an opportunity for a hearing "has little reality or worth unless one is informed that the matter is pending").

[34] *See, e.g.*, Day v. Hatton, 83 S.E.2d 6, 7 (Ga. 1954) (holding that a state statute declaring that only the mother of a child born of wedlock has parental rights requires an award of custody to a third party to whom the mother had transferred custody rather than to the child's father).

[35] *See, e.g.*, State *ex rel.* Lewis v. Lutheran Soc. Servs., 178 N.W.2d 56, 62–63 (Wis. 1970), *vacated*, 405 U.S. 1051 (1972).

[36] *Stanley*, 405 U.S. at 645, 658.

[37] *Id.*

A. THE UNIFORM PARENTAGE ACT OF 1973

The decision in *Stanley v. Illinois* impelled the National Conference of Commissioners on Uniform State Laws[38] (NCCUSL) to formulate a uniform state law on paternity that would pass constitutional muster.[39] The UPA 1973 was the product of this endeavor.[40] A core purpose was to ensure that "all children and all parents have equal rights with respect to each other," regardless of the marital status of parents.[41] While they were at it, the commissioners decided to address a novel legal question that had recently been raised, namely, whether couples that use artificial insemination to conceive children are parents.[42]

At the time the first sperm bank opened in 1970, "legal parenthood was largely coterminous with biological parenthood."[43] The only exception was adoption.[44] The commissioners elected "not [to] deal with many complex and serious legal problems raised by the practice of artificial insemination"[45] but reached a consensus about one thing: Rather than require a husband to adopt children whom his wife conceives using donated sperm, children born to married couples using physician-supervised artificial insemination with the husband's consent should be treated no differently from children who are conceived through sexual intercourse.[46]

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[38] The NCCUSL is now known as the Uniform Laws Commission (ULC). *About Us*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/aboutulc/overview (last visited Mar. 3, 2020).

[39] UNIF. PARENTAGE ACT § 5 (UNIF. LAW COMM'N 1973) (amended 2002).

[40] UNIF. PARENTAGE ACT prefatory note (amended 2002) (UNIF. LAW COMM'N 1973).

[41] *Id.* § 2 cmt.

[42] *Id.* § 5.

[43] William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 263 (2010). The presumption of legitimacy during marriage originated in the idea that a husband is likely to be the biological father of children his wife conceives during the marriage. *Id.* It may also reflect a social judgment that the husband *ought* to be the biological parent. *Id.* The enactment of statutes making the presumption conclusive (irrebuttable) tends to support the latter view. Whether rebuttable or conclusive, though, the presumption of legitimacy is that a husband is *the biological parent* of any children born during the marriage. *See, e.g.*, MINN. STAT. § 257.55, subd. 1 (2018) (stating the presumption). The conclusiveness of the presumption simply regulates the extent to which the existence of a biological relationship may be challenged.

[44] "Even adoption…has traditionally been organized by law in such a way as to create adoptive families that imitate biological parent families." Duncan, *supra* note 43, at 263.

[45] UNIF. PARENTAGE ACT § 5, cmt (amended 2002) (UNIF. LAW COMM'N 1973).

[46] *Id.* § 5(a) (declaring that the husband "is treated in law as if he were the natural father" in this circumstance).

B. THE UNIFORM PARENTAGE ACT OF 2002

Two important developments occurred after the UPA 1973 was written. First, advancements in science and technology made it possible for women to donate their eggs to other women.[47] Second, Congress enacted laws requiring states that wished to receive federal funds to "provide simplified nonjudicial means to establish paternity, especially for newborns and young children."[48] Cognizant of these developments, the NCCUSL decided to promulgate a revision of the UPA, which it did in the year 2000[49] (UPA 2000).

Reception to the revisions was lukewarm.[50] The American Bar Association objected that the Act still only recognized the right of married couples to be parents of children of assisted reproduction.[51] The organization took the position that unless the Act gave unmarried and married couples the same right to be parents of children of assisted reproduction, it was unconstitutional.[52] In Minnesota, the legislature established a Uniform Parentage Act Task Force (Task Force) to study the proposed revisions and make recommendations about whether they should be adopted.[53] The Task Force recommended against adopting them.[54] Among other things, the Task Force shared the American Bar Association's objection that the Act still limited assisted reproduction to married couples.[55] The NCCUSL agreed that the objection had merit so in 2002 it released a second revision (UPA 2002), this one treating married and unmarried couples alike in the context of assisted reproduction.[56] The Task Force had already made its recommendation by then, however.[57] As a result, the Minnesota legislature never considered the UPA 2002.[58]

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[47] The first successful pregnancy using donated eggs occurred in 1983. Bonnie Steinbock, *Payment for Egg Donation and Surrogacy*, 71 MT. SINAI J. MED. 255, 257 (2004).

[48] UNIF. PARENTAGE ACT prefatory note (amended 2002) (UNIF. LAW COMM'N 2000). *See* 42 U.S.C. § 666 (2019).

[49] UNIF. PARENTAGE ACT prefatory note (amended 2002) (UNIF. LAW COMM'N 2000).

[50] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAWS COMM'N 2002).

[51] *Id.*

[52] *Id.*

[53] 2001 Minn. Laws 645.

[54] UNIFORM PARENTAGE ACT TASK FORCE, FINAL REPORT 3 (2002) [hereinafter TASK FORCE REPORT].

[55] *Id.* at 26.

[56] UNIF. PARENTAGE ACT §§ 702, cmt., 703, cmt., 704, cmt. (UNIF. LAW COMM'N 2002).

[57] The Task Force issued its report in January, 2002. TASK FORCE REPORT, *supra* note 54, at 1. The UPA 2002 was released in December, 2002. UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2002).

[58] *See* 2002 Minn. Laws 1838-1839.

Although the Task Force did not recommend adopting the UPA 2000, it acknowledged "a significant need for comprehensive, specific legislation concerning the various aspects of parentage (or disputed parentage) and related matters when individuals use assisted reproduction."[59] That need still exists.[60]

C. THE UNIFORM PARENTAGE ACT OF 2017

Obergefell v. Hodges[61] was a modern-day *Stanley v. Illinois*, except that this time the victory was for same-sex couples, not unwed fathers.[62] Issued in 2015, it established that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit states from limiting the right of marriage to opposite-sex couples.[63] Two years later, *Pavan v. Smith*[64] clarified that *Obergefell* meant that states may not discriminate against same-sex couples.[65] States must give spouses in same-sex marriages the same benefits and protections they give spouses in opposite sex marriages.[66] If a state law provides for putting the husband's name on the birth certificate of a child born during a marriage, then the names of both spouses in a same-sex marriage must be put on the birth certificates of children born to them during their marriage, too.[67] If Mr. and Mrs. John and Mary Jones conceive a child through assisted reproduction while they are married, and the law presumes John and Mary to be the child's parents, then the law must also presume that a child conceived by Mary using assisted reproduction while she is married to Joan is the child of Mary and Joan.[68]

To adapt the UPA to the newly established constitutional mandate to treat same-sex and opposite-sex couples alike the NCCUSL, in 2017, promulgated another revision (UPA 2017).[69] At the same time, the commissioners took the opportunity to address the right of children

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59 TASK FORCE REPORT, supra note 54, at 24.

60 Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325, 325–26 (2019).

61 135 S. Ct. 2584 (2015).

62 Stanley v. Illinois, 405 U.S. 645, 658 (1972); *see also Obergefell*, 138 S. Ct. 2584 at 2608.

63 Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

64 137 S. Ct. 2075 (2017).

65 *Id.* at 2078.

66 *Id.* at 2078–79.

67 *Id.*

68 McLaughlin v. Jones *ex rel.* Cty. of Pima, 401 P.3d 492, 498 (Ariz. 2017), *cert. denied, sub nom.* McLaughlin v. McLaughlin, 138 S.Ct. 1165 (2018); *see also* Wendy G-M v. Erin G-M, 985 N.Y.S.2d 845, 859 (N.Y. Sup. Ct. 2014) (holding that the marital presumption of legitimacy applies to children born to same-sex couples, too).

69 UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

of assisted reproduction to access information about their gamete donors, and to provide for the elimination of the parental rights of men who impregnate women by sexual assault.[70] So far, only California, Vermont, and Washington have adopted this version of the Act.[71]

III. STATUTORY OBJECTIVES

Parentage law is concerned with the rights, responsibilities, and methods of establishing the identity of a child's parents.[72] It attempts to balance the interests of children, parents, and the state in a manner that complies with state and federal constitutional and statutory requirements.[73] Assisted reproduction implicates an additional category of interests: gamete donors.[74]

A. STATES' FINANCIAL INTEREST

The principal reason for the enactment of parentage laws is to lighten a state's welfare burden by compelling men to financially support the children they father out of wedlock.[75] When a child's biological parents are financially dependent on the state for financial assistance, adoptions serve the state's financial interests by transferring responsibility for children to couples who are able and willing to care for them.[76] Hence, states also have a financial interest in facilitating adoptions.[77] After *Stanley*, facilitating adoptions can no longer be considered a valid justification for completely obliterating parental rights, but it is still used as a justification for establishing short time frames and strictly enforcing

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70 *Id.* § 614, art. 9.

71 *Parentage Act,* UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited Feb. 28, 2019).

72 *Establishing Parentage*, CHILDREN'S RIGHTS COUNCIL, https://www.crckids.org/child-support/establishing-paternity/. (last visited Nov. 10, 2019).

73 Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and Rational Distinctions*, 50 CREIGHTON L. REV. 479, 479-480 (2017).

74 Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, CTR. FOR RES. ON ETHICAL, LEGAL AND SOC. IMPLICATIONS OF PSYCHIATRIC, NEUROLOGIC & BEHAV. GENETICS 352, 352-353 (2015).

75 Hatcher, *supra* note 27, at 1038; Lasok, *supra* note 28, at 407; Hansen, *supra* note 27, at 1144; Current Legislation, *The Uniform Illegitimacy Act and the Present Status of Illegitimate Children*, 24 COLUM. L. REV. 909, 909–10 (1924).

76 Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1032 (2007).

77 *See* Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 491 (2017).

procedural requirements for putative fathers to assert paternity.[78] Prompt determinations of parentage for the purpose of establishing child support orders continues to be a principal objective of parentage laws, as well.[79]

The federal government provides grants to states to help them establish and collect child support.[80] Congress has conditioned these grants on a state's enactment of the kinds of parentage and child support laws the federal government specifies.[81] As a result, states have a financial interest in complying with federally imposed paternity establishment requirements.[82]

B. CHILDREN'S INTERESTS

Identifying a child's parents makes it possible to establish and enforce support obligations for a child's benefit.[83] Since parents are presumed to act in their children's best interest,[84] establishing and enforcing parental rights normally furthers that interest.[85] Knowing who their parents are also may benefit children psychologically, helping them acquire a sense of identity.[86] Knowing their medical and genetic histories can improve children's likelihood of receiving appropriate medical care.[87] Finally, parentage determinations help ensure that children receive the inheritances to which they are entitled.[88]

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[78] *Id.* at 493. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 265 (1983) ("The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously . . . justify a . . . determination to require all interested parties to adhere precisely to the procedural requirements . . . . ").

[79] Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 MICH. J. GENDER & L. 67, 70, 74–75 (2014).

[80] 42 U.S.C. § 651 (2019).

[81] 42 U.S.C. § 654 (2019).

[82] *See* Kansas v. United States, 214 F.3d 1196, 1203 (10th Cir. 2000).

[83] *See How to Get Child Support*, OFFICE OF CHILD SUPPORT ENFORCEMENT (Sept. 9, 2014), https://www.acf.hhs.gov/css/resource/how-to-get-child-support.

[84] Troxel v. Granville, 530 U.S. 57, 68 (2000).

[85] *See* June Carbone, *Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a measure of Institutional Competence?*, 134 OFFICIAL J. OF THE AM. ACADEMY OF PEDIATRICS SUPP. 2 S111, S112 (2019).

[86] J. David Velleman, *Family History*, 34 PHIL. PAPERS 357, 369 (2005).

[87] UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2017).

[88] *Cf.* Trimble v. Gordon, 430 U.S. 762, 770–71 (1977) (invalidating intestate succession laws that allow only children of married parents to inherit from their fathers).

C. PARENTS' INTERESTS

In an earlier age, children were considered a valuable labor resource for parents.[89] Today, the law emphasizes the interest of parents in the companionship and care of their children, and in raising them as they see fit.[90] Parents also have an interest in being treated fairly.[91] In 1923, the U.S. Supreme Court held that parental rights are protected liberty interests under the Due Process Clause of the Fourteenth Amendment.[92] A long line of cases since then has affirmed that parental rights are not merely protected; they are fundamental rights.[93] This means that a parent may be divested of them only if doing so is necessary to serve a compelling government interest.[94] In addition, parents and children, as citizens, have a constitutionally protected interest in receiving the equal protection of a state's laws.[95] A primary reason the NCCUSL convened to promulgate a uniform parentage act in 1973 was to comply with Supreme Court rulings that state laws may not discriminate against children born out of wedlock.[96] Pursuant to the Equal Protection Clause of the Fourteenth Amendment, states must now attempt to provide equal protection of the laws along three different axes: sex, marital status, and sexual orientation.[97] Individuals have an interest in making their own

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[89] 1 BLACKSTONE *452; MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 3 (1994); *see, e.g.*, McEntyre v. Jones, 263 P.2d 313, 314 (Colo. 1953) (approving a jury instruction regarding the probable pecuniary benefit a child could provide for a parent, as an element of damages in a claim for the wrongful death of the child); Evans v. Farmers Elevator Co., 147 S.W.2d 593, 599 (Mo. 1941) (explaining that a child may assert a claim for loss of future earning capacity as an adult but the claim for lost earning capacity as a child belongs to the child's parents). This interest continues to play a role in wrongful death cases where a parent makes a claim for money damages for the loss of a deceased child's "services" in providing a parent companionship, society, and affection. John C. Duncan Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1270 (2005).

