place publicly held for-profit corporations that combine insurer and provider functions with employer-based health benefit plans and nonprofit medical care organizations. 204 These organizations and their incentives should be more generally aligned with the patients. 205

CONCLUSION

Based on the application of a five-stage model for industry change, it appears that managed care may be at the end of an evolutionary process. It may also appear that managed care is undergoing a doctrinal change wherein new accountabilities are created. Problems with mental health managed care abound, especially regarding application of the ERISA preemption clause. It is important to remember, however, that there are myriad compelling reasons for retaining ERISA preemption, some of which are positive for mental health patients. By removing ERISA preemption, legislators may in fact create more problems for mental health patients. Finally, there are other positive ways of solving the problems—attacking ERISA preemption may not be the effective prescription for mental health care.

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THE WILD WILD WEST:
INADEQUATE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY

Alexander N. Hecht*

The law addresses any new question by relying on precedent. When cars were introduced, the wisdom from cases dealing with horses and buggies governed . . . [i]t was difficult to find precedents to deal with human embryos. Were they property or people? . . . The doctors called me . . . because the attorneys for their clinics respond to each of their questions by saying, “There is no law in this state that covers that.” 1

INTRODUCTION

Recent advances in Assisted Reproductive Technology (ART) have spawned an exciting industry that aids thousands of American couples in conceiving their own children. 2 While promoting the “traditional” values of raising a natural family, ART has unlocked a Pandora’s box of ethical concerns and policy issues that current health law seems unprepared to resolve. 3 Prenatal genetic screening

* J.D., University of Houston Law Center Class of 2001; B.A., University of Texas at Austin.
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1 LORI B. ANDERSON, CLONE AGE ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY 22 (1999).

2 For purposes of this paper, Assisted Reproductive Technology (ART) is defined as any medical technique that, through advances in biomedicine, facilitates or enables human reproduction. This definition includes artificial insemination by donor, surrogacy, in vitro fertilization (IVF), embryo transfer, and human cloning. See generally Sandra Anderson Garcia, Sociocultural and Legal Implications of Creating and Sustaining Life Through Biomedical Technology, 17 J. L. & E. Med. 167 (1996) (providing a history of biotechnology development).


permits parents to abort their fetus if it carries a gene for a serious disorder. Moreover, infertile couples may eventually select their fetus from a menu of phenotypic characteristics such as hair color and height. What prevents potential parents from aborting a fetus simply to satisfy personal preferences such as gender, skin color, intelligence, or the potential to play professional sports?

Unfortunately, this industry remains largely unregulated. The near-absence of federal and state laws combined with ineffective and unheeded industry guidelines leads to a lawless free-for-all. In the "Wild Wild West" of ART, doctors fraudulently impregnate their patients, fertility researchers use their patients' genetic samples without valid consent, and clinics fail to safely screen potent-


Patricia A. Baird, Genetic Technologies and Achieving Health for Populations, 30 J. HEALTH SERVICES 607, 609-10 (2000) (reporting that a majority of currently available clinical genetic services involve prenatal diagnosis of genetic disorders such as Tay-Sachs and phenylketonuria). See also V. Goossens et al., Clinical Application of Preimplantation Genetic Diagnosis for Cystic Fibrosis, 20 PRIMAGEM DIAGNOSIS 571 (2000) (discussing screening for cystic fibrosis, one of the most common, severe, and lethal genetic disorders in Caucasian populations).

See Baird, supra note 5, at 411 (warning that as prenatal genetic testing technologies advance and the range of identifiable traits and susceptibilities continues to expand, the legal issues surrounding prenatal testing are likely to increase).

Laura M. Kaiser, Comment, Arguing the "Obvious" in Wisconsin: Will State Regulation of Assisted Reproductive Technology Has Not Come to Pass, and How It Should, 2000 Wisc. L. REV. 441, 443 (2000) (noting that although thirty states have statutes regulating artificial insemination, few have comprehensive regulations). But see Judith F. Daar, Regulating Reproductive Technology: Fanconia or Paper Tiger? 34 Hous. L. REV. 609, 615, 655 (1997) (arguing that current legal regulations of assisted reproductive technologies are sufficient and that more complex legal regulation may deter cautious, skilled doctors from entering the assisted reproductive field and will do little to deter unethical behavior).

See Daar, supra note 7 at 642-45 (noting that 42 U.S.C. § 200(e)(1) (Supp. IV 1998) is the only federal law directly pertaining to reproductive technology, requiring programs to report success rates to the Secretary of Health and Human Services, but was not funded until May 1996).


James v. Jacobson, 6 F.3d 233 (4th Cir. 1993) (invoking an action against a physician who artificially inseminated his patient with another sperm, and representing to the mother of the semen who was from her husband).

Shirley J. Faima et al., Ethical Dilemmas in Reproductive Medicine, 18 WHARTON L. REV. 51, 51 (1990) (reporting an incident at the University of California, Irvine, in which three physi-
Previous generations turned to fertility rituals to enhance reproductive odds. Some believed that having sexual intercourse during a north wind increased the statistical probability of conceiving a male child. Today, an estimated ten to seventeen percent of American couples cannot procreate in the usual manner. Nor can these couples turn to adoption, because overwhelming demand for infants and waiting periods often exceed five years. At least one adoption agency summarily rejects thirty-six-month professionals in favor of younger prospective adoptive parents.

