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## Shifting Ethical and Social Conundrums and “Stunningly Anachronistic” Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider

by

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### Introduction

The earthen world for lawyers and judicial systems today is definitely flatter.<sup>1</sup> The benefits and consequences of technology and social media provide the opportunity for engaging and arranging international contracts between ordinary citizens, including agreements regarding reproduction and the conception, birth, and adoption of children.<sup>2</sup> The electronic sharing of science and

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<sup>1</sup> See Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 *HEALTH MATRIX* 65, 67 (2006) (“A nation’s approach to the burgeoning ART industry reflects deep-rooted cultural imperatives. Choices regarding how ART should be regulated and funded, as well as how ART-related disputes should be mediated, reflect both specific attitudes toward family and parenthood, as well as broader notions about the role of the state in encouraging or impeding novel family forms.”).

<sup>2</sup> See Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 *BERKELEY J. INT’L L.* 412, 413 (2012) (“International, or global, surrogacy is a booming business. Despite many countries’ prohibitions or restrictions on surrogacy arrangements, the market for international surrogacy has grown to an estimated size of six billion dollars annually worldwide.”); Debora Spar, *Reproductive Tourism and the Regulatory Map*, 352 *NEW ENG. J. MED.* 531, 533 (2005) (“But as the market

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its benefits, at the speed of nanoseconds and between agencies, third-parties, and parents seeking children has profoundly altered the traditional world of reproduction, adoption, and surrogacy.<sup>3</sup>

The risk, as with any evolution in science ahead of the capacity of governments to regulate an evolving market that is now world-wide, is that ethical codes for professionals and law as social welfare policy creep much more slowly behind science and technology in ways that may, even unintentionally or subtly, exploit the vulnerable.<sup>4</sup> Few areas of science, policy, and family re-

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for reproductive medicine expands, policymakers in the United States will have to grapple with issues that they have thus far avoided, crafting policies to deal with the burgeoning business of reproductive tourism.”). The fact that literature in this field uses the phrase “reproductive tourism” so easily has its own implications for intranational and international policy. The debate is robust, including a preferred use of the term “reproductive exile.” Guido Pennings, *Reply: Reproductive Exile Versus Reproductive Tourism*, 20 *HUM. REPRODUCTION* 3571, 3571 (2005) (“Finally, we agree that there are a number of controversial and even polemic aspects in reproductive medicine. However, employing terms such as reproductive tourism can trivialize the problem and predispose the reader against reproductive problems. The term ‘reproductive exile’, in our opinion, is more sensitive with infertility patients.”).

<sup>3</sup> We will use the terms “surrogate” and “gestational carrier” interchangeably in this article. Both are terms for a third person who intends to give birth to a child for intended parent(s). A surrogate may be referred to as a “traditional surrogate” who is carrying a child formed with her own genetic material, whereas a gestational carrier usually is carrying the intended parent’s genetic material or a donor’s material but there is no genetic tie between the gestational carrier/gestational surrogate and the intended parents. *See, e.g., In re Paternity of F.T.R.*, 833 N.W.2d 634, ¶ 45 (Wis. 2013) (“Adoption often occurs in circumstances where the parent cannot or will not care for the child. Substantial court oversight is necessary in a voluntary-TPR-and-adoption scenario to ensure that the biological parents have consented to the TPR after being informed of the consequences thereof. In contrast, surrogacies are planned, and the intended parents want the child and are willing and able to care for the child. Wisconsin law prohibits the proposed adoptive parents from making certain payments to the birth mother for fear of causing undue influence or encouraging ‘baby-selling.’”).

<sup>4</sup> For differing views from one journal, see Gillian K.D. Crozier & Dominique Martin, *How to Address the Ethics of Reproductive Travel to Developing Countries: A Comparison of National Regulated Market Approaches*, 12 *DEVELOPING WORLD BIOETHICS* 45, 53 (2012) (“The responsibilities of governments to protect their citizens, and to provide not only for their healthcare needs but also for their basic human rights, should motivate them to examine and monitor the industry, to enact legislation that will minimize the risks to providers, and to

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veal more about these trade-offs than adoption and assisted reproduction technology (ART).<sup>5</sup> The international implications generate culture, gender, and ethical dilemmas related to self-determination and personal autonomy as they pertain to the rights and duties of fathers and mothers and third parties to negotiate terms for the delivery of a child.<sup>6</sup>

Quite possibly lost amidst this intersection of science, law, and social welfare policy are the dramatic changes, in just a decade or so, of what the law recognizes as a biological or legal or psychological parent.<sup>7</sup> And, derivatively, the legal status of what

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strive to ensure that women are provided with opportunities to improve their lives and to flourish in their life goals.”); Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEVELOPING WORLD BIOETHICS 111, 112 (2009) (“I will argue that the only valid objection to international surrogacy is that surrogate mothers may be exploited by being given too little compensation. International surrogacy is ethical provided it is practiced following the principles of Fair Trade. Fair Trade addresses the injustices of traditional trade where benefits are unequally shared.”).