[90] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758 (1982) (companionship and care); Stanley v. Illinois, 405 U. S. 645, 651 (1972) (same); Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972) (right to direct educational and religious upbringing).

[91] *Santosky*, 455 U.S. at 759.

[92] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[93] Troxel v. Granville, 530 U.S. 57, 65–67 (2000); *Santosky*, 455 U.S. at 753; Parham v. J.R., 442 U.S. 584, 602–606 (1979); *Yoder*, 406 U.S. at 232; Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[94] Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

[95] U.S. CONST. amend. XIV, § 1.

[96] UNIF. PARENTAGE ACT prefatory note (amended 2002) (UNIF. LAW COMM'N 1973).

[97] *See* discussion *infra*, Section IV.A, B, C and D.

decisions about procreation, that is, decisions about whether and when they will become parents.[98]

D. GAMETE DONORS 'INTERESTS

Donors have an interest in avoiding the legal consequences that traditionally flow from a biological relationship with a child.[99] Few people would be willing to donate their gametes to others if it meant incurring a risk of liability for child support.[100] For this and other reasons, donors also have interests in confidentiality and anonymity.[101]

E. TRIBAL INTERESTS

Because tribes have a federally protected interest in the custody and placement of children who are members of the tribe or the biological children of tribe members, parentage laws should address whether and how they apply to these children.[102]

The remainder of this article explores the specific changes that need to be made to state assisted reproduction laws to better accomplish the legitimate objectives of assisted reproduction laws, to comply with constitutional requirements, and to bring them up to date with modern technology.[103]

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[98] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . are central to the liberty protected by the Fourteenth Amendment"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing "the right of the *individual*. . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis added).

[99] Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 190.

[100] Ferguson v. McKiernan, 940 A.2d 1236, 1247 (Pa. 2007) ("[W]here a would-be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his sperm. . .").

[101] *See generally* Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291 (2013).

[102] TASK FORCE REPORT, *supra* note 54, at 17.

[103] *See* discussion *infra*, Part IV.

IV. PROBLEMS AND SOLUTIONS

A. EGGS, EMBRYOS, AND IN VITRO FERTILIZATION

Artificial insemination is the oldest known form of assisted reproduction, dating back to the eighteenth century.[104] It involves inserting sperm into a woman's uterus, fallopian tubes, or vagina with a needle.[105] Sperm may be fresh or cryopreserved; it may be used immediately or stored for later use.[106] If the sperm comes from the woman's husband, the procedure is called *homologous* insemination.[107] *Heterologous* insemination, or artificial insemination by donor (AID), involves a third-party donor.[108] Egg donation is a newer phenomenon.[109] It involves extracting eggs, fertilizing them with sperm, and inserting the resulting embryo into the uterus of the recipient.[110] This procedure is called *in-vitro fertilization and embryo transfer*.[111] Like sperm, embryos can be cryopreserved, so they may be transferred shortly after forming or preserved for possible future use.[112] With the advent of in-vitro fertilization and embryo transfer technology, gamete donation is no longer the exclusive province of males.[113]

Assisted reproduction using third-party gamete donors squarely raises the question whether it is biological relatedness or intent that establishes parentage.[114] If biological relatedness is determinative, then a

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[104] Willem Ombelet & Johan Van Robays, *Artificial Insemination—History: Hurdles and Milestones*, 7 FACTS, VIEWS & VISIONS IN OBGYN 137, 138 (2015).

[105] Julie E. Goodwin, Comment, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 208, 212 (2005).

[106] Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695, 698 (2000). *Cryopreservation* is a process by which human cells are frozen, remaining viable for long periods of time. *Id.* at 699.

[107] Priyasha Saksena, *Artificial Insemination and the Family*, 20 NAT'L LAW SCH. OF INDIA REV. 76, 78 (2008).

[108] *Id.*

[109] John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. L. REV. 1, 6 (1988–1989).

[110] Michelle L. Anderson, Comment, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 599–600 (2006).

[111] The UPA 2017 defines "assisted reproduction" to include (a) intrauterine or intracervical insemination, (b) donation of gametes, (c) donation of embryos, (d) in-vitro fertilization and transfer of embryos, and (e) intracytoplasmic sperm injection. There is some overlap in these categories. UNIF. PARENTAGE ACT § 102(4) (UNIF. LAW COMM'N 2017).

[112] Lyon, *supra* note 106, at 698–99.

[113] *See* Aaron D. Levine, *Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors*, 40 HASTINGS CTR. REP., 25 (2010).

[114] Lyon , *supra* note 106, at 726.

gamete donor will be a child's legal parent even if everybody involved intended the recipient and the recipient's spouse or significant other, if any, to be the child's parent(s).[115] If intent is determinative, then a gamete donor will not be a parent unless that is what the parties intended.[116] In the absence of legislative guidance, courts have developed and applied contradictory rules of decision.[117] Sometimes they will ascribe no significance to genetics and focus instead on effectuating the parties ' intent, an approach that can result in a determination that a donor is not a parent but can also result in a determination that a donor is a parent.[118] At other times, they will ignore the parties 'intent and rely instead on genetic relatedness.[119] Obviously, this has created a great deal of uncertainty in the law.[120] Some guidance from legislatures would be helpful.

Legislation clarifying that assisted reproduction statutes apply to both sperm donors and egg donors is also needed. Thirteen states have statutes that reference sperm donors, artificial insemination, or both, but not egg donors or in-vitro fertilization.[121] It is remarkable that the legislatures of these states have never amended their statutes to provide female gamete donors the same legal protections as male gamete donors, given that more than one commentator has observed that these statutes violate women's Equal Protection rights.[122]

It might be thought that it is not necessary to explicitly state that egg donors are not parents because only a person who carries a baby in

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[115] Alisa Von Hagel, *Federalism and Bioethics: Women's Health and the Regulation of Oocyte Donation*, 33 POL. & LIFE SCI. 79 (2014).

[116] Kass v. Kass, 696 N.E.2d I74, 182 (N.Y. 1998) (holding that the law honors the parties clearly manifested intentions to donate their pre-zygotes for research purposes).

[117] Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 841 (2000).

[118] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (applying intent analysis to hold that an egg donor, not the birth mother, is a child's parent); Ferguson v. McKiernan, 940 A.2d 1236, 1246 (Pa. 2007) (applying intent analysis to hold that a sperm donor is not a child's parent).

[119] *See, e.g.*, Bassett v. Saunders, 835 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2002) (holding a waiver of a biological parent's child support obligation is against public policy and unenforceable regardless of the parties' intent).

[120] Marsha Garrison, *Law Making For Baby Making: An Interpretative Approach to the Determination of Legal Parentage,* 113 HARV. L. REV. 845, 838 (2000).

[121] *See* ALASKA STAT. § 25.20.045 (2016); ARIZ. REV. STAT. ANN. § 25-501 (2007); ARK. CODE ANN. § 9-10-201(a) (2002); GA. CODE ANN. § 19-7-21 (2015); IDAHO CODE §§ 39-5401–408 (2018); KAN. STAT. ANN. §23-2301 (Supp. 2014); MASS. GEN. L. Part I, title 7, ch. 46, §4B (2018); MINN. STAT. § 257.56 (West 2015); MO. ANN. STAT. §210.824 (West 2010); MONT. CODE ANN. § 40-6-106 (2015); N.Y. DOM. REL. LAW § 73 (MCKINNEY 2010); N.C. GEN. STAT. § 49A-1 (2015); WIS. STAT. ANN. § 891.40 (West Supp. 2016).

[122] *See* Mary Lynne Birck, Comment, *Modern Reproductive Technology and Motherhood: The Search for Common Ground and the Recognition of Difference*, 62 U. CIN. L. REV. 1623, 1653 (1994); Cork, *supra* note 16, at 1561.

her womb can be a mother. State laws are far from certain on this point, however.[123] For example, a Minnesota statute authorizes a legal action to declare the existence of a mother-child relationship and makes Minnesota Statutes §§ 257.51 to 257.74 applicable to it.[124] These statutes, in turn, authorize a mother-child relationship to be established either "by proof of her having given birth to the child, or under sections 257.51 to 257.74 or 257.75."[125] Among other things, these sections provide that a biological relationship between a person and a child, as determined by genetic testing, can be used as the basis for a finding that the person is the child's parent.[126] An egg donor has a biological relationship with a child that is conceived using her eggs.[127] Therefore, these statutes could reasonably be interpreted to mean that either or both the birth mother and the egg donor (biological mother) could be parents of a child conceived with a donated egg.[128]

Of course, the Equal Protection Clause does not impose an absolute prohibition against legislative classifications that treat people differently.[129] The classification must at least be rational, though, i.e., it must treat people "who are similarly situated with respect to the purpose of the law" the same.[130] The purpose of assisted reproduction statutes, insofar as they concern donors, is to protect people who donate their gametes to others from being declared the parents of children conceived with them.[131] Men and women may not be similarly situated with respect to the ability to become pregnant, but they are similarly situated with respect to the capacity to donate gametes to others.[132] They were not

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[123] *See infra* text accompanying notes 124–28.

[124] MINN. STAT. § 257.71 (2018).

[125] MINN. STAT. § 257.54(a) (2018) (emphasis added).

[126] MINN. STAT. § 257.62 (2018).

[127] Susan Golombok et al., *Children conceived by gamete donation: Psychological adjustment and mother-child relationships at age 7*, *25* J. FAMILY PSYCHOLOGY, 230 (2011).

[128] *Compare* MINN. STAT. § 257.71 (2018) *with*; MINN. STAT. § 257.54(a) (2018); *and* MINN. STAT. § 257.62 (2018).

[129] Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

[130] Jospeh Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949).

[131] UNIF. PARENTAGE ACT art. 7 cmt. (UNIF. LAW COMM'N 2002).

[132] Christina M. Eastman, Comment, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 391–92 (2010). Gamete donors use their gametes to enable others to become pregnant, not to become pregnant themselves. *Id. See also* Lord v. Lord, 409 N.Y.S.2d 46, 47–48 (N.Y. Sup. Ct. 1978) (holding men and women are also similarly situated with respect to the child support obligation).

similarly situated in this respect at the time the UPA 1973 was promulgated, but they are now.[133]

Statutes that discriminate against similarly situated individuals on the basis of sex violate the Equal Protection Clause of the Fourteenth Amendment unless they are substantially related to achieving an important government interest.[134] An "exceedingly persuasive justification" is needed to sustain them.[135] Statutes are scrutinized even more closely if they discriminate with respect to a fundamental right.[136] When that is the case, a state must demonstrate that the classification is necessary and narrowly tailored to accomplish a compelling state interest.[137] The right of personal autonomy with regard to the decision not to become a parent is a fundamental right.[138] No important or compelling nondiscriminatory interest is served by protecting male gamete donors but not female gamete donors from child support obligations, or by authorizing couples to become legal parents using donated sperm but not donated eggs.[139]

B. SAME-SEX COUPLES

The UPA 1973 and state statutes adopting it were written long before *Obergefell* and *Pavan v. Smith* held that states must treat same-sex and opposite-sex couples alike. Today, if a state extends a right of marriage to opposite-sex couples, then it must extend the right of marriage to same-sex couples, too.[140] If a state extends a benefit of marriage to opposite-sex couples, then it must extend the same benefit to same-sex couples, too.[141] This includes the benefit of a presumption that the

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[133] *See* Aaron D. Levine, *Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors*, 40 HASTINGS CTR. REP., 25 (2010) (stating that the first IVF birth occurred in 1983).

[134] Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971).

[135] United States v. Virginia, 518 U.S. 515, 531 (1996).

[136] Maher v. Roe, 432 U.S. 464, 470 (1977).

[137] Roe v. Wade, 410 U.S. 113, 155–56 (1973); Kramer v. Union Free Sch. Dist., 395 U. S. 621, 627 (1969); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[138] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); *Roe*, 410 U.S. at 154; Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *Griswold*, 381 U.S. at 485; Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 57–58 (1994); *see also* Davis v. Davis, 842 S.W.2d 588, 602 (Tenn. 1992) (invoking the constitutionally protected right to decide not to become a parent to uphold an individual's right to object to the implantation of embryos to which s/he has contributed gametes).

[139] See Eastman, *supra* note 132, at 396–405, for a detailed analysis concluding that assisted reproduction statutes limited to artificial insemination violate the Equal Protection Clause.