Over 11,000 physicians provide ART services to an estimated 172,000 women each year. Americans spend over $100 million dollars annually on artificial insemination. Until the late 1980s, this technology was successful only ten percent of the time. However, the science quickly improved, and by 1995, the Baylor College of Medicine Assisted Reproduction Technology program at Methodist Hospital in Houston reported success rates as high as forty percent. Fertility clinics alert their patients of a fetus's potentially undesirable traits, giving patients the option to try again for a healthier fetus. As a result of these advances, proper procedures substanc-

23 Id. at 11.
24 Id.
26 Lorio, supra note 21, at 1641-42 (asserting that the accessibility of abortion, society's increased acceptance of single parent households, and greater numbers of unwed mothers keeping their children, have rendered adoption a less viable option today).
27 Id. at 1642.
29 Id. See also ROGER GORDON, DESIGNING BABIES: THE BRAVE NEW WORLD OF REPRODUCTIVE TECHNOLOGY 243 (1999) (defining artificial insemination as injection into a woman of sperm derived from either her male partner or a donor).
30 Alexander N. Hecht, The ART of Conception, 35(2) THE JOURNAL 8, 10 (1996).
31 Id. at 10.
32 Seealso, supra note 4, at 176 (describing preimplantation genetic diagnosis (PGD), a very early type of prenatal genetic test aimed at terminating genetically defective embryos before implantation; also noting that PGD screens out defective embryos before implantation, eliminating the need to terminate a future pregnancy and making the procedure more socially acceptable).
33 Id. (noting that PGD is particularly beneficial to women who carry one of the three hundred X-linked recessive diseases currently known). See also CAPLAN, supra note 17, at 67 (challenging that artificial reproduction combined with genetic knowledge may allow parents to have healthy children without the risk of serious or fatal disorders).
34 Laura M. Pardy, Assisted Reproduction, in A COMPANION TO BIOETHICS 163 (Helga Kuhse & Peter Singer eds., 1998) (indicating changing social attitudes toward new technologies of reproduction have resulted in more people willing to seek help for reproductive dysfunction).
35 See K.B. v. N.B., 811 S.W.2d 634, 639 (Tex. App.—San Antonio 1994, writ denied) (holding that where the husband knowingly participates in the artificial insemination of his wife by a third-party sperm donor and publicly holds the child out as his own son, the husband is considered the legal father of the child). But see Gorny v. Gorny, 243 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. 1963) (holding that a child conceived through artificial insemination by donor sperm not of his mother's husband is illegitimate).
36 S. Lynn Mulcare & Herman Agosti, Effects of Adoptive Status on Evaluations of Children, 1392 J. SOC. PSYCHOL. 159, 169 (1999). See also Susan Caruso Klock & Dorothy A. Greenfield, Psychological Status Of In Vitro Fertilization Patients During Pregnancy: A Longitudinal Study, 73 FERTILITY & STERILITY 1159, 1159 (2003) (reporting that infertility causes depression, anxiety, and a decrease in women and that prolonged infertility treatments have an adverse emotional impact on couples).
37 Mulcare, supra note 32.
38 Id. See also Christine Comrie, "Women Want it": In-Vitro Fertilization and Women's Motivations for Participation, 8 WOMEN'S STUD. INT'L. FORUM 547, 549 (1985) (arguing that in-vitro fertilization is a "male medical science" and as such, mirrors the power relations between men and women in so far as women are pressured into participating because of the social pressures of a male-dominated society).

Americans are often reluctant to openly discuss reproductive dysfunction. Some argue that this reticence stems, in part, from powerful social expectations regarding motherhood and male virility. In fact, a 1985 study found that some men preferred to remain childless rather than adopt a child. Male infertility remains denied or hidden and "[r]esearch has shown that men may distance themselves emotionally from their physiological problems and may be reluctant to start infertility treatment."
In a climate where people rarely discuss infertility, ART progresses largely without legal regulation. Often, birth certificates reflect the mother’s husband as the biological father of children born via artificial insemination. Couples using artificial insemination are “often advised not to disclose the child’s true origin, thus allowing the couple to keep the husband’s infertility a secret.”

Deferring to a couple’s right to privacy, trial courts in reproduction actions are quick to grant protective orders that shield the identities of participants. In James v. Jacobson, the Fourth Circuit Court of Appeals held that a trial court abused its discretion when it denied a request for anonymity. This highly-publicized case involved a doctor who fraudulently used his own sperm to artificially inseminate his unsuspecting patients. The court determined that revealing the parties’ true identities would subject the doctor’s victims to “feelings of public obloquy or shame.”

In the absence of legal regulation, the Jacobson court also reasoned that an anonymity order would protect the pre-adolescent children from a “sudden, unplanned” revelation that they were conceived by artificial insemination and that their father “was not, as they had supposed, their biological father.” The court’s concern emanates from the debates regarding privacy policy. Do courts have the authority to publicize confidential information about a person, in violation of that person’s right to privacy? As attorneys Samuel Warren and Louis Brandeis stated in 1890,

concluding that men shift the blame for their infertility to their wives in order to protect their “fragile sense of manhood.”

48 18 U.S.C. § 3509(a)(3) (1994) (defining the term child as a person who is under the age of 18 and who is alleged to be a victim of a crime of physical abuse or exploitation; or a witness to a crime committed against another person).
52 Id.
54 Id.
vides a more likely explanation for the dearth of litigation. The reproductive industry prefers to avoid negative headlines that could deter potential customers from undergoing such procedures.

Modern courts, however, are lifting the shroud of secrecy. In Gifford v. National Enquirer, Inc., a federal district court held that a tabloid news article, "Kathe Leel's Baby Secret: The High-Tech, No-Sex Way She Got Pregnant," was not defamatory. The article referred to the celebrity Giffords as a "desperate pair" and to artificial insemination as a "shocking" and "controversial" laboratory technique of "spinning." The plaintiffs had conceived their second child through artificial insemination, and the court held that "such medical practices are common enough in contemporary society that one could hardly claim that engaging in such a practice subjects one to 'hatred, contempt or aversion or induces an evil or unsavory opinion ... in the minds of a substantial number of the community.'"

C. Rationale Against Regulation

The ever-changing definition of what society considers "natural" lies at the forefront of anti-regulatory reasoning. Laurence Tribe, a national constitutional law expert, writes that: "the very decision to use the law to condemn, and then outlaw, patterns of human reproduction—especially by invoking vague notions of what is 'natural'—is at least as dangerous as the technologies such a decision might be used to control."