<sup>5</sup> Sven Bergmann, *Fertility Tourism: Circumventive Routes that Enable Access to Reproductive Technologies and Substances*, 36 SIGNS: J. WOMEN IN CULTURE & SOC’Y 280, 283 (2011) (“As Sarah Franklin remarks, reproductive technology combines ‘two of the most powerful Euro-American symbols of future possibility: children and scientific progress.’ In Germany IVF and ART are marketed as *Kinderwunsch-Behandlung* (the treatment of the desire to have children.”); Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 337 (2002) (“‘Procreative tourism’ was first named by Knoppers and LeBris in 1991 to describe the practice of citizens exercising their personal reproductive choices in less restrictive states. It is the travelling by candidate service recipients from one institution, jurisdiction or country where treatment is not available to another institution, jurisdiction or country where they can obtain the kind of medically assisted reproduction they desire. As such, it is part of the more general ‘medical tourism.’”).

<sup>6</sup> Naomi R. Cahn, *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIM. LAW. 1, 1 (2011) (“The world of adoption has developed significant knowledge through generations of experience and research, some of which could be used to inform improved policies and practices relating to assisted reproductive technologies.”).

<sup>7</sup> It is beyond the scope of this article to address this point, but see Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1115 (2009) (“As is the case with any right, handing out new parental rights is a zero-sum game: where a right is enlarged for one party, it is diminished for the other.”); *See also* Kilborn v. Carey, 140 A.3d 461, 465 (Me. 2016) (“To obtain parental rights as a de facto parent, an individual must show that (1) he or she has undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s

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it means to be a mother or father and the rights traditionally attendant to that status or standing.<sup>8</sup> As the U.S. Supreme Court, hardly a historical bastion of non-married fathers' rights, just posited this term in a decision related to gender and immigration status: some of these laws and policies are "stunningly anachronistic."<sup>9</sup>

These points *really* matter here because, as described below, times are a-changing concerning the perceptions and realities of parental rights in the judicial system. Our thesis is that these changes mirror the contemporary demographics of judges and lawyers and policymakers who operate in particular geo-political environments. Across society familial systems and relationships

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life, and (2) there are exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent's rights.").

<sup>8</sup> See Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 71-72 (1995) ("In considering the constitutional limits on a state's authority to deny recognition of parental rights, the Court has permitted sensible distinctions in the treatment of unmarried fathers and unmarried mothers, requiring fathers whose relationship with the child is not always readily apparent to take affirmative steps to assert paternity and assume the protections afforded to existing parent-child relationships."); Tonya M. Zdon, *Putative Fathers' Rights: Striking the Right Balance in Adoption Laws*, 20 WM. MITCHELL L. REV. 929, 931 (1994) ("Historically, unwed and putative fathers had neither a right to notice of an adoption nor a right to prevent mothers from placing their children for adoption."); See also *In re Adoption of J.S.*, 358 P.3d 1009, 1011-12 (Utah 2014) ("Unwed mothers acquire parental rights—and the accompanying right to object to an adoption—as a result of the objective manifestation of the commitment to the child that is demonstrated by their decision to carry a child to term. An unwed father's legal obligation to file the paternity affidavit is a rough counterpart to the mother's commitment."); *Moreau v. Sylvester*, 95 A.3d 416, 419 (Vt. 2014) ("In 1984 the Legislature enacted the Parentage Proceedings Act, giving putative fathers the right, denied at common law, to establish paternity and thus pursue custody or visitation.").

<sup>9</sup> See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (U.S. 2017) ("Laws according or denying benefits in reliance on '[s]tereotypes about women's domestic roles,' the Court has observed, may 'creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.' Correspondingly, such laws may disserve men who exercise responsibility for raising their children. . . . In light of the equal protection jurisprudence this Court has developed since 1971, see *Virginia*, 518 U. S., at 531-534, §1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.").