[140] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[141] Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017).

spouse of a woman who gives birth to a child during the marriage is a parent of the child.[142] If a state declares that the male spouse of a woman who conceives or gives birth to a child of assisted reproduction during the marriage is a parent of the child, then it must also declare that the female spouse of a woman who conceives or gives birth to a child of assisted reproduction during the marriage is a parent of the child.[143] To comply with constitutional requirements, therefore, assisted reproduction statutes should be made gender-neutral so they apply to both same-sex and opposite-sex couples.[144] Gendered pronouns should be replaced with gender-neutral ones.[145] The words *husband* and *wife* should be replaced with *spouse*.[146] The words *mother* and *father* should be replaced with *parent*.[147]

C. UNMARRIED COUPLES

Most states that adopted the UPA 1973 opted to make the ART provision applicable to both married and unmarried couples.[148] When the NCCUSL issued its first revision of the UPA in 2000, the American Bar Association objected to provisions that did not treat children of married and unmarried parents the same.[149] The Task Force voiced this objection, as well.[150] The NCCUSL agreed the objection had merit and therefore removed references to "husbands" and "wives" from the Act.[151] Despite this, a majority of state statutes still only recognize the right of married couples to conceive children using third-party donors.[152]

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[142] McLaughlin v. Jones *ex rel.* Cty. of Pima, 401 P.3d 492, 498 (Ariz. 2017), *cert. denied, sub nom.* McLaughlin v. McLaughlin, 138 S.Ct. 1165 (2018) ("The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses").

[143] *Pavan*, 137 S.Ct. at 2077–79.

[144] *See id.*

[145] Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2342 (2017). *See generally* Colorado General Assembly Office of Legis. Legal Services, COLORADO LEGISLATIVE DRAFTING MANUAL 1, 133-136 (2017).

[146] *Id.*

[147] *Id.*

[148] Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 536 n.40 (1994).

[149] UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2002).

[150] TASK FORCE REPORT, *supra note* 54, executive summary.

[151] UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2002).

[152] ALA. CODE § 26-17-702 (2018); ALASKA STAT. § 25.20.045 (2018); ARIZ. REV. STAT. ANN. § 25-501 (2007); ARK. CODE ANN. § 9-10-201(a) (2002); COLO. REV. STAT. § 19-4-106 (2018); CONN. GEN. STAT. § 45a-771(a) (2018); FLA. STAT. § 742.11 (2018); GA. CODE ANN. § 19-7-21 (2015); IDAHO CODE § 39-5403 (2015); KAN. STAT. ANN. § 23-2301 (Supp. 2014); LA. CIV. CODE ANN. Art. 188 (2009); MASS. GEN. LAWS Ch. 46, § 4B (West 2009); MICH. COMP. LAWS §

This is not a significant problem for the female member of an unmarried couple that uses artificial insemination to conceive.[153] Since the birth mother's own egg is used in this situation, she will be both the biological mother and the birth mother.[154] She may use either of these as a basis for claiming to be a parent.[155] It is a significant problem for the other member of an unmarried couple, though.[156] Not having a biological relationship with the child and not having the benefit of a presumption of legitimacy during marriage, s/he will not be considered the child's parent even if the couple complies with all the requirements set out in the state's statute.[157] In some states, it might be possible to invoke a statutory presumption of parentage if the person lives with the child and holds the child out as his or her own.[158] Even if it is available in a particular jurisdiction, however, not everybody will be able to invoke this presumption.[159] An unmarried person must either endure the delay and expense of adoption or wait a while and hope the mother does not decide to move away with the child.[160] Even then, it will still be necessary to file a petition in court and ask a judge to declare his or her parentage.[161] Assisted reproduction statutes, by contrast, declare a married person a parent immediately upon the birth of the child.[162] A spouse is not required to petition for adoption or to commence a proceeding in court to establish parentage, much less wait a couple of years to do so.[163]

333.2824(6) (2018); MINN. STAT. § 257.56 (West 2015); MO. ANN. STAT. § 210.824 (West 2010); MONT. CODE ANN § 40-6-106 (2015); N.J. STAT. ANN. § 9:17-44 (2019) ("Spouse Or Partner In A Civil Union"); N.Y. DOM. REL. LAW § 73 (McKinney 2010); N.C. GEN. STAT. § 49A-1 (2015); OHIO REV. CODE ANN. §§ 3111.90–95 (West 2018); OKLA. STAT. tit. 10, §§ 551-556 (2018); OR. REV. STAT. §§ 109.243, 677.365 (2017); TENN. CODE ANN. § 68-3-306 (2017); UTAH CODE ANN. § 78b-15-703 (West 2018); VA. CODE §§ 20-156-158 (2018); WIS. STAT. § 891.40 (West Supp. 2016).

[153] Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 5(1981).

[154] *Id.* at 38.

[155] *Id.* at 18-19.

[156] *Id.* at 4.

[157] *Custody of a Child Conceived by Artificial insemination*, HG, https://www.hg.org/legal-articles/custody-of-a-child-conceived-by-artificial-insemination-47245 (last visited Nov. 10, 2019).

[158] For an example of this kind of statute, see MINN. STAT. § 257.55(1)(d) (2018).

[159] *Id.*

[160] NATIONAL CENTER FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES, 4 (2019).

[161] *Id.*

[162] *See* UNIF. PARENTAGE ACT § 5(a) (amended 2002) (UNIF. LAW COMM'N 1973); UNIF. PARENTAGE ACT § 703 (amended 2002) (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017).

[163] *See Parentage/Paternity*, CALIFORNIA COURTS, https://www.courts.ca.gov/selfhelp-parentage.htm?rdeLocaleAttr=en&print=1 (last visited Nov. 10, 2019).

Moreover, a married person's parental rights, having been established at birth, are not defeasible if the other spouse decides to move away with the children.[164] Courts may allocate custody and other parental rights and responsibilities between spouses in a divorce, but a divorce does not terminate parentage.[165]

It might be argued that married and unmarried parents are not similarly situated because a biological relationship between a spouse and a child born to the other spouse during a marriage is the couple's biological child by virtue of the presumption of legitimacy but an unmarried mother's boyfriend or girlfriend may or may not have a biological relationship with the child.[166] Assisted reproduction statutes are intended to declare a person to be the parent of a child even in the absence of a biological relationship.[167] They would not be needed if the presumption of legitimacy were conclusive.[168] They are needed when the presumption is rebuttable by proof that a person other than the husband is a child's biological father, as is the case is in most states.[169] Spouses of married women and the partners of unmarried women who consent to become parents through the woman's use of ART are similarly situated with respect to the intent to be a parent of a child to whom one is not biologically related.[170] Gamete donors for married and unmarried persons are similarly situated with respect to their potential liability for parental responsibilities such as child support and with respect to their intent not to become parents.[171] The fundamental right of procreation is not restricted to married persons.[172] Discrimination with respect to it is

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[164] *Id.*

[165] WILLIAM A.H. SAMMONS & JENNIFER M. LEWIS, DON'T DIVORCE YOUR KIDS: PROTECTING THEIR RIGHTS AND YOUR HAPPINESS (1999).

[166] *De Facto Parents: Parenthood Status Should Depend on Relationship Between Parent and Child,* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu-wa.org/print/news/de-facto-parents-parenthood-status-should-depend-relationship-between-parent-and-child (last visited Nov. 10, 2019).

[167] Elizabeth J. Levy, *Virgin Fathers: Paternity Law, Assisted Reproductive Technology, and the Legal Bias against Gay Dads*, 22 AM. U. J. OF GENDER SOC. POL'Y & L. 893, 899-900.

[168] *Id.*

[169] Naomi R. Cahn & June R. Carbone, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 513 (2017).

[170] NATIONAL CENTER FOR LESBIAN RIGHTS, *supra* note 160, at 1.

[171] Lisa Luetkemeyer & Kimela West, *Paternity Law: Sperm Donors, Surrogate Mothers and Child Custody*, 112 MO. MED. 162, 163 (2015).

[172] Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Strictly speaking, the right of procreation is a right of decision-making autonomy with respect to procreation, not an enforceable right to have children. The right does not impose an affirmative obligation on the part of a state to provide people with free access to any medical services that may be needed to make it happen. *Cf.* Harris v. McRae, 448 U.S. 297, 316

presumptively unconstitutional and subject to strict scrutiny analysis.[173] If a sterile married person has a legally protected right to procreate using ART, what compelling interest is served by denying sterile single individuals the same right?

It might be contended that states have a compelling interest in preserving "traditional families" and that marriage is part of the concept of traditional families.[174] The Court has certainly expressed great reverence for the institution of marriage.[175] Indeed, it has waxed poetic at times.[176] The Court has never held, however, that a state has a compelling interest in preserving a vision of what it considers "traditional families" per se.[177] To the contrary, as *Obergefell* demonstrates, the Court has consistently rejected the argument that exalting traditional notions about marriage is a compelling justification for discriminatory state action.[178]

Some see the Court's aggrandizement of marriage in *Obergefell* as diminishing, or at least threatening a diminution of, the rights of unmarried persons.[179] "[T]he decision's veneration of marriage might be interpreted as signaling that robust constitutional protections for nonmarriage are unavailable if marriage is widely available."[180] This concern is understandable, but it must be remembered that the Court has

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(1980) (holding that the constitutional right of abortion does not impose an affirmative obligation upon government to subsidize them). A state may not place obstacles in the way of a person's exercise of freedom of choice but "it need not remove those not of its own creation." *Id.* A statute conditioning the exercise of the right to procreate using ART on marriage is an obstacle of a state's own making. *See id.*

[173] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).

[174] Kritchevsky, *supra* note 153, at 17.

[175] George W. Dent, *The Defense of Traditional Marriage*, CASE W. RES. U. J. OF L. & POL. 515, 608 (1999).

[176] *See, e.g.,* Obergefell v. Hodges, 135 S. Ct. 2584, 2593–94 (2015) ("transcendant importance of marriage" and its "centrality. . .to the human condition"); *Id.* at 2608 ("embodies a love that may endure even past death"); Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989) ("sanctity"); *Skinner*, 316 U.S. at 541 ("basic civil right[] of man").

[177] Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 GEO. U. J. L. & POL'Y 397, 401 (2001).

[178] ""If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach," *Obergefell*, 135 S. Ct. at 2602 (citing Lawrence v. Texas, 539 U. S. 558, 566–67 (2003); Loving v. Virginia, 388 U.S. 1, 12 (1967)).

[179] *See, e.g.*, Melissa Murray, Comment, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1258 (2016) (asserting that "a victory for marriage equality comes at the expense of the unmarried and nonmarriage").

[180] *Id*. at 1248.

expressed reverence for nonmarital relationships, too.[181] And this reverence has not been invoked only for the benefit of same-sex couples.[182] *Eisenstadt v. Baird*[183] vindicated the fundamental right of unmarried women to access contraceptives on the same terms as married women.[184] Same-sex relationships were not at issue in that case.[185]

In the course of expounding upon the importance of marriage to both opposite-sex and same-sex couples, Justice Kennedy remarked that "[m]arriage also affords the permanency and stability important to children's best interests."[186] Although this was obiter dictum, it seems to suggest that the Court might find nothing objectionable in a statute that reserves the right of personal autonomy with respect to procreation exclusively to married persons.[187] Because the Court did not have the issue before it, though, it did not inquire into the question whether marriage relationships really are more permanent and stable than other kinds of relationships or not.[188] It did not need to consider, for example, the effect of no-fault divorce laws and other factors on the supposed "permanency" of marriage.[189] It did not need to consider whether the stability that marriage offers, if any, is or should be the sole or primary determinant of—or even relevant at all to— what is in a child's best interests.[190] It seems likely that if the Court had intended to retract its repeated assertions that "natural bonds of affection lead parents to act in the best

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[181] *See, e.g.,* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down prohibitions against sexual intercourse between unmarried persons); *see also* Murray, *supra* note 179, at 1226 (describing *Lawrence* as speaking "movingly—even reverently—about the transcendence of nonmarital sexual relationships").

[182] *See e.g.* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

[183] 405 U.S. 438 (1972).

[184] *Id.* at 443.

[185] *Id.*

[186] Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2600 (2015).

[187] *Id.*

[188] *Id.* at 2593.

[189] The divorce rate increased by nearly 50% during the first 10 years after California enacted the first no-fault divorce law in 1970. Sally C. Clarke, *Advance Report of Final Divorce Statistics, 1989 and 1990*, 43 MONTHLY VITAL STATISTICS REPORT 1, 2 fig. 1 (1995). The number of divorces tripled during the 20-year span from 1961 to 1981. *Id.* The precise impact of no-fault divorce on divorce rates is uncertain. Divorce rates were already on the rise before 1970, suggesting that factors other than no-fault divorce played at least some role in increasing divorce rates. *Id.*

[190] *See, e.g.*, S.F. 1191, 89th Leg., Reg. Sess. (Minn. 2015) (removing "stability" from the definition of "best interests of the child" for purposes of custody determinations); *see also* MINN. STAT. § 518.17 (2018).

interests of their children"[191]—even when the parent in question is single[192]—it would have waited until the facts of a case before it necessitated such a radical reversal of position.

Statutory schemes that grant married persons, but not unmarried persons, a right to become parents using ART are not narrowly tailored to protect the best interests of children.[193] There is no evidence that unmarried couples are worse parents than married couples are or that children of married parents have superior developmental outcomes.[194] A correlation between parental relationship transitions and adverse impacts on child development exists,[195] but correlation is not cause.[196] In any event, the correlation has no bearing on whether being raised by a couple in a long-term, committed, nonmarital relationship is worse for children than being raised by a married couple that could easily become divorced at any time.[197] A good case can be made that it isn't.[198]

States also have a legitimate interest in ensuring that children are adequately supported.[199] Denying unmarried couples the right to procreate using ART is neither necessary nor narrowly tailored to further that interest, though.[200] The same objective could be achieved by declaring that unmarried fathers, like married fathers, are responsible for the support of their children.[201] That is already the law in every state.[202]

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[191] Parham v. J.R., 442 U.S. 584, 602 (1979).