Another factor in the slow development of ART regulation is the deep moral divide among Americans over abortion. Both sides of the debate typically link nearly all of a woman's reproductive decisions to abortion. Pro-Choice supporters might protest regulation because it would be a restriction of a woman's right to reproductive freedom. Right-to-Life advocates might object to regulation on the ground that such regulation would be an acceptance of the validity of such technology. Those opposed to regulation also fear that once the government opens the door, it will be incapable of limiting the scope of restrictions. Past legislative action on reproduction issues appeared to be motivated by an aversion to the "nightmarish and decided unnatural perversion of human reproduction." For example, in the wake of sudden advances in cloning, California enacted a flat ban on human cloning. The National Bioethics Advisory Commission examined ethical issues surrounding cloning, and on March 4, 1997, President Clinton recommended extending the ban nationwide. The United States House of Representatives heard this call and passed the Human Cloning Prohibition Act of 2001 (H.R. 2505), which would amend the United States Code to prohibit

54 Annas, supra note 49, at 1 (indicating that people have a tendency to equate all post-conception, reproductive choices with abortion).
55 Planned Parenthood, Homepage (explaining that pro-choice means supporting access to all reproductive options and allowing all individuals to make their own personal decisions about when and whether they have a child), at http://www.plannedparenthood.org/politicalarena/pro-choice_Debate_Handbook.html (last visited Mar. 31, 2001).
56 Howard W. Jones & Susan L. Croall, On Assisted Reproduction, Religion, and Civil Law, 73 FURTHNESS & STERILITY 447, 448 (2000) (describing "Right-to-Life" protests demonstrating outside an in vitro fertilization clinic in Norfolk, Virginia after the first baby was born). See also J.G. Schonker, Women's Reproductive Health: Monothetic Religious Perspectives, 70 B.U.L. J. GENDER & COMMERCE 77, 82 (2000) (reporting that according to Roman Catholic instruction, "marriage does not confer upon the spouses the right to have a child, but only the right to perform those natural acts, which are per se ordered to procreation.").
57 Tribe, supra note 57, at 98 (alerting the public of the dangers of "weeping prohibitions rather than mere regulation").
58 Id.
59 Cal. HEALTH & SAFETY CODE § 24185 (1997) (forbidding "cloning of human beings; purchase or sale of ovum, zygote, embryo, or fetus for purpose of cloning human being... For purpose of this section, 'clone' means the practice of creating or attempting to create a human being by transferring the nucleus from a human cell from whatever source into a human egg cell from which the nucleus has been removed for the purpose of, or to implant, the resulting product to initiate a pregnancy that could result in the birth of a human being.").
human cloning.\textsuperscript{66} According to Tribe, such “knee-jerk,” over-regulation of cloning would be difficult to enforce and could give rise to a class of societal outcasts, “people whose very existence society will have chosen to label as a misfortune and, in essence, to condemn.”\textsuperscript{67} Free-market advocates contend that the unregulated sale of human genetic materials would create a market guided by an invisible hand that would increase availability of research materials and eliminate lingering legal, social, and ethical dilemmas.\textsuperscript{68}

D. Reasoning for Increased Regulation

Notwithstanding the perpetual moral debate over abortion, ART clearly requires increased regulation. Several studies show that women may have a more negative view of both adopted children and those born with the assistance of technology.\textsuperscript{69} Federal regulation would exert a positive influence on such perceptions by “mov[ing] these children to the center of consideration in the infertility business.”\textsuperscript{70}

Increased regulation may yield a utilitarian outcome by increasing society’s overall happiness. Examples include: alleviating the plight of infertile couples, using cloning to bolster a reservoir of beneficial tissue and organ donors, employing the regulated “rebirth” of cloning to ameliorate parental grief following the death of a child, and improving the population’s resistance to disease.\textsuperscript{71} Contrary to the laissez faire theory held by invisible hand proponents, a free-market scenario would create a world where the poor would become a “breeder class” for the rich.\textsuperscript{72} In an unregulated system where people are free to sell their genetic material to the highest bidder, the economically disenfranchised have a much greater moti-

\textsuperscript{67} Tribe, supra note 57, at 98.
\textsuperscript{68} Kimbrell, supra note 24, at 83.
\textsuperscript{69} Mukaram, supra note 32, at 160 (concluding that children will suffer detrimental consequences because society will have a negative perception of children considered “semi-adopted” through artificial insemination).
\textsuperscript{70} Annas, supra note 49, at 81 (citing President Clinton’s 1997 proposed law that shifted focus in adoption from the rights of biological parents to the welfare of children and concluding that national standards and regulation of ART technology would achieve the same result).
\textsuperscript{71} Tribe, supra note 57, at 98.
\textsuperscript{72} Kimbrell, supra note 24, at 83.

\textsuperscript{73} Id.

\textsuperscript{74} In re Baby M., 537 A.2d 1227, 1249 (N.J. 1988) (regarding a surrogate mother who agreed to be inseminated with the semen of another woman’s husband and surrender the child at birth in exchange for 10,000 dollars).
\textsuperscript{75} Tribe, supra note 57, at 98.
\textsuperscript{76} 467 U.S. 303 (1984).
\textsuperscript{77} Id. at 316 (holding that a human-made, genetically engineered micro-organism qualifies as patentable subject matter under the United States Code).
[Screening of both donors and donated semen is necessary to avoid infectious complications.78 Although donor screening for sexually transmitted organisms would prevent those complications, current donor screening procedures remain dangerously inadequate. In a 1978 questionnaire, physicians listed on the roster of the American Fertility Society (AFS) reported that while doctors usually conduct donor screening, such screening often amounts to nothing more than completing a cursory checklist.79 The study concluded that most physicians did not screen for genetic disorders, while those who did screen lacked the knowledge and training to adequately perform the task.80 Ten years later, the Office of Technology Assessment reported that the artificial insemination industry still "manifested great inconsistency" in testing procedures.81 Finally, a 1996 survey of sixteen sperm banks found that substantial differences existed between industry guidelines and actual clinical practice in sperm bank screening procedures.82

In 1990, heightened concern over deleterious donor sperm led the AFS to establish guidelines for the use of sperm donor insemination.83 The two main prongs of the guidelines were "assurance of good health status" and "absence of genetic abnormalities."84 The AFS recommendations included state-of-the-art testing for genetic disorders, additional practitioner screening for the parents and offspring of donors, and quality-control guidelines for semen purchase from commercial sperm banks.85 Unfortunately, physician compliance remains purely voluntary, and without a mechanism for enforcement, the guidelines are unlikely to improve the safety of the donor screening.