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actively adapt in the context of politics, law, judicial environments, and trans- and intra-national government policy. These shifts include not only who is a parent but the reality that shifting demographics and family realities have generated more litigation dividing children between adults.<sup>10</sup>

The underlying premise is that lawyers who ignore these developments in their own flatter world may generate substantial risk. For a variety of reasons, family formation through adoption and ARTs, the latter now with its own emerging specialty ethics codes, have the potential to create particularly vexing issues. One reason may be that these minefields may occur in the presence of judges less enamored of historical biases that marginalized non-married fathers and stigmatized non-married mothers.<sup>11</sup> Cer-

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<sup>10</sup> See *Conover v. Conover*, 141 A.3d 31, 46 (Md. 2016) (“Our previous recognition of the importance—for legal purposes—of a psychological bond between a child and non-parent confirms the notion that de facto parenthood is distinct from pure third party status.”); *In re Custody of B.M.H.*, 315 P.3d 470, 478 (Wis. 2013) (“De facto parentage is a flexible, equitable remedy that complements legislative enactments where parent-child relationships arise in ways that are not contemplated in the statutory scheme.”); *But see Gordius v. Kelley*, 139 A.3d 928, 933 (Me. 2016) (Alexander, J., dissenting) (“This appeal addresses a sad scenario that recurs hundreds or thousands of times a year in Maine—a child’s parent with primary residence of a child has a long-term relationship with a friend, fiancée, or spouse who is not the child’s biological parent. The friend, fiancée, or spouse develops a positive, parent-like relationship with the child. The child’s parent and the friend, fiancée, or spouse then separate, and the child is saddened, or, as the trial court found here, ‘hurt’ by the loss of contact with the now ex-friend, fiancée, or spouse”).

<sup>11</sup> See Marcia A. Ellison, *Authoritative Knowledge and Single Women’s Unintentional Pregnancies, Abortions, Adoption, and Single Motherhood: Social Stigma and Structural Violence*, 17 *MED. ANTHROPOLOGY Q.* 322, 332 (2003) (“Women who adopted away their child reported being influenced by their mothers, social workers, social expectations, and multiple threats of social stigma for themselves, their family, and their child.”); Celia Witney, *Over Half a Million Fathers: An Exploration into the Experiences of Fathers Involved in Adoption in the Mid-20th Century in England and Wales*, 5 *J. SOC. WORK* 83, 86 (2005) (“The commonly held belief at that time was that unmarried pregnancy was the result of casual sex; that when he knew about the pregnancy the unmarried father would desert his partner; that he would not care for his child; that he was an older man and a ‘seducer’ of young working-class girls; and that ‘anyway’ the young pregnant woman would not reveal his name.”). For additional surveys of the literature, see Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 *DUKE J. GENDER L. & POL’Y* 353 (2010); Victoria R. Guzman, *A Comparison of Surrogacy Laws of the*

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tainly, one rather important reason is that this specialty practice involves the creation of a parent-child relationship between unrelated adoptive parents and the child or situations of intended parents using someone else's genetic material, topics long fraught with emotional conflict as reflected in recent developments across professional disciplines.<sup>12</sup>

Nevertheless, these changing views and complex legal developments are having an influence on the ethical duties of family law practitioners, and the awareness of these developments have been slow to find their way to seminars and literature for lawyers outside this specialty.<sup>13</sup> Given the evolving nature of relationships that diminish the importance of marriage and result in more cohabitation and changes in family reformation, this knowledge gap requires more comprehensive study and discus-

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*US to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy*, 38 HOUS. J. INT'L L. 619 (2016); Summer James et al., *Avoiding Legal Pitfalls in Surrogacy Arrangements*, 21 REPRODUCTIVE BIOMEDICINE ONLINE 862 (2010).

<sup>12</sup> See Raywat Deonandan, Samantha Green, & Amanda Van Beinum, *Ethical Concerns for Maternal Surrogacy and Reproductive Tourism*, 38 J. MED. ETHICS 742, 742 (2012) ("Reproductive tourism (RT) is an emerging, ethically problematic phenomenon at the interface between commerce and clinical care."); Patricia Fronek & Marilyn Crawshaw, *The 'New Family' as an Emerging Norm: A Commentary on the Position of Social Work in Assisted Reproduction*, 45 BRIT. J. SOC. WORK 737, 738 (2014) ("The commodification and commercialisation of human life, sperm, ova and embryos are recognised by the International Federation of Social Workers (IFSW, 2008) as a global concern. Businesses are promoting the transnational movement of humans, sperm, ova and embryos to potential donors and commissioning singles, same-sex and heterosexual couples.").

<sup>13</sup> See Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America's Courts*, AM. PROGRESS (Sept. 15, 2016), <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts/> ("State courts handle more than 95 percent of America's court cases, and they continue to be run primarily by white male judges. A recent report on racial and gender diversity from the American Constitution Society found that white men comprise 58 percent of state court judges, even though they make up less than one-third of the population. Less than one-third of state judges are women, and only 20 percent are people of color. Meanwhile, Latinos constitute 17 percent of the U.S. population, African Americans 12 percent, and Asians and other people of color 8 percent. Women of color comprise nearly one-fifth of the overall population but only 8 percent of state judges.").