[192] Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

[193] Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Doners*, 14 HASTINGS WOMEN'S L. J. 185, 189 (2003).

[194] Mary Parke, *Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being*, CTR. FOR L. & SOC. POL'Y 1, 2 (2003).

[195] Paula Fomby & Andrew J. Cherlin, *Family Instability and Child Well-Being*, 72 AM. SOC. REV. 181, 201 (2007).

[196] *Id.*

[197] *See, e.g.*, Marilyn Coleman, Lawrence H. Ganong, & Mark Fine, *Reinvestigating Remarriage: Another Decade of Progress*, 62 J. MARR. & FAM. 1288, 1292 (2000) (reporting research finding that children whose parents have remarried do not have higher levels of well-being than children in single-parent families).

[198] *Id.*

[199] Hunt v. Hunt, 648 A.2d 843, 851 (Vt. 1994).

[200] *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 679–80 (1985).

[201] Child Welfare Information Gateway, *The Rights of Unmarried Fathers* (2018) https://www.childwelfare.gov/pubPDFs/putative.pdf.

[202] *See*, *e.g.*, CAL. FAM. CODE § 3901(West 2018); MASS. GEN. LAWS ch. 119A, § 2 (2018); MINN. STAT. § 257.66 (2018); Erika M. Hiester, *Child Support Statutes and the Father's Right Not to Procreate*, 2 AVE MARIA L. REV. 213, 218–22 (2004). The federal government requires states to establish procedures for determining parentage and enforcing child support obligations of unmarried fathers in order to receive welfare grants. 42 U.S.C. §§ 651–669b (2016).

In view of the Court's history of respect for the individual right of procreational autonomy of both married and single people,[203] and because of the country's history of discrimination against "illegitimate" children (as they were once called), something more than a rational basis is needed to justify a statutory classification that is based on the marital status of a child's parent.[204] While Supreme Court decisions in this area can be difficult to reconcile,[205] it is clear that a state's interest in discouraging unmarried persons from conceiving children does not justify denying a child a right to the support of the child's parent in circumstances where the child would be entitled to such support if the parents had been married to each other.[206] State laws that deny children of unmarried couples the rights of support that children of married parents enjoy unreasonably discriminate on the basis of marital status in violation of the Equal Protection Clause.[207]

State legislatures should abide by constitutional requirements and adopt the recommendation of the NCCUSL, the American Bar Association, and the Task Force.[208] They should make assisted reproduction laws applicable to both married and unmarried couples.[209]

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[203] Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

[204] Trimble v. Gordon, 430 U.S. 762, 767 (1977)

[205] Baker, *supra* note 22, at 1694 (concluding that "[t]here is simply no way to reconcile all of the U.S. Supreme Court's legitimacy cases with each other"); *Compare* Lalli v. Lalli, 439 U.S. 259, 275–76 (1978) (holding that classifications on the basis need only be "related to the important state interests the statute is intended to promote"), *with Trimble*, 430 U.S. at 767 (declining to apply deferential scrutiny and insisting that review in this area "is not a toothless one").

[206] *Trimble*, 430 U.S. at 774–76; Gomez v. Perez, 409 U.S. 535, 538 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust"); Scott E. Isaacson, *Equal Protection for Illegitimate Children: A Consistent Rule Emerges*, 1980 BYU. L. REV. 142, 144 (1980).

[207] *Weber*, 406 U.S. at 165, 170. *Cf.* Levy v. Louisiana, 391 U.S. 68, 69, 71–72 (1968) (declaring unconstitutional a statute granting children of married parents but not children of unmarried parents a right of recovery for the wrongful death of a parent).

[208] American Bar Association*, Model Act Governing Assisted Reproductive Technology* (February 2008), 42 FAM. L.Q. 171, 175 (2008), https://www.americanbar.org/ content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf.

[209] GLAD, Protecting Families No Matter How They Are Formed, https://www.glad.org/protecting-families-no-matter-how-they-are-formed/.

D. SINGLE WOMEN

Many women desire to use ART to procreate without at the same time wishing to be involved in a relationship with another person.[210] Yet only ten jurisdictions have statutes that both protect gamete donors and apply even when a single woman is the recipient.[211] Again, procreational decision-making is a constitutionally protected fundamental right.[212] To fail to extend this protection to the decision to conceive a child using ART instead of sexual intercourse "would be to disregard the underlying principle of procreative freedom, namely the right of a person to have children."[213]

Limiting the right to become a parent through ART to couples is neither necessary nor narrowly tailored to further a compelling state interest.[214] It might be argued that children fare better when they are supported by two parents rather than one, or that allowing single women to use assisted reproduction to procreate creates a risk of increasing a state's welfare rolls.[215] The risk that sperm donation to unmarried women will increase a state's welfare costs is very slight, though.[216] It could reasonably be argued that whatever small risk there is does not

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[210] Clinics are not required to keep records of the number, so reliable data on single women who use artificial insemination to conceive do not exist. Jessica Yadegaran, *No Mr. Right? More Women Start Families via Artificial Insemination,* MERCURY NEWS (June 26, 2018), https://www.mercurynews.com/2010/08/13/no-mr-right-more-women-start-families-via-artificial-insemination/. Some in the infertility industry put the number at about 50,000 per year. *Id.* This is a significant increase since 1987, when it was estimated that approximately 8,600 single women had used donor insemination. Vicki L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285, 288 (1993) (citing U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY—BACKGROUND PAPER 3 (1988)).

[211] CAL. FAM,. CODE § 7613 (West 2019); D.C. CODE § 16-401 (2017); 750 ILL. COMP. STAT. 46/702 (2017); ME. STAT. tit. 19A, § 1922 (2015); NEV. REV. STAT. § 126.660 (2013); N.H. REV. STAT. § 168-B:2 (2014); N.M. STAT. ANN. § 40-11A-702 (2017); N.D. CENT. CODE § 14-20-60 (2005); VT. STAT. ANN. tit. 15C, § 701 (2017); WYO. STAT. ANN. § 14-2-902 (2018).

[212] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542 (1942).

[213] Nicole L. Cucci, Note, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. REV. 417, 427–28 (1998). *see also* Cleveland Bd. of Educ. v. L:aFleur, 414 U.S. 632, 639–40 (1974) (stating that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

[214] *Eisenstadt*, 405 U.S. at 453; *Skinner*, 316 U.S. at 542.

[215] Paula Fomby & Andrew J. Cherlin, *Family Instability and Child Well-Being*, 72 AM. SOC. REV. 181, 201 (2007).

[216] ROBERTSON, *supra* note 138.

justify reducing single women's reproduction options by imposing parental responsibilities on sperm donors.[217] More importantly, these arguments assume that women are incapable of supporting themselves and their children without help from somebody else.[218] Classifications based on sex-based generalizations and stereotypes violate the Equal Protection Clause.[219] Because women are not necessarily dependent on others for support, a classification based on a woman's relationship status alone is not narrowly tailored to serve the purpose of ensuring that children are adequately supported.[220]

There does not appear to be any rational justification for granting or denying donors protection from parental responsibilities depending on whether their gametes are used by a married woman, a woman with a boyfriend or girlfriend, or a single woman.[221] State statutes should be amended to accommodate women who wish to procreate using ART but who do not necessarily wish to become involved in a relationship with

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[217] *Id.*

[218] *See* Califano v. Westcott, 443 U.S. 76, 89 (1979).

[219] Califano v. Westcott, 443 U.S. 76 (1979) struck down a statute that provided for government aid to the children of unemployed fathers but not to children of unemployed mothers. The Court explained that the presumption that "the father has the 'primary responsibility to provide a home and its essentials,…' while the mother is the 'center of home and family life,'" is "part of the 'baggage of sexual stereotypes" and not a legitimate ground for government-imposed sex classifications. *Id.* at 89. *see also* Orr v. Orr, 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection"); Craig v. Boren, 429 U.S. 190, 198–99 (1976) (characterizing as an invalid basis for state action 'increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'"); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in particular effect, put women, not on a pedestal, but in a cage." (footnote omitted)); *cf.* J.E.B. v. Alabama, 511 U.S. 127, 130–31 (1994) (explaining that legislation is particularly violative of the Equal Protection Clause when it "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women").

[220] J.E.B. v. Alabama, 511 U.S. at 130–31.

[221] "Under the current statute, donors have no legal protection when single women are inseminated and could theoretically be held liable for child support. Also, the legal status of the child is in question." Cork, *supra* note 16, at 1559. *See also* Henry, *supra* note 210, at 290 (discussing the law's deficiencies in protecting the rights of unmarried biological mothers and their offspring). Post-1973 versions of the UPA "shield[] all donors, whether of sperm or eggs… from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent to be the child's parent, either by herself or with a man, as provided in sections 703 and 704." UNIF. PARENTAGE ACT § 702 cmt. (UNIF. LAW COMM'N 2002). California has long honored the procreational rights of single women. *See, e.g.*, Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 392 (Ct. App. 1986) ("[T]he California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity").

another person. All gamete donors should be protected regardless of whether their recipients are married or single.

E. LEGAL, BIOLOGICAL, AND ADOPTIVE PARENTAGE

Minnesota Statutes section 257.54 provides:

> The parent and child relationship between a child and:
> (a) the biological mother may be established by proof of her having given birth to the child, or under sections 257.51 to 257.74 or 257.75;
> (b) the biological father may be established under sections 257.51 to 257.74 or 257.75; or
> (c) an adoptive parent may be established by proof of adoption.[222]

This statute, like those of a number of other states, assumes that there can be only two kinds of parents: biological and adoptive.[223] To accommodate the phenomenon of married couples using artificial insemination to conceive, the NCCUSL created a legal fiction that a husband whose wife conceives using artificial insemination is the child's "natural father" even though he does not really have any biological relationship to the child at all.[224]

Instead of trying to squeeze children of assisted reproduction into an outdated binary, it would make more sense to simply recognize three kinds of parentage: biological, adoptive, and legal. Under this rubric, a biological parent would be one who has a biological (genetic) relationship with a child, an adoptive parent would be one who formally adopts a child, and a legal parent would be one whom the law recognizes as the child's parent for whatever reason, whether it is a biological relationship, an adoptive relationship, an acknowledgement of parentage, an unrebutted presumption, or assisted reproduction. It is inaccurate and unnecessarily confusing to maintain a legal fiction that people who have

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222 MINN. STAT. § 257.54 (2018).

223 *See, e.g.,* CONN. GEN. STAT. § 45a-707(5) (2006), IND. CODE § 31-9-2-88 (2011), KY. REV. STAT. ANN. § 205.710(14) (West 2005), MONT. CODE ANN. § 40-6-102(2) (2017), and N.J. STAT. ANN. § 9:2-13(f) (West 2013) (defining the parent-child relationship as being based on either a biological or an adoptive relationship). The UPA 1973 defines "parent and child relationship" as the "legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." UNIF. PARENTAGE ACT § 1 (amended 2002) (UNIF. LAW COMM'N 1973).

224 UNIF. PARENTAGE ACT § 5 (amended 2002) (UNIF. LAW COMM'N 1973).

no biological relationship to a child are the child's "biological" parents.[225]

The UPA 2017 recognizes that people can become parents in more than two ways.[226] It provides that a parent-child relationship exists between a person and a child if:

> (1) the individual gives birth to the child . . .;
> (2) there is a presumption under Section 204 of the individual's parentage of the child . . .;
> (3) the individual is adjudicated a parent of the child . . .;
> (4) the individual adopts the child;
> (5) the individual acknowledges parentage of the child under . . .; or
> (6) the individual [is a parent of a child born through assisted reproductive technology].[227]

This approach is not only less confusing; it also has the benefit of being truthful and gender neutral.[228]

F. CONSENT

The UPA 1973 and statutes adopting or patterned after it condition a husband's parentage of a child that his wife conceives by assisted reproduction on both spouses signing a written consent.[229] Consent is a critical element of parentage through assisted reproduction.[230] Without it, people could be made parents of biologically unrelated children against their wills.[231] The requirement that the consent be in writing and

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[225] Fixation on biological relatedness also "undermines contemporary movements to recognize family forms that are not and could not be rooted in genetic connection." Baker, *supra* note 22, at 1695.
[226] *See infra* text accompanying notes 227-28.
[227] UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2017).
[228] S*ee generally* Jennifer Sroka, Note, *A Mother Yesterday, but not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships*, 47 VAL. U. L. REV. 137 (2013) (criticizing earlier versions of the UPA because they provided that a parent-child relationship between a woman and a child could come about only by birth or adoption).
[229] UNIF. PARENTAGE ACT § 5 (amended 2002) (UNIF. LAW COMM'N 1973).
[230] UNIF. PARENTAGE ACT § 704 (UNIF. LAW COMM'N 2017).
[231] *Id*.

signed also makes sense.[232] The parent-child relationship is too important to be decided on the basis of oral allegations alone.[233] The requirement raises some questions that will need to be addressed, however.