Several factors account for relaxed donor screening. Donors are generally paid per specimen donation, so they have little incentive to reveal a negative genetic family history that would preclude their participation.86 Also, a study conducted at the University of North Carolina revealed that the majority of sperm donors tested did not recognize a genetic problem existing in their family history.87 Physicians may also believe the “quality” of the typical sperm donor, usually a medical student or hospital resident of above-average intelligence and health, renders rigorous screening unnecessary.88 For the first recorded artificial insemination by donor, in 1984, a physician impregnated a patient with “fresh semen from the best-looking member of the class.”89 These same physicians continue to rely upon medical students or donors with the above characteristics, believing that the “exceptional donor pool screen[s] out many problematic sources.”90

Physicians may exert exclusive control over ART, in what has been referred to as a “medical hegemony.”91 It is frightening that some physicians advocate subjective evaluation of potential donors to screen for genetic conditions and infectious diseases. Looming ever-present is the specter of eugenics and its goal of creating a master, perfect human race.92 In unregulated laboratories, fertility doctors have an unprecedented and unchecked opportunity to mold developing human beings. By selecting eggs or sperm with only the
most desirable traits, physicians can “improve” on nature by fashioning new and re-written genetic make-ups.93

To counter inadequate donor screening, many commentators propose that the federal government establish a national system of regulated sperm donation operated by the Food and Drug Administration (FDA).94 Albert Gore, as Tennessee Senator in 1988, proposed such a system and pledged to “take appropriate action” if the FDA did not strengthen regulation of donor screening.95 The 1993 Code of Federal Regulations appeared to answer Gore’s challenge:

[The] FDA is proposing regulations intended to require registration of establishments collecting, manufacturing and distributing semen intended for artificial insemination. Registered facilities would be required to meet standards to ensure that semen donors are appropriately screened and tested, that collected semen is not contaminated and that records are kept documenting that the appropriate measures have been followed.96

Unfortunately, the proposed regulations did not contain a legal deadline for implementation.97 Since that time, the federal government has taken no further steps toward the national regulation of sperm banks. Generally, states have been more successful at regulating sperm donor screening. Many states have enacted laws mandating screening for HIV and infectious disease, while others require sperm banks to register with their state’s department of health.98

As a result of inadequate screening regulations, women commonly contract gonorrhea, hepatitis B, and genital herpes from donated sperm.99 According to Lori Andrews, Director of the Institute for Science, Law and Technology, as many as 141 women have contracted the Acquired Immunodeficiency Syndrome (AIDS) vi-

90 M.
91 M.
92 Ginsburg, supra note 80, at 844.
94 Ginsburg, supra note 80, at 844-45.
95 M. at 845.
96 M. at 846.
97 Stryker, supra note 89, at A23 (referring to a new generation of “turkey buster” babies, conceived at home, using semen from friends, or friends of friends).
99 M. (holding the recipient and her husband failed to state a claim because they did not suffer physical harm and the negligence was not of the type likely to cause severe emotional distress).
sued a Manhattan fertility clinic for impregnating her with sperm from an unknown donor instead of from her dying husband.110

The most notorious case involved Dr. Cecil Jacobson, who used his own sperm to impregnate up to seventy-five of his patients between 1976 and 1986.111 Dubbed “The Spermocrates” by the media,112 Jacobson is the poster-child for increased regulation. Jacobson was not qualified to be an infertility specialist; his infertility “treatment” consisted of useless drug injections, and he performed needless “resorptions,” or uterus scrapings, on patients who mistakenly believed they were pregnant.113 In early 1992, Jacobson was convicted on thirty-three felony counts of mail fraud, ten counts of wire fraud, four counts of travel fraud, and six counts of perjury.114

Inadequate regulation has also led to poor record keeping in facilities. According to Lori Andrews, “[there is] an appalling lack of regulation” by some agencies who operate under the assumption that “nobody’s perfect.”115 Conducted in “masturbatoriums,” softly lit rooms supplied with erotic magazines, sperm donation can be quite lucrative.116 Public facilities pay donors an average of thirty-four dollars per visit, while private facilities pay an average of forty-four dollars.117 Andrews maintains that many sperm banks have no limit on the quantity of specimens accepted from donors; at one sperm bank it was theoretically possible for one father to father as many as 173 children per year.118 In reality, a California physician donated so many times as a Georgetown University medical student that he advised his children not to marry anyone from the District of Columbia.119 According to Andrews, “[d]octors have stopped two marriages that they knew to be between children born with sperm from the same donor.”120

110 Ronald Sullivan, Mother Accuses Sperm Bank of Mis-Mix-Up, N.Y. Times, Mar. 9, 1990, at B1. See also Ronald Sullivan, Sperm Mis-Up Lawsuit Is Settled, N.Y. Times, Aug. 1, 1991, at B4 (indicating specific details were sealed from the public, but the physician reportedly paid $300,000 dollars and the sperm bank settled for $100,000 dollars).


112 Stryker, supra note 89, at A23.

113 4 F.3d at 987.