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sion.<sup>14</sup> This includes a better understanding of the effects of family dissolution like divorce on parents and children in the context of child custody litigation.<sup>15</sup>

The purpose of this article, therefore, is to provide practitioners with an overview of policy and law and what we then foresee on the horizon. Following this foundation, we will review briefly the history of adoption practice as it affects these moral developments. This will be followed by a discussion of a recent decision by the Missouri Supreme Court in *In re Krigel*.<sup>16</sup> Although an adoption dispute, *Krigel* highlights the connection between family formation and ethical and legal ramifications for family law practitioners across the board, but in particular, in the emerging practice area of assisted reproduction.

With that as a backdrop, we then present a basic overview of the differences between moral and ethical codes and a review of duty and standard of care, before delving into a discussion of the

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<sup>14</sup> See, e.g., Lucy Owen & Susan Golombok, *Families Created by Assisted Reproduction: Parent-Child Relationships in Late Adolescence*, 32 J. ADOLESCENCE 835, 836 (2009) (“It may seem that the only difference between IVF and natural conception is the conception itself. However, there are a number of reasons why having a child by IVF may result in a rather different experience for parents. It has been suggested that the stress of infertility and its treatment may lead to parenting difficulties when a long-awaited baby is eventually born.”).

<sup>15</sup> For an example of recent research, see Susan Golombok, et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 J. CHILD PSYCHOL. & PSYCHIATRY 653, 654 (2013) (“The aim of the present investigation was to obtain in-depth data from infancy onward on the quality of parenting and children’s psychological adjustment in families created by egg donation, donor insemination and surrogacy. The children were born at the millennium, by which time a substantial proportion of parents intended to tell their child about the nature of their conception thus enabling a longitudinal investigation of the consequences of secrecy versus disclosure to be conducted for the first time.”). The study also examined parental factors. *Id.* at 661 (“Regarding the quality of parenting, no differences between surrogacy, egg donation, donor insemination and natural conception families were found for maternal positivity, maternal negativity, or maternal distress. However, a higher level of distress was shown by mothers who had not told their child about their biological origins, indicating that non-disclosure is associated with mothers’ more negative mental state. The greater distress shown by mothers who had not informed their children of their biological origins is consistent with research on adoptive mothers who had kept the adoption secret.”).

<sup>16</sup> 480 S.W.3d 294 (Mo. 2016).

emerging specialty codes related to ARTs. We start our discussion with a brief history of adoption because this roots ARTs, and much of what may follow, in terms of the myths and biases and good intentions that drove this area of law and, in other respects, science and technology, for a generation now.

## **A Few Lessons from the History of Adoption**

The history of child adoption as a matter of law and policy in the United States is rooted in a complex web of Blackstone's version of the common law, federal and state legislative enactments, constitutional rights, and judicial decision making. Buried beneath a complex web of biases and "science" regarding parenting preferences and innate skill-sets are matters of stigma for unwed parents, race, socio-economic status, privilege, religious beliefs, and poverty.<sup>17</sup> Yet, as one scholar aptly noted, the "history of adoption is weakly documented, mostly in a disconnected manner."<sup>18</sup>

Because adoption has been "shrouded in secrecy for most of the century, comprehensive histories of the topic are rare or incomplete at best."<sup>19</sup> What is material for purposes of this article is that adoption *always* invoked judicial oversight, even as motives, capacities, and purposes shifted across eras:

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<sup>17</sup> See Melissa Murray, *What's So New About the New Illegitimacy*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 387, 390 (2011) ("At common law, children born out of wedlock were legally disfavored—*filius nullius*, the child of no one. Parents had no obligation to recognize their illegitimate offspring or to provide for their upkeep, though this was later amended statutorily to place the duty of care for non-marital children squarely on the shoulders of their unmarried mothers. Vestigial aspects of this common law tradition persisted, even on this side of the Atlantic, well into the twentieth century."). The literature is vast, but see ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* (2009); BARBARA YNGVESSON, *BELONGING IN AN ADOPTED WORLD: RACE, IDENTITY, AND TRANSNATIONAL ADOPTION* (2010); Anjani Chandra et al., *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, 306 ADVANCE DATA 1 (1999); See also *In re Adoption of M.A.*, 930 A.2d 1088, 1094 (Me. 2007) ("The legal adoption of another person's child was unknown at common law and was first introduced to American jurisprudence through statutory enactments in the mid-nineteenth century.").

<sup>18</sup> Michelle Kahan, *Put Up on Platforms: A History of Twentieth Century Adoption Policy on the United States*, 33 J. SOC. & SOC. WELFARE 51, 52 (2006).