1. The Effect of Noncompliance

The UPA 1973 is silent about the consequences of failure to comply with the requirement that consent must be in writing and signed by both spouses.[234] This can be a problem. Except in the case of surrogacy, it is generally understood that giving birth is enough to establish a mother's parentage of a child.[235] Therefore, people could reasonably believe that a birth mother's signature on a consent to become a parent is unnecessary.[236] If the birth mother therefore neglects to sign the form, should the consequence be that the child she conceives and delivers will not have a parent-child relationship with the spouse who signed the form? Should the gamete donor be on the hook for eighteen years of child support? These seem like harsh penalties for an honest, reasonable mistake. Members of the Task Force probably had questions like these in mind when they observed that greater clarity is needed for determining who will be recognized as a child's parent(s) in assisted reproduction cases when people fail to comply with statutory requirements.[237]

Some states have enacted statutes providing that an intended parent's failure to comply with statutory requirements does not give a sperm donor a right to claim biological parentage.[238] This is not a completely satisfactory solution, however, because it leaves open the possibility that somebody else (such as the intended parents, the child, or a child support agency) could claim the donor is the child's parent.[239] People who want to be parents probably are not inclined to claim the sperm donor is the father, but an intended parent could change his or her mind

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[232] Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 69 (1974) (describing rationales for requiring contracts to be in writing and signed).
[233] *Id.*
[234] UNIF. PARENTAGE ACT § 5 (amended 2002) (UNIF. LAW COMM'N 1973) (showing the lack of explicit consequences for failure of parents to comply with the written consent requirement).
[235] *See, e.g.*, UNIF. PARENTAGE ACT § 201(a)(1) (UNIF. LAW COMM'N 2002).
[236] *See* TASK FORCE REPORT, *supra* note 54, at 13.
[237] *Id*. at 24.
[238] *See, e.g.,* MINN. STAT. § 257.62, subd. 5(c) (2018).
[239] *See* MINN. STAT. § 257.57, subd. 2(b)(1) (2018) (authorizing a child support agency to commence an action to declare that a man whom genetic tests determine within the specified degree of accuracy is a child's biological father, is the child's father).

if the relationship between the intended parents deteriorates.[240] Should an intended parent be able to use a defect like the mother's failure to sign her name to the consent form as a basis for asserting that a sperm donor is the child's parent? What if the mother is or becomes a recipient of public assistance and the child support agency commences a paternity action naming the sperm donor as the father?[241]

The UPA 2000 and 2002 address the consequences of noncompliance.[242] Section 703 provides: "A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."[243] This makes it clear that the omission of the mother's signature does not destroy the effectiveness of the consent form to establish the other person's parentage.[244] Section 704 provides that the failure to sign a consent does not preclude a finding that a man is the father if he lives with and openly holds out the child as his own during the first two years of the child's life.[245] The Task Force recommended adoption of these provisions because they "provide substantially clearer direction to the court to determine which man will be recognized as the child's father in assisted reproduction cases where there is no clear consent by husband."[246]

Consent is not a necessary condition precedent to nonbiological parentage.[247] An unrelated person who lives with and openly holds a child out as his or her own may be presumed to be the child's parent.[248] The rule should not be different merely because ART is involved.[249] Of course, if Section 704 is enacted, then the wording of the "holding out

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[240] *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J. OF L. & FEMINISM 211 (2012) (discusses issues regarding intended parents and ART).

[241] *See* MINN. STAT. § 257.57, subd. 2(b)(1) (2018) (authorizing a child support agency to commence an action to declare that a man whom genetic tests determine within the specified degree of accuracy is a child's biological father, is the child's father).

[242] UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2002).

[243] *Id.*

[244] *Id.*

[245] UNIF. PARENTAGE ACT § 704 (UNIF. LAW COMM'N 2002); *see also* UNIF. PARENTAGE ACT § 704(b) (UNIF. LAW COMM'N 2017) (stating that if a man openly holds out the child as his own during the first two years of life, failure to sign a consent does not preclude him from fatherhood).

[246] TASK FORCE REPORT, *supra* note 54, at 24.

[247] UNIF. PARENTAGE ACT § 704 cmt. (UNIF. LAW COMM'N 2017).

[248] *See, e.g.*, MINN. STAT. § 257.55, subd. 1(d) (2018); UNIF. PARENTAGE ACT § 704(b) (UNIF. LAW COMM'N 2017).

[249] *See* UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. LAW COMM'N 2017) (stating if the two parties hold the child out as their own the court can find consent to parentage, which speaks to the idea that this should naturally extend to ART).

as one's child" presumption in a state's statutes should be harmonized with it.[250]

What should the consequences of the failure of both spouses to sign a written consent to the use of a third party's gametes be? In practice, married couples do not always realize that they need to sign a written consent form if they both want to be parents of a child that one of them conceives using ART.[251] Some courts have relied on common law or equitable doctrines to hold that both spouses are parents of a child of assisted reproduction if there is evidence that both spouses, although not putting it in writing, consented in fact.[252] Other courts rigidly apply the written consent requirement.[253] Recognizing that rigid application of the written consent requirement can produce inequitable results and harm children, the UPA 2017 allows the written consent to be signed before, at or after the child's birth.[254] It dispenses with the requirement of a writing altogether if there is clear and convincing evidence of the existence of an oral agreement that the parties intended to be parents of the child, provided the agreement was made prior to conception.[255]

As is the case under earlier versions of the UPA, the UPA 2017 does not require a writing if a person resides with and holds the child out as his or her own for two years.[256] In this situation, it is not even necessary to prove the existence of an oral agreement.[257]

The UPA 2017 adds more detail to the "holding out as one's own child" provision.[258] It specifies that in the absence of a writing, parentage might be established by proof that

> the woman and the individual for the first two years of the child's life, including any period of temporary absence, resided together in the same household with the child and both openly held out the child as the individ-

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[250] UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. LAW COMM'N 2017).
[251] UNIF. PARENTAGE ACT § 704 cmt (UNIF. LAW COMM'N 2002).
[252] *See*, *e.g.*, *In re* Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (reasoning that "if an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law").
[253] UNIF. PARENTAGE ACT § 704 cmt (UNIF. LAW COMM'N 2017)..
[254] *Id.* § 704(b).
[255] *Id.* § 704(b)(1).
[256] *Id*. § 704(b)(2).
[257] *Id.* § 704(b)(2).
[258] UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. LAW COMM'N 2017).

> ual's child, unless the individual dies or becomes incapacitated before the child attains two years of age or the child dies before the child attains two years of age, in which case the court may find consent under this subsection to parentage if a party proves by clear-and-convincing evidence that the woman and the individual intended to reside together in the same household with the child and both intended the individual would openly hold out the child as the individual's child, but the individual was prevented from carrying out that intent by death or incapacity.[259]

This language provides much clearer guidance for the application of the "holding out as one's own" principle than existing statutes do.[260]

2. Multiple Consents, Multiple Parents

When the NCCUSL substituted *man* for *husband*, and *woman* for *wife*, in 2002 to make the UPA applicable to both married and unmarried couples, little thought seems to have been given to the possibility that an unmarried person might have more than one "significant other."[261] Bigamous marriages are void,[262] so a woman can have only one husband at a time.[263] Therefore, a law declaring that a husband who consents to his wife's conception using ART is the father can result in only one man being the father.[264] There is no law against an unmarried woman having multiple boyfriends or girlfriends, however.[265] If she secures consents to her use of ART from more than one of them, then the child will have multiple parents.

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[259] UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. LAW COMM'N 2017).

[260] *See, e.g.,* MINN. STAT. § 257.55 subd. 1(d) (2015) (stating simply that a man is presumed to be a child's father if "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child").

[261] UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2002).

[262] *See, e.g.*, CAL. FAM. CODE § 2201 (West 2015); MISS. CODE ANN. § 93-7-1 (2018).

[263] Michael J. Higdon, *Polygamous Marriage, Monogamous Divorce*, 67 DUKE L.J. 79, 86 (2017).

[264] *See,* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002) §703 (stating that an individual who consents to be the parent of a child conceived by ART is the parent of the child).

[265] *See* Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIMONIAL LAW. 175, 176 (2018) (describing the increased recognition of polyamory relationships).

While this scenario may seem fanciful, it really is not. The days of lifelong commitments to one person are gone.[266] It is possible for successive or concurrent boyfriends or girlfriends of the same woman to sign ART consent forms, each intending at the time to become parents and each therefore becoming parents of the child that the woman ultimately conceives using ART.[267]

Commentators have suggested that children should not be limited to only two parents.[268] Some states even authorize courts to declare that a child has more than two parents.[269] These states are proceeding very cautiously, though. The California statute, for example, allows a court to recognize more than two parents of a child only if it finds that being limited to two parents would be detrimental to the child.[270]

Under parentage statutes other than those dealing with ART, it is possible for more than one man to be the presumed father of a child.[271] In these situations, a court must determine, based on public policy considerations, which presumption should prevail.[272] ART statutes do not

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[266] Anjani Chandra, et al., *HIV Risk-Related Behaviors in the United States Household Population Aged 15-44 Years: Data from the National Survey of Family Growth, 2002 and 2006-2010*, 46 NAT'L HEALTH STATISTICS REP. 1, 8 fig. 3 (2012); Anjani Chandra, et al., *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006-2008 National Survey of Family Growth*, 36 NAT'L HEALTH STATISTICS REP. 1, 17–18 (2011); William D. Mosher, et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age*, United States, 2002, 362 ADVANCE DATA FROM VITAL & HEALTH STATISTICS 1, 2 fig. 1–2 (2005).

[267] *See generally*, Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 309 (2007).

[268] Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 173 (2008) (stating that there should be a three-parent framework available for same-sex couples); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231, 231–32 (2007) (arguing that in the age of birthfathers, stepfathers, and psychological fathers there should be a more flexible understanding of what constitutes a "legal father"); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 309 (2007) (declaring that the "nuclear family" model is outdated); Polikoff, *supra* note 7, at 267 (arguing that children should not have to suffer because their parents are of the same sex).

[269] *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2018) (stating "a court may find that more than two persons with a claim to parentage under this division are parents"); ME. STAT. tit. 19-A, § 1853 (2018) (stating "a court may determinate that a child has more than 2 parents").

[270] CAL. FAM. CODE § 7612(c) (West 2018).

[271] *See* MINN. STAT. § 257.55 subd. 2 (2018) (addressing the determination of paternity when two or more men are presumed to be a child's father).

[272] *Id.* (stating "[T]he presumption which on the facts is founded on the weightier considerations of policy and logic controls").

merely create presumptions; they declare who is and who is not a parent.[273] There is currently nothing in any version of the UPA explicitly requiring courts to assign only two parents to a child of assisted reproduction.[274]

One way to address this problem would be to specify that there can be only one valid ART consent form per child. If this approach is taken, then a framework for deciding which of two or more consent forms is valid will be needed. In terms of effectuating the parties 'probable intent, a rule that the latest consent supersedes all previously executed ones might make sense. If a woman and another person sign an ART consent and the woman later signs one with a different person, it would probably be reasonable to infer that the woman has broken up with the first person and now wants her new "significant other" to be a parent with her instead. It is not entirely clear, however, that a "last in time" rule would necessarily be the correct one to apply in every case.

Consider, for example, the following scenario: Amy is dating Paula. They want to have children, so they sign an ART consent. Before conception occurs, however, they split up and Amy starts dating Charlene. Charlene doesn't really have a strong interest in being a parent, but she figures it will be worth it to sign an ART consent form to keep Amy happy. Amy subsequently becomes pregnant using sperm from an anonymous donor. Panicking, Charlene moves out. At Amy's invitation, Paula moves back in. Immediately after the child's birth, Paula and Amy establish a home together. Excited to be a new parent and having no reason to think her consent is no longer valid, Paula treats the child as her own for the first two years of the child's life. The last anyone heard from Charlene she had joined a motorcycle gang in New Orleans.

Who should the law declare to be Amy's co-parent here—Paula or Charlene? From the child's, the mother's, Paula's, and probably Charlene's point of view, it should be Paula. Applying the "last in time" rule, though, Charlene would be Paula's co-parent.

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[273] *See, e.g.*, UNIF. PARENTAGE ACT § 5 (amended 2002) (UNIF. LAW. COMM'N 1973) (declaring that when a married woman receives donor semen, her husband is legally the natural father); UNIF. PARENTAGE ACT §§ 702, 703 (UNIF. LAW COMM'N 2002) (declaring that a sperm donor is not the natural father of a child unless he consents); UNIF. PARENTAGE ACT §§ 702, 703 (UNIF. LAW COMM'N 2017) (declaring that a sperm donor is not the natural father of a child unless he consents).

[274] UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973) (omitting any explicit requirement that courts assign only two parents to a child of assisted reproduction); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002) (omitting any explicit requirement that courts assign only two parents to a child of assisted reproduction); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017) (omitting any explicit requirement that courts assign only two parents to a child of assisted reproduction).

A better rule might be that when two or more ART consents for the same child exist, they give rise only to rebuttable presumptions of paternity. This is how Minnesota law deals with multiple recognitions of parentage for the same child.[275] If this kind of rule were enacted, then both Paula and Charlene would have the benefit of the multiple consents presumption but only Paula could invoke the "holding out as one's child" presumption. When parentage presumptions conflict, the UPA directs courts to decide which one to apply based on policy considerations.[276] Accordingly, a court could choose to apply the "holding out" presumption to favor Paula over Charlene.