115 Stryker, supra note 89, at A23.

116 ANDREWS, supra note 1, at 35.

117 KIMBrell, supra note 24, at B3.

118 ANDREWS, supra note 1, at 81.

119 Id.

120 Id.
C. The Legal Inconsistencies Surrounding Surrogacy

Surrogacy is a biological contract between an infertile couple and a woman who agrees to carry the couple’s child to term.126 The process has roots in the Old Testament.127 When Abraham’s wife, Sarah, felt she was too old to have a child, she allowed Hagar, her Egyptian handmaid, to lie with her husband so he could sire an heir, Ishmael.128 Seemingly innocuous in theory, unregulated surrogacy can have devastating after-effects on the parties involved. Later, when Sarah, in her old age, bore a son, Isaac, her fear and jealousy drove Hagar and Ishmael into the barren desert.129

Traditionally, states have neither sanctioned nor regulated surrogacy. Allowing surrogate contracts in which a natural mother gives up her child to the natural father and his wife may violate state laws restricting private adoptions.130 Many opponents consider surrogacy contracts a violation of public policy and “detrimental to the family unit by injecting third parties into the private marital sector of procreation. . . . [They] treat children like property and women like incubators subject to economic coercion.”131

126 [Note 25], at 187–88 (describing the evolution of surrogacy from the discreet arrangement of the third party by the husband to the use of artificial insemination and embryo transfer).
127 Genesis 16:2 (proclaiming, “Sarah said unto Abraham, behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maids; it may be that I may obtain children by her.”)
128 Genesis 16:15.
129 Genesis 21:2-10 (proclaiming, “wherewith she said unto Abraham, cast out this bondwoman and her son: for the son of this bondwoman shall not be heir with my son, even with Isaac.”).
130 [Note 21], at 1606. See also [Note 21], at 117–20 (discussing the creation of a panel of advisors to draft surrogacy legislation in Michigan). The panel committee adopted the position that everyone has a basic constitutional right to reproduce. Id. Senator Benfield of Michigan assumed an opposing viewpoint and introduced a bill into the Michigan legislature criminalizing surrogate motherhood, with the couple and the surrogate facing up to a year in jail and a $10,000 dollar fine. Id. Once the legislative log jam, three states had banned surrogacy, thirteen had adopted laws prohibiting enforcement of surrogacy contracts, and only three states offered some protection for participants. Id.
131 [Note 21], at 1606. See also [Note 21], at 117–20 (explaining the controversy perpetuated once surrogacy moved into the paid realm). Attracting the attention of many feminists concerned about the exploitation of women, surrogate opponents shoulder at the notion that a man could purchase a woman’s reproductive power without having to enter into any intimate relationship with her. Id. Furthermore, critics of surrogacy advance the idea that a woman’s boyfriend might compel surrogacy contracts for financial reasons. But opponents of this position argue that women might also be pressured into abortions for financial reasons. Id. Thus, the fact that women may be persuaded

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Professional malpractice pervades the unregulated realm of surrogacy.132 In Silver v. Parker,133 the Sixth Circuit Court of Appeals held that a surrogate broker “owed an affirmative duty to act to protect the plaintiffs against harm” when the real father, and not the surrogate sperm donor, impregnated the natural mother.134 The child was born with the very birth defects that the natural parents had contracted to avoid through surrogacy.135 In its first opinion on surrogacy issues, the court refused to rely on expert testimony to determine the standard of care and concluded that a surrogate broker owed a duty of care to the parents, marked by “heightened diligence.”136 The court further reasoned that the malpractice requirement of expert testimony does not apply in circumstances involving negligence liability of those who undertake to operate a surrogacy program.137

A review of relevant statutes reveals that Arkansas is the only state with legislation providing for an unconditional presumption of validity of traditional surrogacy contracts.138 The Arkansas statute

by a male-dominated society or economic circumstances is an insufficient reason to bar surrogacy. Id.
132 [Note 1], at 79–80 (citing James v. Jacobson, 6 F.3d 233 (4th Cir. 1993)), where Dr. Jacobson used his own sperm to impregnate patients. Although he was sued for malpractice, there were no laws prohibiting doctors from using their sperm on unwitting patients, even though patients believed the sperm to be from an anonymous donor. Id. Dr. Jacobson’s malpractice insurance carrier argued that they should not have to defend him since the policy only covered claims arising from his “professional services.” The federal court disagreed, reasoning that insemination qualified under the title of professional services. Id. Ultimately, the insurer settled with Jacobson’s patients for an undisclosed amount. Id.
133 [Note 21], at 264.
134 Id. at 263, 265–66 (holding that the defendants, a surrogate broker and other professionals who profited from the program owed an affirmative duty of protection to the mother, who sustained damages when her child, who was actually fathered by her husband rather than from the contracting father, was born with serious birth defects).
135 Id. at 268–72 (taking guidance from its long-established principles of tort law, the court imposed an affirmative duty to act between parties in a special relationship. Other factors influencing the court’s decision involved the public policy concerns prohibiting monetary gain in connection with adoption and the high level risk of loss to the child, the surrogate mother, her family, and to the putative father and his family. Id. Therefore, the absence of a plan for protection on behalf of the design of the surrogacy program raises issues of negligence and foreseeable risk of harm. Id.)
136 Id. at 273.
137 Ark. Code Ann. § 9-10-201 (Dickie 1998) (stating that “[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.”).
concludes that a child born to a surrogate mother is the child of the
"intended parents" and not of the surrogate. It seems reasonable to
conclude that other states will adopt Arkansas' surrogacy laws,
because the Arkansas statute enforces the intent of the parties in a
clear and unambiguous manner. Specifically, the statute elimi-
nates many of the family court nightmares that arise when a surro-
gate mother has second thoughts and wants to keep the child. However, when it comes to surrogacy regulations, states are in
disagreement. Many statutes generally deny the enforcement of
surrogacy arrangements. Other states condition the validity of a
contract on the absence of economic incentive for the surrogate
mother or the non-gestating mother. Prospective parents often en-

gage in ART tourism, traveling to states with laws that are more
favorable and convenient.

Unfortunately, in the absence of consistent and effective legal
regulations, courts maintain a well-settled common law view that
surrogacy contracts are unenforceable. This view was highlighted
by In re Baby M., where the New Jersey Supreme Court held that
payment of money to a surrogate mother was illegal, contrary to
public policy, and potentially degrading to women. Although the
court derided surrogacy as "illegal and perhaps criminal" and

138 See Avena, supra note 1, at 114 (discussing the importance of psychiatric screening for
potential surrogates to determine whether the surrogate is capable of relinquishing the
child).

139 See id. at 112 (noting that the intended parents have the right to control the child's life).

140 Ibid.

141 See, e.g., A.V. v. B.A., 725 N.E.2d 1031 (Mass. 2000) (holding that a contract to
relinquish a child is not enforceable).