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



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1. The late Nineteenth Century, when the first modern adoption law was passed and the “orphan train” movement began as a way to control children from poor families.
2. The Progressive Era, a time of child welfare reform, the rise of social work, beginnings of the family preservation movement, early efforts to regulate adoption, and Mothers’ Pensions as a means to help worthy poor women take care of their children.
3. The World War II period through the 1950s, during which the prevalence of adoption increased, as did the focus on secrecy in its implementation. American adoption of children of all races from other countries also began during this period.
4. The 1970s-1990s, which, due to increased availability of birth control and the advent of legal abortion, were marked by decreases in the numbers of available healthy white infants for adoption, as well as the emergence of the adoption rights movement advocating for open processes.<sup>20</sup>

As in the United States, policies related to adoption evolved from decade to decade with gender elements which find parallels in France and the United Kingdom. As Abigail Gregory and Susan Milner wrote, “the public debate in many countries contains competing and potentially conflicting messages about men and fathers: fatherhood as a problem and as a resource; father absence and father presence; responsibility and irresponsibility.”<sup>21</sup> Yet not much has changed in the context of stigma for single parents and the role of poverty and child protection in the adoption of infants in particular.<sup>22</sup> Moreover, non-married fathers, merely by status, in many American states must still establish rights, beyond conceptual responsibility, and affirmatively and promptly do so even when lacking resources or knowledge.<sup>23</sup>

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<sup>20</sup> *Id.* at 52-53.

<sup>21</sup> Abigail Gregory & Susan Milner, *What Is “New” About Fatherhood? The Social Construction of Fatherhood in France and the UK*, 14 *MEN & MASCULINITIES* 588, 590 (2011).

<sup>22</sup> For a discussion of the connections in policy, see Naomi Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 *OHIO ST. L.J.* 1189 (1999).

<sup>23</sup> See *In re Adoption of A.A.T.*, 196 P.3d 1180, 1185 (Kan. 2008), *cert. denied sub nom. Peterson v. Jackson*, 556 U.S. 1184 (2009) (“Even though the father may be blameless in this failure that was induced by the natural mother’s fraud, his belated attempt to assert a parental interest, beginning 6 months after the adoption was final, cannot overcome the fully matured interests of the State and the adoptive family in the permanency and stability of the adoption.”); *In re Adoption of Baby B.*, 308 P.3d 382, 402 (Utah 2012) (“If the father has failed

These historical policy drifts reflect social and political tensions between marriage and non-marriage as a *status* with different rights (often heard in blame language), arguments concerning the autonomy and rights of women after conception, and the neutering of fathers for many decades, particularly in communities of color or economically poor communities.<sup>24</sup> And today, the vestiges of these disparities affect men and women who, if poor, suffer as well from loss of children, not by choice in any libertarian sense, but by virtue of their status in the shadows of any legal protections.

Even with the turn of this new century, adoption in the United States invokes iterations of federal and state policy as researchers and stakeholders debate the implications of same-sex adoption, international and transnational adoption, cross-cultural and inter-racial adoptions.<sup>25</sup> Evolutions in the science of surro-

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to file the paternity papers and affidavit by the time of the consent or relinquishment, in other words, he has failed to effect strict compliance and his parental rights are forfeited.”); *But see In re Adoption of Baby Girl P.*, 242 P.3d 1168, 1175 (Kan. 2010) (“It does not set out a series of heroic quests that a father who appears in a pending adoption case must undertake so that he may triumphantly return bearing the prize of a relationship with his child. Instead, the law presumes that the father starts out with a parental relationship; it is his to abandon, not to conquer.”).

<sup>24</sup> See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476-77 (2012) (“The prison and foster care systems are marked by glaring race, gender, and class disparities: The populations in both are disproportionately poor and African American, and both systems are particularly burdensome to poor black mothers.”). For an article with a unique point of view, see Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U.J. GENDER SOC. POL’Y & L. 347, 353 (2011) (“These manipulative attempts to maintain racial apartheid provide important insights about illegitimacy as a legal and social construct. Even if emphasizing the connections between race and nonmarital births reflected nothing more than crass political opportunism, these efforts highlight that sexual immorality constitutes the animating and taken-for granted core of illegitimacy.”).

<sup>25</sup> See Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303, 303 (2006) (“Additionally, ASFA provides financial incentives to states that place children in adoptive homes. To accomplish this goal, Congress abandoned the social policy that placing black children in black homes was important to the development of black children. Instead, through the Multi-Ethnic Placement Act (MEPA) and the Inter-Ethnic Adoption Act, Congress denied federal funding to agencies that placed children according to their race or took race into consideration when making placement decisions. Congress’s justification

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gacy and in vitro fertilization, and new technologies on a horizon yet unseen, may yet further alter that calculus in profound ways related to religious faith, race, culture, and nationalism.<sup>26</sup> Despite all that, adoptive and putative parents may hold the most intimate of conversations about fertility and adoption, and couples may seek private advice and guidance from agencies and lawyers and mental health professionals and ethicists, and that is as it should be. At least until that moment when an adoption enters the courthouse portal.