3. Withdrawal of Consent

The UPA 1973 did not address the possibility that an individual might withdraw consent.[277] The 2002 and 2017 versions of the UPA provide that if a person withdraws consent before placement of the eggs, sperm or embryos, then he or she is not the parent of the resulting child.[278] This would be a reasonable rule to adopt, as it would prevent an individual from being made a parent against his or her will. Giving effect to withdrawals should also help reduce the frequency of multiple-consent problems.

The UPA 2017 requires written notice of withdrawal to be given to the woman who agreed to give birth to the child.[279] Notice also must

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[275] MINN. STAT. §§ 257.55 subd. 1(g), 2 (2018).

[276] UNIF. PARENTAGE ACT § 4(b) (amended 2002) (UNIF. LAW COMM'N 1973) ("If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls"). The UPA 2017 provides considerably more specificity, directing "court[s] [to] adjudicate parentage in the best interest of the child, based on: (1) the age of the child; (2) the length of time during which each individual assumed the role of parent of the child; (3) the nature of the relationship between the child and each individual; (4) the harm to the child if the relationship between the child and each individual is not recognized; (5) the basis for each individual's claim to parentage of the child; and (6) other equitable factors arising from the disruption of the relationship between the child and each individual or the likelihood of other harm to the child." "If an individual challenges parentage based on the results of genetic testing, in addition to the factors listed in subsection (a), the court shall consider: (1) the facts surrounding the discovery the individual might not be a genetic parent of the child; and (2) the length of time between the time that the individual was placed on notice that the individual might not be a genetic parent and the commencement of the proceeding." UNIF. PARENTAGE ACT § 613 (UNIF. LAW COMM'N 2017).

[277] UNIF. PARENTAGE ACT (amended 2002) (UNIF. LAW COMM'N 1973).

[278] UNIF. PARENTAGE ACT § 706(b) (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 707 (UNIF. LAW COMM'N 2017).

[279] UNIF. PARENTAGE ACT § 707(a) (UNIF. LAW COMM'N 2017).

be given to the clinic or health care provider, but failure to notify a clinic or health care provider does not affect the parentage of the child.[280]

4. Informed Consent

The American Bar Association has proposed that states enact legislation to provide that "[i]nformed consent must be provided by all participants prior to the commencement of assisted reproduction."[281] The proposal would require every participant to be informed, orally and in writing, of the following things, among others: the right to withdraw consent; the known and potential risks, consequences and benefits of ART; the possibility of unforeseen legal consequences; the advisability of seeking legal counsel; other routes to parentage, including adoption and sexual intercourse; confidentiality rights and obligations; rights of access to medical information about donors; and information about who has the right to possession and control of embryos or gametes.[282]

While this kind of information can be beneficial to gamete donors and people who wish to use ART to conceive children, a state that enacts an informed consent statute for assisted reproduction should make it clear that failure to provide the required information will not affect the validity of consent for purposes of determining a child's parentage. Informed consent laws normally are enacted for the purpose of defining the scope of the consent defense in cases involving patient claims against health care providers, not to determine who a child's parents are.[283] It would not be sound public policy to deprive a child of an intended parent and declare a sperm donor the child's parent merely because a person was informed in writing but not orally that adoption is also a way of becoming a parent, for example.

5. Minors

No version of the UPA addresses the validity of a minor's consent to assisted reproduction or when it may be withdrawn.[284] Because

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280 *Id.*
281 MODEL ACT GOVERNING ASSISTED REPROD. TECH § 201 (2008).
282 *Id.*
283 Martin R. Struder, *The Doctrine of Informed Consent: Protecting the Patient's Right to Make Informed Health Care Decisions,* 48 MONT. L. REV. 85, 85 (1987).
284 UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973)(failing to address the validity of a minor's consent to assisted reproduction); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002)(failing to address the validity of a minor's consent to assisted reproduction); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017)(failing to address the validity of a minor's consent to assisted reproduction).

minors do not have a fully developed capacity to understand and appreciate the consequences of their actions, the contracts into which they enter generally are voidable at their option.[285] This is why some states allow a minor to vacate a recognition of parentage upon attaining the age of majority, and why a recognition form signed by a minor operates only as a presumption of parentage, not a determination of parentage.[286] One of the reasons the Task Force rejected the UPA 2000 was that it failed to distinguish between adults and minors in connection with the signing of documents that have the effect of making an individual a parent.[287] It is a valid criticism. An assisted reproduction statute could provide that a minor may withdraw consent at any time until he or she attains the age of majority or the time the gametes or embryo are placed, whichever is later.

6. The Effect of Divorce, Annulment, Legal Separation, or Death

Several states have addressed the effect a dissolution of marriage has on a spouse's consent to the other spouse's use of ART to conceive.[288] Under the UPA 2002, a person who signs a consent does not become a parent if the sperm, eggs, or embryos have not been placed at the time of the divorce.[289] The consenting spouse will be a parent if the gametes are placed before the divorce or if the spouse consented in writing that the spouse would be a parent of the child if the placement occurs after a divorce.[290] These provisions reflect probable intent.[291] It can probably be safely assumed that most people do not wish to conceive babies with a former spouse.[292] An exception could be made for those couples

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[285] Richard A. Lord, 5 WILLISTON ON CONTRACTS § 9:5 (4th ed. 2010); RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981).

[286] *See, e.g.*, MINN. STAT. § 257.57 subd. 2(4) (2018) (stating that a minor has the right to vacate within six months of turning eighteen) & MINN. STAT. § 257.75 subd. 9 (2018) (presumption of parentage).

[287] TASK FORCE REPORT, supra note 54, at 8.

[288] *See* ALA. CODE § 26-17-706 (2019); COLO. REV. STAT. §19-4-106 (2018); DEL. CODE ANN. tit. 13, § 8-706 (2018); ME. STAT. tit. 19-A, § 1926 (2019); NEV. REV. STAT. § 126.700 (2019); N.M. STAT. ANN. § 40-11A-706 (2019); N.D.. CENT. CODE § 14-20-64 (2019); TEX. FAM. CODE ANN. § 160.706 (West 2019); UTAH CODE ANN. § 78B-15-706 (West 2019); VT. STAT. ANN. tit. 15C, § 706 (2019); VA. CODE ANN. § 20-158 (2019); WASH. REV. CODE § 26.26.275 (2018) (repealed 2018); WYO. STAT. ANN. § 14-2-906 (2019).

[289] UNIF. PARENTAGE ACT § 706 (UNIF. LAW COMM'N 2002).

[290] *Id.*

[291] *Id.* § 702 cmt.

[292] *See generally* April Wilder, *Strings Attached: What Happens When You Get Pregnant with Your Ex-Husband?* (Feb. 2014) http://www.oprah.com/spirit/april-wilder-pregnancy-after-divorce/all.

who clearly express an intention to become parents with a person from whom they have become divorced.[293]

The UPA 2002 does not address legal separations or annulments.[294] The UPA 2017 gives these the same effect as divorces.[295] There does not appear to be any valid policy reason for distinguishing between divorces and other kinds of proceedings that terminate a marriage relationship.[296] Neither the consenting spouse nor the donor should become a parent if the other spouse unilaterally decides to proceed with the placement after the parties have split up, whether the placement occurs after a divorce, an annulment, or a decree of legal separation.

Under the UPA 2017, a former spouse will not be a parent if a transfer of gametes or an embryo occurs after the marriage is terminated or if consent is withdrawn before transfer.[297] The Task Force recommended a requirement that divorce proceedings address custody of biological materials (sperm, eggs, zygotes, embryos, and the like) that exist in storage.[298] Given the profound impact an individual's unilateral decision to have a child using another person's gametes can have on the other person's life and on the lives of child(ren) that are conceived this way, this seems like a reasonable requirement.[299] It should also apply to legal separations and annulments.

These rules are not easily adaptable to unmarried couples.[300] They are not similarly situated with married couples in this respect.[301] There is no formal procedure like divorce or annulment for ending a nonmarital relationship.[302] Consequently, in the absence of a stipulation, the date of termination of a relationship is not as easily determined.[303] Foreseeably, courts could find themselves being called upon to decide a child's parentage based on whether people intended a permanent termination of their relationship or only a trial separation. There is no formal procedure for re-establishing a nonmarital relationship (also known as

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293 Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55 (1999).

294 Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 67 (2003).

295 UNIF. PARENTAGE ACT § 706 cmt. (UNIF. LAW COMM'N 2017).

296 Trisha Zeller, FAMILY LAW AND PRACTICE, Ch. 6, § 63.02 (2019).

297 UNIF. PARENTAGE ACT § 102 (UNIF. LAW COMM'N 2017) (explaining that a "transfer" occurs at the time gametes or an embryo are placed in a woman's body).

298 TASK FORCE REPORT, *supra* note 54, at 26.

299 Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 U. PA. J.L. & SOC. CHANGE 41, 62 (2016).

300 June Carbone & Naomi Cahn, *Nonmarriage*, 76 *Md. L. Rev.* 55, 95 (2016).

301 *Id.* at 96.

302 *Id.* at 70.

303 *Id.* at 96.

"getting back together"), either. Thought would need to be given to the question whether consent is automatically revived when a couple reunites after a breakup, and the level and kind of proof that would be needed to establish that a reunion was mutually intended to be permanent (as distinguished from a trial reunion, for example.) It might be more expedient to require withdrawals of consent for unmarried couples to be made expressly rather than implied from the termination of the relationship.

Legislators should also give some consideration to the effect of death on a person's consent. It probably may be assumed that people generally do not wish to conceive children after they are dead. Accordingly, a statute declaring an ART consent void if gamete or embryo transfer has not taken place before the donor dies would make sense. An exception could be recognized for cases in which the donor has clearly expressed a contrary intention. The UPA 2017 contains suggested language for such a provision.[304]

G. LICENSED PHYSICIAN OR DONATION FACILITY

The UPA 1973 and statutes adopting or patterned on it required assisted reproduction to be supervised by a licensed physician.[305] This requirement does not appear in later versions of the UPA.[306] California has retained at least some form of it.[307] The Task Force was concerned that without it, a woman's sexual partner might try to avoid parental responsibility by claiming that he only donated sperm artificially rather than by having sexual intercourse.[308]

Retaining the requirement of either a licensed physician or a licensed gamete bank raises a thorny question: What happens if the physician or gamete bank does not have a valid license? It seems unfair that the intended parents, the donor, and the child of the intended parents could be thwarted by a physician's failure to pay a license renewal fee, for example.[309]

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[304] UNIF. PARENTAGE ACT § 708 (UNIF. LAW COMM'N 2017). Texas has already enacted a statute addressing this contingency. *See* TEX. FAM. CODE ANN. § 160.707 (West 2018).

[305] UNIF. PARENTAGE ACT § 5 (amended 2002) (UNIF. LAW COMM'N 1973).

[306] Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 909 (2012).

[307] *See, e.g.*, CAL. FAM. CODE § 7613 (West 2019) (dispensing with the requirement if a licensed gamete bank is used).

[308] TASK FORCE REPORT, *supra* note 54, at 9.

[309] Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 390 (Ct. App. 1986) & E.E. v. O.M.G.R., 20 A.3d 1171, 1175–76 (N.J. Super. Ct. Ch. Div. 2011) strictly applied statutes mandating physician supervision. Those cases, however, involved individuals who did not even try to use the

A California statute provides that a man who donates sperm to a licensed physician or sperm bank does not become a father unless he and the woman otherwise agree in writing before conception.[310] He still is not the father if he fails to donate to a licensed physician or sperm bank and either (a) he and the woman agreed in a writing signed prior to conception that he would not be a parent, or (b) a court finds by clear and convincing evidence that he and the woman had an oral agreement that he would not be a parent.[311] On the other hand, the donor will be the father if he fails to donate to a licensed physician or sperm bank, and he and the woman agreed he would be a parent in a writing signed before conception.[312]

These provisions have the benefit of encouraging would-be donors and recipients to enter into well-drafted consent agreements.[313] They will be of little help, however, in those cases where the donor, recipient, or both did no contingency planning because they both reasonably but mistakenly believed that the physician or gamete bank possessed a valid license.[314] A good argument may be made that consent given under these circumstances should nevertheless be considered valid.[315] States may have a legitimate interest in regulating ART clinics and professionals, but there are less drastic means of doing that than making the parental status of their customers depend on the professional's or business's regulatory compliance.[316] States could achieve their regulatory objectives by imposing criminal and/or administrative penalties on service providers who practice a profession or operate a business without a license, or with a revoked or suspended license.[317]

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services of a licensed physician. *Id.* They are distinguishable from cases in which the parties make a good faith effort to comply with statutory requirements. *Id.*

310 CAL. FAM. CODE § 7613(b) (West 2019).

311 *Id*.

312 *Id.*

313 Certain forms can be used to show the intentions of parents and donors involved in the conception of a child; these forms can serve as the foundation of a consent agreement can help protect the rights of all involved in the process. *California's New Assisted Reproduction Law*, NATL. CTR. FOR LESBIAN RTS. (last visited Nov. 9, 2019), http://www.nclrights.org/wp-content/uploads/2015/11/Cal-statutory-forms-assisted-reproduction.pdf.

314 *See e.g.* CAL. FAM. CODE § 7613(b)(2) (2019).

315 *See* Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1–44 (1957) (explaining the rationale for making "reasonable mistake of fact" an excuse for noncompliance with legal requirements, and the considerations relevant to it).