142 Harkins, supra note 138, at 827-828 (noting that the plaintiff's rights were
protected by the court).

143 See id. at 828-829 (noting that the court's decision was consistent with
previous cases).

144 See id. at 829-830 (noting that the court's decision was consistent with
previous cases).

145 Harkins, supra note 138, at 848.

146 Id. See also id. at 848. (noting that the court's decision was consistent with
previous cases).

147 Id. See also id. at 848.

148 In re Baby M., 725 N.E.2d 1031 (Mass. 2000) (holding that a contract to
relinquish a child is not enforceable).

149 Harkins, supra note 138, at 848.

150 See Harkins, supra note 138, at 848.

151 See id. at 848.

152 See id. at 848.

153 See id. at 848.

154 See id. at 848.

155 See id. at 848.

156 See id. at 848.

157 See id. at 848.

158 See id. at 848.

159 See id. at 848.

160 See id. at 848.

161 See id. at 848.

162 See id. at 848.

163 See id. at 848.

164 See id. at 848.

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245 See id. at 848.

246 See id. at 848.

247 See id. at 848.
found in statutes enacted in Louisiana, Utah, and Illinois were unconstitutionally vague. 

The abolition of slavery and the resulting constitutional amendments prohibited the ownership or the transfer of entire humans. However, the United States has allowed the sale of human materials such as blood. Blood donation is a 450 million dollar industry, but the use of paid blood donors has decreased from eighty percent in 1965 to less than one percent in 1990. As discussed earlier, sperm donation, in contrast, is a burgeoning industry. In 1990, an estimated 11,000 physicians provided artificial insemination to about 72,000 women, half of whom were supplied with sperm by anonymous donors, at prices ranging from thirty-four to forty-four dollars per visit. 

While the selling of sperm has not been challenged, courts may attempt to regulate surrogate motherhood on the grounds that it is simply the selling of an entire human. The New Jersey Supreme Court, for example, unanimously held in Baby M. that a surrogacy contract was "baby-selling." Recently, an Arizona court of appeals determined that a statute automatically granting the surrogate status as the legal mother violated the Fourteenth Amendment Equal


104 U.S. Const. amend. XIII, § 1.

105 Kimebrell, supra note 24, at B3 (noting the distinction policymakers draw between replaceable materials such as blood, cells, and tissue versus irreparably injudicious materials like kidneys or corneas). This distinction is helpful in evaluating underlying policy concerns regarding human material sales. Opponents fear people in economic straits would be coerced into selling their body parts. Id. However, this argument loses some of its persuasiveness when the human parts are replaceable. Id.

106 Id.

107 Andrews, supra note 1, at 48-49 (noting that infertility services have transformed into a two billion dollar industry). Infertility doctors are the highest paid physicians, with experienced specialists making 650,000 dollars annually. With the array of reproductive options growing, more Americans are willing to use technology to procreate. Id.

108 Kimebrell, supra note 24, at B3.

109 557 A.2d, at 1240-42.
Protection Clause. Under such a statute, the biological mother has no chance to prove her maternity is unconstitutionally denied the opportunity to be heard, and suffers an infringement on her parent-child relationship, which is a fundamental liberty interest.713

B. Existing Statutes May Severely Restrict Attempts at New Regulation

Much like constitutional protection, existing statutes may severely limit the regulation of reproductive technology.714 For instance, the Pregnancy Discrimination Act of 1978 (PDA)715 protects a woman’s right to become pregnant and retain her existing status in the workplace.716 The PDA clearly protects a woman who elects ART from discrimination on the basis of her decision.717 Although no consent exists on point, the PDA could also apply to men opting for ART in order to counter infertility or a vasectomy.718

Additionally, the Americans with Disabilities Act of 1990 (ADA)719 may provide further statutory protections for ART. The ADA prohibits discrimination in the workplace and public accommodations on the basis of an individual’s disability.720 The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities of such individua

776 See v. Superior Court, 897 F.2d 1586, 1586-62 (9th Cir. 1989) (upholding the rights of a father to protect the property against a mother’s opportunity to prove maternity). The court found that the Arizona statute did not afford a procedural process to prove maternity. Id. Because a woman’s rights are no less important than a man’s rights, the court concluded the statute violated the Equal Protection Clause. Id.

777 Id. at 1589. Interestingly, the Scoot court did not address the section of the Arizona statute that forbade surrogacy entirely: “No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.” See also Am. Rev. Stat. § 25-218 (1994).


780 42 U.S.C. § 2000e-3(a) (Supp. IV 1998) (defining the terms “because of sex” or “on the basis of sex” as including but not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and woman affected by pregnancy, childbirth, or related conditions shall be treated the same for all employment-related purposes); 42 U.S.C. § 2000e(2)(a) (Supp. IV 1998) (stating that it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual because of such individual’s sex or deprive any employee of opportunities on the basis of sex).


782 Havins, supra note 138, at 831.


784 Id.
inmates equally. Balancing public policy concerns against the plaintiff's claims, the court held that public policy outweighed the plaintiff's argument that waiting until his release to conceive would increase the probability of his offspring being born with genetic defects.

C. Problems With Regulations: State Statutes Are Inadequate

The laws regulating ART have developed slowly and frequently appear inadequate. The slow evolution of regulations indicates that society's principal concern with ART may not be with the science itself, but rather how, and if, such regulation should take place. A balance must be struck between whether or not to regulate, and the effect that any restrictive measures will bear on research.

Few state statutes in force today are largely inadequate. Most commonly, the extent of regulation requires the consent of both husband and wife prior to using ART. In 1985, fourteen states required that patients file consent forms with a local court or the state department of health. The majority of such statutes applied only to married women. Adopted by reluctant legislators, these statutes took a moral stance against the technology. Rather than focusing on the actual procedures, the regulations centered on restricting public access. Unfortunately, most state statutes today.

107 Id. at 1399 (deciding whether the challenged prison regulation meets a reasonable basis test, the court considered various factors). The prison prohibition on inmate procreation was rationally related to the Bureau's interest of treating all inmates equally, and such an interest was a legitimate penal interest. Id.