Most adoptions occur in a rather conventional and routine manner within the American judicial system and without reported or public discussion.<sup>27</sup> The courthouse is, however, bounded by a statutory framework under which parental rights are forfeited or protected.<sup>28</sup> In fairness, these legislative efforts,

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for the change in policy was that race-matching policies, ‘damage black children by not only denying them placements with white adoptive parents, but also by causing them to languish in foster care.’”).

<sup>26</sup> See GARY J. GATES ET AL., *ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES*, THE WILLIAMS INSTITUTE 7 (2007) (“We estimate that approximately 65,500 adopted children are being raised by lesbian or gay parents, accounting for more than four percent of all adopted children in the United States.”); Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi’a Islam*, 30 *CULTURE, MED. & PSYCHIATRY* 427, 446 (2006) (“As the assisted reproductive technologies become further entrenched in the Muslim world, and additional forms of global reproductive technology become available, it is important to examine the new local moral worlds that are likely to arise in response to this variant of globalization.”); Richard M. Lee et al., *Cultural Socialization in Families with Internationally Adopted Children*, 20 *J. FAM. PSYCHOL.* 571, 571 (2006) (“International adoption also reflects a larger, growing trend toward multiracial and multiethnic families, who face unique challenges in the upbringing of children of different ethnic and racial heritages. Research suggests that same-race and transracially adopted children begin to become aware of racial differences, as well as their adoptive status, as early as 4–5 years of age.”).

<sup>27</sup> See Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 *MICH. J. GENDER & L.* 149, 154 (2012) (“Courts rarely publish adoption proceedings; ‘most cases are sealed, and there are strong policy reasons for keeping adoption proceedings as private as possible.’ Considering how rare it is for a court to conduct adoption proceedings openly, there are not many adoption opinions available to see how race and orientation are treated.”).

<sup>28</sup> For an instructive and detailed history of the evolution of parental termination and adoption in one state, see *Heidbreder v. Carton*, 645 N.W.2d 355, 377 (Minn. 2002) (“The dissent asserts that in our ‘arrogance’ we have fore-

for over a century, were intended to make adoption private, collaborative, and life-changing for children. Nevertheless, judicial review means, derivatively and concomitantly, that lawyers represent clients, whoever that may include, within a purposefully designed adversarial environment.<sup>29</sup>

Within an adversarial system, there are rules; where there are rules there are ethical codes. Lawyers are, if nothing else, creatures of habit and written and unwritten norms. When examining the role of the legal system in an adoption, and by direct extension lawyer ethics and liability, it is past the time when these social consequences to families can be ignored—especially when the rights of children to healthy and safe lives should be paramount.<sup>30</sup> In this sense, adoption and its efficacy as policy is consistent with what Dorothy Roberts describes: “Over the last

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closed the possibility that the best interests of the child can be met by having a permanent and stable relationship with the child’s biological father. The legislature has concluded, however, that a child’s best interests will be served in an adoption proceeding if the rights of any putative father not entitled to notice of her adoption under Minn. Stat. § 259.49 are terminated unless the putative father registered with the Minnesota Fathers’ Adoption Registry before the child is more than 30 days old or the putative father’s failure to register is excused under Minn. Stat. § 259.52, subd. 8(i)-(iii).”

<sup>29</sup> Of course, there are always the interesting parental rights debates which occur within the Alabama Supreme Court. *See Ex parte G.C., Jr.*, 924 So.2d 651, 661-62 (Ala. 2005) (“Today there is no reason for uncertainty or delay in assuming parental responsibility, as science provides prompt determination of the biological parent of a child and the law offers immediate protection for that parent’s rights. Dramatic advances in DNA testing allow putative fathers to determine biological paternity immediately after the child’s birth.”). In dissent, Justice Parker wrote, “With respect to ‘voluntarily relinquishment,’ natural parents who have founded family governments by marriage covenant should never be found by courts to have relinquished their custody or other parental rights apart from a definitive and unambiguous act such as a signed writing to that effect, as when children are given up by natural parents for adoption. Natural parents who have not founded their own family governments by marriage covenant, however, have not established their right of state noninterference and thus should be subject to something akin to a ‘presumptive waiver’ standard.” *Id.* at 685-66 (Parker, J., dissenting).

<sup>30</sup> This point is not without controversy. *See* Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 73-74 (2006) (“Indeed, adoption is no longer a domestic welfare service that attends primarily to the needs of children born in the United States. Rather, adoption is a multi-million-dollar transnational service where aesthetics and genetic traits are significantly scrutinized. There are pitfalls in the free-mar-

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several decades, the United States has embarked on a pervasive form of governance known as neoliberalism that transfers services from the welfare state to the private realm of family and market while promoting the free market conditions conducive to capital accumulation.”<sup>31</sup>

Free markets are, however, never free or without social and political consequences. Even the most conservative corporation and its management does not really mean it when it speaks of “no” market regulation because swimming (and surviving) with sharks<sup>32</sup> is different than watching them from the seats and kvetching about interference from government [unless “unfair”].<sup>33</sup> What is “free” about any market is that the benefits go to those who accurately recognize the shifting tides of policies, persons, and social norms, and adapt and dominate accordingly.