316 While the American Society for Reproductive Medicine (ASRM) issues lengthy guidelines to its membership, which consists of fertility clinics and sperm banks, ASRM does not sanction those who are in violation of its guidelines. Michel Ollove, *States Not Eager to Regulate Fertility Industry,* PEW CHARITABLE TRUSTS (Mar. 18, 2015), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/18/states-not-eager-to-regulate-fertility-industry.

317 *Id.*

H. ADJUDICATION OF PARENTAGE

If multiple consents to ART can result in multiple presumptions of parentage, then a mechanism for resolving the conflict will be needed. It is also foreseeable that disputes may arise regarding the validity of a consent, the authenticity of a signature, or the validity or timeliness of a withdrawal of consent. For these reasons, state statutes should authorize parentage adjudication proceedings for children of assisted reproduction in the same way that they authorize proceedings to adjudicate the parentage of children who are conceived through sexual intercourse.

In cases not involving assisted reproduction, state statutes typically specify who is authorized to seek a paternity adjudication.[318] Care should be taken to ensure that these statutes, in addition to being gender-neutralized to accommodate same-sex couples, are clear that a person who claims to be the legal parent of a child pursuant to the ART statute may bring an action for an adjudication of parentage, too. Intended parents, alleged intended parents, and children of assisted reproduction should have a right to an adjudication of parentage when necessary.[319]

To prevent the disruption of parent-child attachments, a legislature may want to consider establishing a limitations period for adjudications.[320] The UPA 2017 would require a spouse to commence a proceeding to contest parentage of a child of assisted reproduction no later than two years after the child's birth.[321] There is no time limit if the spouse can prove that s/he (a) did not provide a gamete, (b) did not consent, (c) did not cohabit with the birth mother since the probable time of assisted reproduction, and (d) never openly held out the child as his or her own.[322]

The UPA 2017 provides a limitations period only for situations in which no valid consent exists.[323] The commissioners evidently as-

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[318] See, e.g., MINN. STAT. § 257.57, subd. 3 (2018) (listing the child, the mother, the mother's parent (if the mother is a minor or deceased), a man alleging himself to be the father (or a parent of a minor or deceased alleged father), and child support agencies).

[319] *Cf.* UNIF. PARENTAGE ACT § 612 (UNIF. LAW COMM'N 2017) (adding a new provision to the UPA to specifically authorize proceedings to adjudicate the parentage of individuals who are or are alleged to be the intended parents of children of assisted reproduction).

[320] Stephen A. Sherman, *You Ain't My Baby Daddy: The Problem of Paternity Fraud and Paternity Laws*, 5 AVE MARIA L. REV. 273, 295–96 (2007).

[321] UNIF. PARENTAGE ACT § 608 (UNIF. LAW COMM'N 2017) (stating that the presumption of parentage cannot be overcome once the child reaches two years of age (with two exceptions determined by the court).

[322] *See* UNIF. PARENTAGE ACT § 705 (UNIF. LAW COMM'N 2017) (stating that the specified time limits would apply even if the marriage is declared invalid after assisted reproduction occurs).

[323] *Id.*

sumed that only an invalid consent could invalidate parentage by assisted reproduction.[324] They did not anticipate the possibility that two or more properly executed consent forms might be signed for the same child.[325] If a legislature adopts the UPA 2017 limitations periods, the language should be made broad enough to cover situations involving multiple consents as well those involving invalid consent.

I. GENETIC TESTING

Minnesota has enacted a statute prohibiting gamete donors from using genetic test results to claim parentage of children conceived with their gametes.[326] A statute like this protects intended parents but it offers no protection to gamete donors.[327] It does not bar a gamete recipient, her spouse, the child, or a child support agency from seeking to use genetic testing to establish that the donor is the parent.[328]

Except in cases where the parties have failed to execute a valid consent or have failed to comply with some other statutory ART requirement, it does not make sense to allow genetic testing to prove a donor is the parent of a child of assisted reproduction. The objective of assisted reproduction laws is to ensure that intended parents who use ART to conceive a child will be recognized as the child's legal parents and that donors will be protected from the risk of being declared the parents.[329] Genetic testing of donors would thwart that purpose.

The UPA 2017 reflects this idea. It provides:

> Genetic testing may not be used:
> (1) to challenge the parentage of an individual who is a parent under [the ART statute]; or
> (2) to establish the parentage of an individual who is a donor.[330]

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324 UNIF. PARENTAGE ACT § 704 (UNIF. LAW COMM'N 2017) (outlining situations where a court would determine consent to be valid).

325 *Id.*

326 *See* MINN. STAT. § 257.62, subd. 5(c) (2018) ("A determination [by genetic testing] that the alleged father is the biological father does not . . . allow the donor of genetic material for assisted reproduction for the benefit of a recipient parent, whether sperm or ovum (egg), to claim to be the child's biological or legal parent").

327 *Id.*

328 *Id.*

329 *See* TASK FORCE REPORT, *supra* note 54, at 10.

330 UNIF. PARENTAGE ACT § 502(b) (UNIF. LAW COMM'N 2017).

This language makes it clear that neither the donor nor anybody else may use genetic testing to establish that a donor is the child's parent. "Because the parentage of an intended parent . . . is not premised on a genetic connection, the lack of a genetic connection should not be the basis of a challenge to the individual's parentage."[331] On the other hand, because a genetic connection is a component of the definition of an Indian child, an exception should be recognized for cases involving Indian or alleged Indian children.[332]

J. DONOR INFORMATION

Gamete donors often prefer to remain anonymous.[333] Accordingly, gamete donation agreements may contain provisions protecting the identity of donors from being disclosed to the recipients or the child.[334] While such contracts may increase the size of the donor pool, they can also prevent children from knowing their medical and genetic histories.[335] This information can be critical to receiving appropriate medical care.[336]

The UPA 1973 required physicians to file completed ART consent forms with the state's department of health and instructed the state to store them confidentially and indefinitely.[337] This places children of assisted reproduction at a disadvantage relative to adopted children.[338] In many states, adopted children have a right to information about their

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331 *Id.* § 502 cmt.

332 *See* discussion *infra* Section IV.L.4.

333 *See* Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity,* 90 B.U. L. REV. 1189 (2010) (explaining that prohibiting gamete donor anonymity reduces the availability of donor gametes, and erodes commitments to equality and the prevention of commodification in the ART space).

334 *Id.*

335 *Id.*

336 "Today, approximately 1.7% of all infants born in the United States every year are conceived using ART." *Assisted Reproductive Technology (ART): ART Success Rates*, CTR. DISEASE CONTROL & PREVENTION (Nov. 15, 2019), https://www.cdc.gov/art/artdata/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fart%2Freports%2Findex.html. This percentage is growing. Bernstein, *supra* note 101, at 298 (noting "that from 2004 to 2008 the number of IVF cycles used for gestational surrogacy grew by 60%, the number of births by gestational surrogates grew by 53% and the number of babies born to gestational surrogates grew by 89%"). "Accordingly, it is increasingly important for states to address the right of children to access information about their gamete donor." UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2017).

337 "The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file." UNIF. PARENTAGE ACT § 5(a) (amended 2002) (UNIF. LAW COMM'N 1973).

338 *See* Naomi Cahn, *Do Tell - The Rights of Donor-Conceived Offspring,* 42 HOFSTRA L. REV. 1077, 1111–1112 (2013-2014).

biological parents upon attaining adulthood.[339] The requirement does not appear in subsequent versions of the UPA.[340]

The UPA 2017 provides children of assisted reproduction a right of access to some information about their gamete donors.[341] Distinguishing between identifying and nonidentifying donor information, it balances the competing interests of children and donors by respecting a gamete donor's wishes regarding disclosure of the donor's identity while requiring gamete banks and fertility clinics to make a good faith effort to provide nonidentifying medical information about the donor to the child or the child's parent upon request.[342] Adopting UPA article 9 would help ensure that children of assisted reproduction receive the same health care and legal protections that other children do.

K. SURROGACY CONTRACTS

A surrogacy contract, sometimes called a gestational agreement, is an agreement between a woman and intended parents in which the parties agree that the woman will become pregnant using ART and will carry and give birth to the baby but will not have any parental rights or responsibilities upon the baby's birth.[343] If the woman's own eggs are used, she is called a *genetic* or *traditional* surrogate.[344] If another woman's eggs are used, she is called a *gestational* surrogate.[345]

The 2000, 2002, and 2017 versions of the UPA authorize surrogacy contracts.[346] The NCCUSL made these provisions optional, however, because the subject is highly controversial.[347] Courts in some states have held that surrogacy contracts are void, deeming them contrary to

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[339] Some examples of statutes granting adopted children a right of access to information about their birth parents include ALA. CODE § 26-10A-31 (2015), ALASKA STAT. §§ 18.50.500, 18.50.510 (2019), CAL. FAM. CODE §§ 9202, 9203 (West 2015), and MINN. STAT. §§ 259.83, 259.89 (2018). This is not an exhaustive list.

[340] UNIF. PARENTAGE ACT § 407 (UNIF. LAW COMM'N 2017) (discussing the conditions under which a donor's information may be released).

[341] UNIF. PARENTAGE ACT art. 9 (UNIF. LAW COMM'N 2017).

[342] *Id.* § 905. The Task Force, too, recommended that children of assisted reproduction should have access to their gamete donors 'medical information. TASK FORCE REPORT, *supra* note 54, at 25.

[343] UNIF. PARENTAGE ACT § 801(3) (UNIF. LAW COMM'N 2017).

[344] Alexus Williams, *State Regulatory Efforts in Protecting a Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 209 (2018).

[345] *Id.*

[346] UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

[347] UNIF. PARENTAGE ACT art. 8 cmt. (UNIF. LAW COMM'N 2002).

the state's public policy against sales or transfers of human beings.[348] As of 2015, seven states and the District of Columbia explicitly prohibit them; fourteen states authorize some, but not all, kinds of surrogacy contracts; and the rest of the country does not have any surrogacy statute at all.[349]

The Task Force recommended against enacting the surrogacy provisions of the UPA, believing additional analysis was needed to address public policy concerns, not the least of which was whether surrogacy agreements should be permitted at all.[350] Some of the concerns the Task Force raised were: Should genetic surrogacy, gestational surrogacy, both, or neither, be allowed?[351] Should fee payments be permitted?[352] Should payments of expenses be permitted?[353] Should payment of lost wages be considered a fee payment or an expense reimbursement?[354] Should agreements require pre-approval by a court?[355] If so, should the statute set out specific requirements for agreements or leave judges free to exercise discretion to decide, on a case by case basis, if the agreement will serve a child's best interests?[356] Should pre-placement counseling, evaluations, and/or home studies be required?[357] What should the effect of noncompliance with statutory requirements be?[358] Should the law require each party to the contract to have independent legal counsel?[359] Their spouses?[360] What effect will an intended parent's death before the child is born have on inheritance rights and guardianship?[361]

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348 *In re* Baby M., 537 A.2d 1227, 1234 (N.J. 1988); *In re* Adoption of Paul, 550 N.Y.S.2d 815, 818 (Fam. Ct. 1990). Some courts have also found them repugnant to adoption laws, on the basis that they circumvent the measures legislatures have put in place for the protection of adopted children (home studies, etc.) *See, e.g.,* Anaconda Fed. Credit Union # 4401 v. West, 483 P.2d 909, 911 (Mont. 1971); *see also* RESTATEMENT OF CONTRACTS § 369 (1932).

349 Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 487–503 (2015).

350 TASK FORCE REPORT, supra note 54, at 27.

351 *Id.* at 31.

352 *Id.* at 30.

353 *Id.* at 28–29.

354 *Id.* at 29.

355 TASK FORCE REPORT, supra note 54, at 27.

356 *Id.* at 30.

357 *Id.* at 29–31.

358 *Id.* at 26.

359 *Id.* at 22.

360 TASK FORCE REPORT, supra note 54, at 22.

361 *Id*. at 27–32.

Efforts to enact surrogacy legislation have had mixed results.[362] In some states, unsuccessful attempts to enact a surrogacy statute have been made several times over the course of the past decade.[363] One strategy legislators commonly employ when calls for surrogacy legislation are made is to establish a legislative commission to study the issue.[364] Because surrogacy is a complicated and controversial issue, it may be prudent to address it separately from other needed revisions to the Parentage Act, after such a commission has completed its study. The UPA provides details throughout regarding the kinds of language that should be used depending on whether a legislature wishes to make surrogacy agreements enforceable or not.[365] These could be used as a guide if a state's legislature and governor one day agree to explicitly make surrogacy contracts enforceable. There is no reason that legislation ensuring equal protection for the rights of children of assisted reproduction, same-sex couples, unmarried couples, and women could not be enacted in the meantime.

L. CONSISTENCY WITH OTHER LAWS

Care should be taken to ensure that reforms of a state's assisted reproduction statutes do not create conflicts with other statutes.

1. Probate Code

The probate codes of some states contain, among other things, detailed provisions concerning the parentage of children of assisted reproduction for purposes of inheritance rights.[366] Greater use of cross-referencing could be made in this area. Rather than maintaining two sets of ART statutes and definitions—one in a state's parentage code or chapter and another in a state's probate code—they could be set out one time in one place. The most natural place for them would be in a state's

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[362] For a survey of the surrogacy laws in each state, see Morrissey, *supra* note 349, at 485–514. States that have enacted surrogacy statutes vary with respect to the kinds of contracts that are enforceable and the conditions under which they are enforceable. *Id*. It should also be noted that the courts of a particular jurisdiction may have addressed the enforceability of surrogacy agreements even if the legislature has not. *Id*.