108 Id. at 1399-1400.

109 Havins, supra note 138, at 825.

110 Id. at 829.

111 Judith Lynne Bick Rice, The Need for Statutes Regulating Artificial Insemination by Donors, 46 Okla. L. Rev. 1095, 1064 (1990) (indicating existing statutes do not regulate the donor's medical condition, which can increase the risks for both mother and child). See also Havins, supra note 138, at 845.

112 Rice, supra note 191, at 1063 (establishing that if a husband and wife consent in writing to have the wife artificially inseminated by a donor, and the insemination is performed by a licensed physician, the "husband is treated in law as if he were the natural father of a child thereby conceived."). Only six states do not require written consent of both the husband and wife. Id. They are Arkansas, Louisiana, Maryland, Michigan, Tennessee, and Texas. Id.

113 Id. (noting that Illinois and California allow records to be filed in the doctor's office).

114 Id.

115 Id. at 1064 (noting that existing statutes do not regulate the donor's medical condition, nor do they establish donor rights and duties with respect to the child). Only Idaho and Oce-
that ninety percent of clinics were voluntarily reporting their conception success rates. However, without an independent audit mechanism, the accuracy of this statement cannot be verified.

Several non-medical institutions have also attempted to promulgate regulations of reproductive technology. For instance, in 1987, the Vatican published the "Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day." The Vatican called for laws banning artificial insemination for unmarried couples and IVF for married couples. Other religions have been less restrictive, leaving "the door open" for technological advancements that would aid childless couples to conceive. Judaism, for example, appears more accepting of artificial insemination and IVF for married couples. "When nature plays a trick on us, we have to outwit it," said Dr. Seymour Siegel, a professor of ethics and theology at the Jewish Theological Seminary of America. Regardless of one's denomination, science should not be left to govern and pursue genetic manipulation of the future generations or cloning. Legal prohibitions and guidelines established by ethics committees may be an available means of regulation.

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209 Id., supra note 138, at 864-47.


211 Id. (teaching that procreation is meant to be a "gift" resulting from the sexual union of husband and wife). Children, the Vatican argues, should be conceived only as a result of such relations, not with the assistance of a laboratory. Id. Consistent with the view that life begins at conception, the Vatican would ban the use of recombinant and genetic testing to determine whether to end a pregnancy because of birth defects. Id.

212 Id.

213 Daniel Eisenberg, Artificial Insemination in Jewish Law, Articles and Lectures by Staff Members of the Institute for Jewish Medical Ethics of the Hebrew Academy of San Francisco at http://www.jjme.org/ (last visited Mar. 31, 2003) (discussing the general agreement that artificial insemination by donor sperm (AID) is forbidden by Jewish law; however, artificial insemination utilizing the husband's sperm (AID) is acceptable if procreation were not possible by normal means). Most Jewish authorities consider the child born of AID to be the legal offspring of the husband. Id.

214 The Vatican Oversteps, supra note 207.

215 Id.

216 Id. (requiring IVF personnel to be board-certified in reproductive technology, employing a pelvic reparative surgeon with laparoscopic experience and specialized training in follicular aspiration, as well as an individual experienced in andrology with special competence in semenology are just a few guidelines recommended by the ASRM).

E. Federal Attempts at Regulation: Ineffective and Limited in Scope

In 1992, the federal Fertility Clinic Success Rate and Certification Act required clinics to report their success rates to the CDC. The Act also required the CDC to develop a model program for the certification of IVF laboratories, which could then be adopted by each state. However, nearly all CDC efforts have been ineffective because of under-funding. The CDC was allocated only one million dollars for the program in 1996 and has not yet produced a set of regulations.

Under the Clinton Administration, the way to dodge the issue of regulation was to prohibit federal funding of research. In the mid 1990s, despite a National Institute of Health (NIH) research panel's recommendation to fund embryonic research, President Clinton directed NIH not to allocate funds for such research. Congress then passed Public Laws 105-178, which prohibited "the use of federal funds for embryo research of any kind, including destroyed, discarded or otherwise unusable embryos." The Code of Federal Regulations (CFR) also guides government-sponsored experimentation involving fetuses and human IVF. The CFR restricts research on fetal material "except where the purpose . . . is to meet the health needs of the mother of a particular fetus, the risk of the fetus is minimal, and, in all cases, is the least possible risk for achieving the objectives of the activity." Thus, the CFR affords enhanced protection to the fetus.
While fetal experimentation and research are banned in government-sponsored research, current federal regulations do not cover the private sector. Current legal regulations do not address the laundry list of genetic Brave New World fears. Without legal guidance on prenatal screening, genetic enhancement may "evolve" unchecked into a New Age eugenics movement where only the strongest and smartest babies are brought into the world. The idea of human equality will be further debunked by genetics. As in the movie Gattaca, lack of reproductive technology regulation may create an underclass of unqualified job applicants and undesirables, considered a societal burden. Any governmental attempt to purge the nation of this class might draw comparisons to past holocausits motivated by the allure of eugenics.

IV. NECESSARY PROVISIONS FOR PROSPECTIVE REGULATION

A. The Need for a Federal Regulatory Agency to Oversee ART

Some commentators recommend that the federal government create a federal agency to regulate ART. According to George Annas, establishing national standards for the regulation of reproductive technology, by a new federal agency, will aid society to change "the way we think about children, families, kinship, pregnancy, genetics and parental obligations." The two major benefits of federal regulation include: refocusing on children's welfare, as opposed to the parents' preferences, and preventing multiple gestation pregnancies so that fetal reduction becomes unnecessary. The counter-argument, however, is that in a time when most Americans favor less governmental intervention, the legislative process will move too slowly to provide a swift, effective, or meaningful solution.

B. More Certain Liability: Adding Warranty Law and Reshaping the Negligence Standard

Other commentators believe applying warranty law to sperm banks would make the sperm banks more scrupulous in their activities. By replacing an out-dated "service" characterization of the transaction with a "vendor-buyer" analysis, the "immediate need for regulation... could be met through a modified application of warranty law." Warranty coverage would hold the physician strictly liable and guarantee patients some measure of recovery; in response, physicians would make their procedures safer in order to limit potential liability.