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ket model, however, where finances prevail over child welfare and the best interests of children are subordinate to adult preference.”).

<sup>31</sup> Roberts, *supra* note 24, at 1477.

<sup>32</sup> See Peter Grabosky, *Globalization and White-Collar Crime*, THE CRIMINOLOGY OF WHITE-COLLAR CRIME 129, 139 (2009) (“Whether states are to be regarded as part of the solution or as part of the problem, one of the more significant concomitants of globalization has been a shift in their role. It has been suggested that at the best of times, the state has been a meek enforcer of white-collar crime laws, at best ‘netting the minnows while letting the sharks swim free.’”).

<sup>33</sup> See Jonathan Dickens, *Social Policy Approaches to Intercountry Adoption*, 52 INT’L. SOC. WORK 595, 599 (2009) (“For those with enough money, the archetypal liberal response is to go to market: if you want a healthy baby and one is not readily available in one’s own country, look elsewhere.”); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21, 31 (1989) (“The elsewhere, I think, is in the hostility to markets, a hostility characteristic of American intellectuals, including some judges; and in the fear of novelty, which is a common characteristic of middle-aged persons in general and middle-aged judges in particular. I think our judicial systems can do better. And the beginning of wisdom is a determination to evaluate surrogate motherhood rationally.”). For a discussion of mixed metaphors, see Michael Kimmel, *Why We Mix Metaphors (and Mix Them Well): Discourse Coherence, Conceptual Metaphor, and Beyond*, 42 J. PRAGMATICS 97, 98 (2010) (“The apparent cognitive complexity underlying the production of mixed metaphors suggests that careful linguistic approaches can reveal general insights about metaphor in discourse, especially with regard to their conceptual role in shaping argumentation units of some length and complexity.”).

This brief historical and economic grounding is appropriate because, for all the conceptual discussion and research, the ethics of adoption in various forms are still guided and governed by markets which generate clients and state judicial systems which provide oversight. Lawyers (and organizations) who have failed to recognize the social and political changes in their own “market” do so at some peril. The law of adoption may expand or contract or re-define family and interpret statutes in more flexible terms (or not).<sup>34</sup> But it is “people” acting to create contractual relationships and then falling into litigation which determines outcomes and precedent in tort or ethics.

Thus, what we argue is that those professionals working in the adoption market have read (or misread) the market as a gestalt. Judges interpreting and applying the law are grandparents and fathers and mothers and lawyers of a different generation who may not view the treatment of one parent gripped by old beliefs.<sup>35</sup> There is the possibility that evolving beliefs about the primacy of children’s relationships may re-define the value, downwind, of biological parents. Lawyers who control the portal to the market for adoption or ARTs should, however, carefully

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<sup>34</sup> See *In re Adoption of M.A.*, 930 A.2d 1088, 1098 (Me. 2007) (“The question of statutory construction presented by this case does not arise in a vacuum. We cannot be oblivious to the fact that if the statute is construed to permit the Probate Court to consider a joint adoption petition by unmarried persons, there will be a greater incentive for other unmarried persons to undertake the profound and difficult responsibility of serving as pre-adoptive foster parents for young children with significant special needs. Absent the incentive that the possibility of joint adoption provides, there will be fewer homes for such children.”); See also Brian Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 276 (2010) (“New reproductive technologies have allowed parties to separate sex from procreation, genetic origins from gestation, and intended parents from genetic or gestational parents.”).

<sup>35</sup> See *Frank R. v. Mother Goose Adoptions*, 367 P.3d 88, 106-07 (Ariz. Ct. App. 2016) (“This case raises serious concerns about the conduct of Mother Goose and its counsel throughout these proceedings. In addition to blatant misrepresentations by Mother Goose’s Executive Director in connection with the ICPC referral, the pleadings were filed in the Pima County Juvenile Court without regard to this state’s venue statute and repeatedly contained materially inaccurate allegations.”); See also *id.* at 107 (Eckstrom, C.J., dissenting) (“Due to the dishonest actions of the birth mother and the strategic, self-serving ‘oversights’ of an adoption agency, this court is faced with resolving litigation that now, over twenty months after E.E’s birth, can have only an unsettling outcome.”).

consider their international and transnational environments/markets as changed and ever-changing.<sup>36</sup>

### **A Few More Lessons from *Krigel* as Harbinger**

We posit in this article that the need for precise ethical rules is not just a function of constraining an evolving international market. Indeed, the need for lawyers to become more self-aware is much subtler and yet more profound. Among the privileged who live in Western society a shift has occurred quietly over the past few generations. Judges, legislators, and governors, across political and ideological lines, are more likely to be divorced, or lived as single parents, or be unwed but with a partner in their 50s and 60s, or have raised unwed parents of a preschooler or be raising their own grandchildren or have raised children with complex special needs or have advocated for family members in or near poverty or have helped friends and family through substance abuse or criminalization-for-life. This is the environment in which *Krigel* came into being.