[363] *See, e.g.*, S.F. 2965, 85th Leg., Reg. Sess. (Minn. 2008); S.F. 2627, 88th Leg., Reg. Sess. (Minn. 2014); H.F. 2593, 90th Leg., Reg. Sess. (Minn. 2017) (not enacted).

[364] *See*, *e.g.*, Act of June 1, 2016, 2016 Minn. Laws ch. 189, art. 13 § 66 (establishing the Minnesota Legislative Commission on Surrogacy).

[365] UNIF. PARENTAGE ACT § 103(c), Legislative Note (UNIF. LAW COMM'N 2017).

[366] Colorado and Minnesota are examples. COLO. REV. STAT. §§ 15-11-115, 15-11-120, 15-11-121 (2019); MINN. STAT. §524.2-120 (2019).

set of parentage laws. The probate code could then refer to the appropriate section of the parentage laws for the definitions of "parent-child relationship" and other terms relating to parentage. Failing that, an effort should be made to ensure that the definitions provided in each set of laws are consistent.

2. Putative Fathers Registry

Registration with a state's fathers adoption registry is a means by which a putative father may be assured of receiving notice and an opportunity to oppose any proposed adoption of a child as to whom his possible parentage has not yet been established so that he can protect his rights.[367] An effort should be made to ensure that the provisions of the applicable fathers adoption registry statute are consistent with any changes that are made to assisted reproduction statutes.

3. Adoption laws

Statutes in some states require adoption records to be retained permanently.[368] This requirement is important to adoptees. Without it, an adoptee's right to acquire information about his or her birth parents upon attaining the age of majority would be of little value.[369] Statutes governing assisted reproduction should provide for the permanent retention of records pertaining to children of assisted reproduction as well. There is no reasonable justification for granting greater rights to adopted children than to children of assisted reproduction.[370] All provisions of the Parentage Act (both current and proposed) should be reviewed to ensure consistent treatment of children whether they are adopted or conceived via assisted reproduction with the use of a third-party donor.

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[367] A.S.B. v. Dep't of Children & Family Servs., 688 N.E.2d 1215, 1225 (Ill. App. Ct. 1997). For an example of a state putative fathers registry statute, see MINN. STAT. § 259.52, subd. 1 (2019).

[368] *See, e.g.*, MINN. STAT. § 259.79, subd. 3 (2019); NEB. REV. STAT. § 43-113 (2019); VT. STAT. ANN. tit. 15A, § 6-102(d) (2017).

[369] Many states allow adoptees access to medical and other nonidentifying information about their birth parents upon attaining adulthood. Lauren Fair, *Shame on Us: The Need for Uniform Open Adoption Records Legislation in the United States*, 48 SANTA CLARA L. REV. 1039, 1041 (2008).

[370] John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 1015–18 (1986) (comparing the rights of adopted children to information about their biological parents with those of children of assisted reproduction).

4. Indian Child Welfare Act

The Indian Child Welfare Act[371] (ICWA) is a federal enactment establishing standards for the custody and placement of children who are members of tribes or biological children of tribe members.[372] Under the Supremacy Clause, no state may enact laws that contradict or conflict with it.[373]

ICWA defines an "Indian child" as an unmarried person under the age of eighteen who is either a member of a tribe or an eligible biological child of a member of a tribe.[374] A "parent" is either a biological or adoptive parent of an Indian child.[375] An unwed father whose "paternity has not been acknowledged or established" is not a parent.[376] In short, ICWA requires either a biological or an adoptive relationship.[377] For this reason, it is problematic when state statutes require that a man and a child who are not related to each other biologically or through adoption be treated as if they are, in fact, biologically related.[378] ICWA does not authorize states to define people who are not members of a tribe and who are neither the biological nor adopted children of a member of a tribe as children of a member of a tribe.[379] State laws that purport to do so conflict with ICWA.[380] Expanding nonbiological parentage of unadopted children of assisted reproduction to include same-sex spouses and unmarried persons who sign ART consent forms will only intensify the conflict.

The simplest way to deal with this conflict would be to enact a statute declaring that the state's parentage laws must be construed consistently with the Indian Child Welfare Act of 1978, United States Code, title 25, sections 1901 to 1963. If this is done, then the assisted reproduction provisions of a state's parentage laws would not conflict with ICWA.

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371 25 U.S.C. § 1901–1963 (2019).
372 25 U.S.C. § 1902 (2019).
373 U.S. CONST. art VI, cl. 2; *In re* Custody of S.E.G., 507 N.W.2d 872, 880 (Minn. Ct. App. 1993).
374 25 U.S.C. § 1903(4) (2019).
375 25 U.S.C. § 1903(9) (2019).
376 *Id.*
377 25 U.S.C. §§ 1915(a), 1917 (2019).
378 Andrew Bainham, *Arguments About Parentage*, 67 CAMBRIDGE L. J. 322, 334 (2008).
379 25 U.S.C. § 1903(4), (9) (1978).
380 25 U.S.C. § 1903(5) (1978).

M. DEFINITIONS

Apart from a statute defining "parent and child relationship,"[381] the UPA 1973 and state statutes adopting it without revision do not have a definitions section.[382] In view of the technological developments and changes in usage that have occurred since 1973, a definitions section would be useful. The Task Force agreed.[383]

If a state has already set out some definitions in its probate code, they should be reviewed to ensure consistency with any definitions that are established for purposes of the state's parentage laws. Better yet, definitions relating to parentage could be set out fully in the Parentage Act, with the Probate Code cross-referencing them rather than setting out a separate set of definitions.

Definitions should comport with constitutional requirements, reflect current usage, and be sufficiently inclusive to accommodate both existing and emerging technologies. The UPA 2017 has a definitions section.[384] It is quite comprehensive and could be used as a model.

Care also should be taken to ensure that any new definition or changes to an existing one do not produce unintended consequences. For example, under the UPA 2017, "[a] donor is not a parent of a child conceived by assisted reproduction."[385] A "donor" is defined as a person "who provides gametes for use in assisted reproduction."[386] "Assisted reproduction" means a "method of causing pregnancy other . . . than sexual intercourse."[387] Further, women who give birth to children of assisted reproduction are parents, not "donors."[388] These provisions sound reasonable enough, but some undesirable consequences that the commissioners probably did not intend become evident when these and other UPA principles discussed elsewhere in this Article are applied in different scenarios.

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381 UNIF. PARENTAGE ACT § 1(14), (amended 2002) (UNIF. LAW COMM'N 1973).
382 *Id.*
383 TASK FORCE REPORT, *supra* note 54, at 8.
384 UNIF. PARENTAGE ACT § 102 & art. 7 cmt. (UNIF. LAW COMM'N 2017).
385 *Id.* § 702.
386 *Id.* § 102(9).
387 *Id.* § 102(4).
388 *Id.* §§ 102, 201.

1. Sexual intercourse

If a child is conceived by sexual intercourse, the woman will be the mother in any event. Whether the man would be the father will depend on non-ART law.[389] Thus, even if a husband and wife consent to the wife having sexual intercourse with a different man and everybody involved intends the husband to be the father of the child, the husband would still only be a presumed father, and then only by virtue of the presumption of legitimacy during marriage.[390] The second man might also be a presumed father if tests evidence a genetic relationship or if he and the woman end up living together and holding the child out as their own.[391] If the man who had sexual intercourse with the woman decides to assert parentage of the child, then the husband would need to pursue an adoption or an adjudication of parentage to protect his parental rights.[392] The same principles would apply if a married lesbian couple arranges to have one of them become pregnant by means of sexual intercourse with a man.[393] Policy makers will need to decide whether this is a desirable outcome or not.

2. Sperm donation

A woman who conceives a child using donated sperm would be the mother in any event. The man whose sperm is used would not be a parent.[394] A man whose sperm is not used would not be a parent unless he consents to the insemination with the intent to be a parent, he lives with and holds the child out as his own, or an applicable presumption is not rebutted.[395] If any person who provides gametes for assisted reproduction is a donor, and donors are not parents of children conceived by ART, then a husband whose own sperm is used to inseminate his wife by any method other than sexual intercourse would not be a parent of

389 *The Rights of Unmarried Fathers*, CHILD WELFARE INFORMATION GATEWAY (Aug. 2017).

390 Batya F. Smernoff, *California's Conclusive Presumption of Paternity and the Expansion of Unwed Fathers' Rights*, 26 GOLDEN GATE U. L. REV. 341 (1996).

391 James J. Vedder et al., *Presumptions in Paternity Cases: Who Is the Father in the Eyes of the Law?*, FAMILY ADVOCATE 5–6 (Apr. 23, 2018).

392 Lisa Luetkemeyer, et al., *Paternity Law: Sperm Donors, Surrogate Mothers and Child Custody*, J. OF MO. ST. MED. ASS'N. 1, 2 (2015).

393 Brandy Zadrozny, *Lesbian Couple's Sperm Donor Sues for Parental Rights*, DADDY DILEMMA (Jan. 31, 2018, 4:10 PM).

394 *See supra* Part II.

395 Ashley Fetters, *The Overlooked Emotions of Sperm Donation*, THE ATLANTIC, 5 (July 9, 2018).

the child.[396] It is not likely that the commissioners intended to require married men to procreate only by engaging in sexual intercourse. More likely, they simply neglected to consider the possibility that a heterosexual couple might choose to use a method other than sexual intercourse to conceive a child using the husband's own sperm.[397]

3. Egg donation

The birth mother would be a parent in any event, whether she uses her own or somebody else's eggs, and whether anybody signs a consent form or not.[398] A woman who donates eggs for another woman's use would not be a parent.[399] Thus, if a female spouse donates gametes to her female spouse, one spouse will be a parent and the other will not.[400] If she had been a male donating gametes to her female spouse, they would both be parents.[401] This result is at odds with the mandate of *Obergefell* and *Pavan* to treat same-sex and opposite-sex married couples alike.[402]

As these scenarios illustrate, the definition of "donor" that appears in the UPA 2017 may need to be tweaked to accommodate situations in which a woman's spouse or significant other wants to be a parent but the couple either cannot or chooses not to engage in sexual intercourse to accomplish it.[403] Defining a donor as a person who provides gametes for use in assisted reproduction with no intent to be a parent would be one way to fix the problem. Another approach would be to exclude from the definition a "person who biologically provides for, or consents to, assisted reproduction with another person. . .with the

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396 Joanna L. Grossman, *Men Who Give It Away: The Potential Perils of Free and Non-Anonymous Sperm Donation*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA, 7 (Jan. 24, 2012).

397 *Global Artificial Insemination Market - Rising Prevalence of Late Parenthood to Drive Growth*, MARKETWATCH.COM (May 13, 2005).

398 Sherry F. Colb, *What is a Mother? The California "Egg Donor" Case Gets It Wrong*, FINDLAW.COM (May 19, 2004).

399 *Id.*

400 *Sperm, Egg and Embryo Donation in NY and NJ: What to Know*, RUMBOLD & SEIDELMAN, LLP 2–3 (last visited Nov. 11, 2019).

401 Joanna L. Grossman, *Men Who Give It Away: The Potential Perils of Free and Non-Anonymous Sperm Donation*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA, 7 (Jan. 24, 2012).

402 Laura Morgan, *U.S. Supreme Court Tackles Discrimination Against Same-Sex Couples*, FAMILY LAW CONSULTING 1, 2 (Apr. 6, 2018).

403 UNIF. PARENTAGE ACT § 102(8) (UNIF. LAW COMM'N 2000) (current version at UPA 2017).

intent to be the parent of the child born."[404] Yet another idea would be to distinguish between an intended parent who is also the donor and a "third-party donor." This is the approach the Minnesota legislature has taken in its Probate Code.[405]

V. CONCLUSION

In recognizing only artificial insemination as a form of assisted reproduction, state statutes are out of date and probably unconstitutional. Limiting the benefits and protections of assisted reproduction parentage to opposite-sex married couples discriminates against same-sex couples, unmarried persons, and single women. Protecting sperm donors but not egg donors from the risk of liability for parental responsibilities discriminates against women. State parentage statutes are overdue for an overhaul. Equipped with an understanding of the specific changes needed and the concerns that will need to be addressed when making them, there is no longer any reason this cannot be done.

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[404] Sroka, *supra* note 228, at 582. Pre-conception intent to be a parent, not the particular method of fertilization used, should control the determination whether a person becomes a parent of a child conceived by ART. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994); John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 418 (1991) ("[T]he intended parents should be considered the 'parents' of the child born [of assisted reproduction]"); Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302 (1990) ("Legal rules governing modern procreative arrangements and parental status should recognize the importance and legitimacy of individual … intentions").

[405] MINN. STAT. § 524.1-201 (2018). Applying a distinction between heterological and homological insemination is another idea, but this approach is problematic. These terms are used to distinguish between insemination using a husband's sperm and insemination using sperm from a man other than a husband. *See* discussion *supra* Section IV-A. If statutes are to apply to both unmarried and married couples, then a new term would need to be invented to refer to an unmarried man who is both a donor and an intended parent.