220 Id.

221 Id. (stating that of the over thirty pronouncements by the ASRM, not one is devoted to children).

222 Id. (defining fetal reduction as the process of reducing the number of early embryos in order to allow a pregnancy to continue to term and allow some of the babies to be born alive and healthy). Without the procedure, the mother takes the risk that the entire pregnancy will spontaneously abort or that many of the premature babies will have significant health problems. Id. Annas analogizes this option with "separating Siamese twins when both cannot survive so that one might live." Id.

223 See Hedgason, supra note 51, at 394-85 (describing the special role sperm sales occupy in contract law due to the implications of commercial guarantees of the quality of human life). Circumventing this problem requires a carefully defined exception to strict liability in the context of sperm sales. Id. The application of warranty law would serve as a regulation device whereby severe economic sanctions would be levied against sperm banks and physicians for failure to comply with specific state regulations. Id.

224 Id. at 361, 379. See also IDANO CODE § 39-2702 (Michie 1987) (providing an example of warranty theory in regulatory action, where the statute specifies that any blood, tissue, and organ donor or facility may be held liable under the implied warranty of merchantability).

225 Id. at 385 (discussing the importance of warranty regulatory law to increase physician accountability and thereby encourage the implementation of precautionary measures to reduce the risk of donor mix-ups, diseases, and birth defects).
The current trend in ART is toward self-insemination: purchasing sperm without the service elements of the physician. This could be governed as a sale of goods under Article 2 of the Uniform Commercial Code (UCC). Less clear, however, are mixed sale-service contracts, in which the physician sells and implants the sperm. However, in response to those situations, courts could apply either the UCC predominance test, examining the transaction to determine whether the sale or service aspect dominates the transaction, or a breakout test, separating the sale from services and treating them, respectively, under tort and warranty law, which could also cure problems of contract interpretation. As stated by a Florida court, it is a "distortion to take what is at least, arguably, a good and twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."241

Support for the warranty theory of regulation also comes from the inadequacy of tort liability. New York, for example, does not recognize theories of joint liability in negligence actions and the evidentiary threshold in a tort claim would be exceedingly high. A plaintiff would have to prove that either the sperm bank or the physician caused the injury, an impossible burden given the current unregulated and chaotic record keeping in sperm banks and laboratories. These unfavorable conditions force plaintiffs to settle for less, while clinics are not required to improve the safety of their facilities.245

240 Id. at 364-66.
241 U.C.C. § 2-106(1) (1999) (a "sale" consists of the passing of title from the seller to the buyer for a price).
246 Id. at 383.
247 Id. at 363-62 (asserting the high evidentiary burden makes recovery virtually impossible).
248 Id.
249 Id. at 363.
painfully than if the couple had to restart the IVF procedure.\textsuperscript{255} There are now more than 100,000 "souls on ice" in America, with the number increasing by nearly 19,000 each year.\textsuperscript{256} The stockpiles of abandoned embryos in IVF clinics across the country have fueled great social debate. Infertile couples pay 16,000 dollars or more per attempt to create an embryo, and the Right-to-Life movement dedicates itself to protecting the embryo's right to be born.\textsuperscript{257} Yet potential parents have abandoned their frozen embryos in clinics for years, leaving the clinics to deal with issues surrounding embryo disposal.\textsuperscript{258}

Researchers regard embryos as a "Xanadu of research possibilities," and perhaps the most coveted of human materials used in experimentation.\textsuperscript{259} Aside from the moral questions surrounding human embryo testing, legal issues also arise concerning how to procure consent of non-responding or unwilling donors. In 1995, clinics in England reported that up to ten percent of patients did not respond to letters asking them to give consent to continue to store their frozen embryos, donate them for medical research or to another couple, or have them destroyed.\textsuperscript{260}

To counteract its own surplus embryo problem, England passed the British Human Fertilisation and Embryology Act,\textsuperscript{261} which prohibited storage of frozen embryos for greater than five years.\textsuperscript{262} Physicians who violate the Act may face fines or jail terms.\textsuperscript{263} The Act allows clinics to extend the maximum storage time if both parents give their consent.\textsuperscript{264} Requiring written consent to either extend storage time or dispose of embryos would prove problematic because patients are often difficult to reach or unwilling to have their embryos thawed out.\textsuperscript{265}

The United States should review international trends concerning the legal rights of technologically conceived children. In this country, no law establishes these children's rights to information regarding the identity of their biological, donor fathers.\textsuperscript{266} Other countries, namely Germany, Sweden, and Austria, have explicit laws providing that such an offspring has a right to know the donor father's identity.\textsuperscript{267}

CONCLUSION

As the science of genetics advances at a lightning-quick pace, the need for regulation of ART is greater than ever before. In the "Wild Wild West," both clinics and practitioners have taken advantage of their patients, unborn fetuses, and society as a whole. Without regulation, it will be difficult to prevent the spirit of eugenics from once again rearing its ugly and discriminatory head. Increased regulation, at the state and federal levels, and mandatory industry guidelines could limit these deleterious impacts on society while encouraging a positive impact upon the lives of those who want nothing more than a child of their own.

\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Arostegui, supra note 1, at 69.
\textsuperscript{259} Id. at 67 (explaining that embryos may be used as a source of cells that can be used to treat Parkinson's disease or Alzheimer's).
\textsuperscript{260} Id. at 69-70 (reporting that clinics experienced difficulty in contacting patients who lived abroad, and could not breach confidentiality in order to search for more recent addresses of patients who had moved).
\textsuperscript{262} Id. at § 14 (1990) (stating that "no gametes or embryos shall be kept in storage for longer than the statutory storage period and, if stored at the end of this period, shall be allowed to perish . . . and that the statutory storage period in respect of embryos is such period not exceeding five years").
\textsuperscript{263} Id. (providing that a person who contravenes the Act "is guilty of an offence (sic) and liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine or both").

\textsuperscript{264} Id.
\textsuperscript{265} Arostegui, supra note 1, at 69-70.
\textsuperscript{266} Id. at 90.
\textsuperscript{267} Id. (surveying laws passed in other countries and discussing a child's right to know the donor father's identity).