Modern adoption and ARTs cases present practitioners with particularly challenging ethical dilemmas and liability risks. We will ultimately suggest that the standard of care is rapidly evolving, that it is not enough to just comply with the core or specialty codes of ethics, and that practitioners need to be mindful of these evolving ethics standards and duties of care in their daily practices and in the jurisdictions in which they practice.

As the definition of parentage expands, the best interests of the child are ever-evolving, and both courts and governing professional bodies are imposing new obligations in terms of ethical

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<sup>36</sup> See, e.g., *Fredericksen v. Olsen*, 888 N.W.2d 682, 682 (Iowa App. Ct. 2016) (“Abigail Fredericksen appeals from the district court’s grant of summary judgment in favor of Jennifer Olsen—an attorney involved with the termination of her parental rights and adoption of Fredericksen’s biological child—and A.M. and B.M.—the couple who adopted the child. Fredericksen maintains the district court wrongly dismissed her claims against Olsen for legal malpractice, tortious interference with custody, and civil conspiracy to commit fraudulent inducement.”); *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 732 (Mo. Ct. App. 2005) (“As soon as the Collinses executed their consent based on Anderson’s and Krigel’s negligent advice, they stood to lose custody of their child. Losing custody was the natural and probable consequence of the lawyers’ negligently advising the Collinses that they could withdraw their consent at any time before the adoption was final.”).

duties and standards of care.<sup>37</sup> Estate planning attorneys, for example, have long had to consider competing interests of their clients in complex marital and family estate structures.<sup>38</sup> Representing both a husband and a wife with potential competing interests or elderly adults with interested children directing the estate planning can create ethical dilemmas and litigation risks. Conservatorships and guardianships present similar challenges with vulnerable clients unable to clearly articulate interests. As the work of ARTs law and practice continues to evolve with ever changing medical technology and societal demographics, ethics issues, and a lawyer's duty of care will continue to evolve and challenge practitioners.

Into this cauldron of policy and practice came the Missouri Supreme Court's plurality opinion in *In re Krigel*.<sup>39</sup> The case involved a common adoption fact pattern and an experienced adoption attorney. The attorney represented a birth mother in which his decisions regarding communications with the birth father and the birth father's attorney led to a six-month suspension and two-year term of probation. As discuss below, the different opinions were *not* about core ethical violations but the severity of the sanction.

In short form, there was a standard "Consent to Terminate Parental Rights" hearing allowing the birth mother to terminate her parental rights in preparation for adoption proceedings. Neither the birth father nor his lawyer was aware of the hearing and did not appear. According to the court, Krigel intentionally

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<sup>37</sup> For points of view from the authors, see Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIM. LAW. 75 (1998); Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 ME. L. REV. 43 (2014).

<sup>38</sup> See Amy J. Amundsen, *Domestic Asset Protection Trusts in Divorce Litigation*, 29 J. AM. ACAD. MATRIM. LAW. 1, 28 (2016) ("However, an attorney who represents both the husband and the wife when DAPTs are created may be at risk of legal and ethical problems for failure to disclose the consequences to the spouses."); Rebecca C. Morgan, *Family Matters in an Elder Law Practice*, 29 J. AM. ACAD. MATRIM. LAW. 109, 116 (2016) ("The family is not recognized as an entity client under the Model Rules of Professional Conduct, so at the outset of the representation the attorney must always determine who is the client as quickly as possible.").

<sup>39</sup> 480 S.W.3d 294 (Mo. 2016).



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employed a “passive strategy” in his representation of his client such that they would “actively do nothing” to communicate with the birth father or his counsel: no notice of adoption plans, birth of the child, or instigation of legal proceedings.<sup>40</sup>

When the birth father learned of the child’s birth and *the deception by the birth mother*, for whom there was “no doubt” in her mind “as to the actual paternity of the child,”<sup>41</sup> he then placed his name on the Putative Father Registry.<sup>42</sup> The birth father later learned of the adoption proceedings and moved to intervene. The trial court denied the petition of the adoptive parents and, following a hearing, awarded legal and physical custody of the child to the birth father. An ethics petition against the birth mother’s attorney soon followed.

After the appointment of special counsel to investigate the ethics charges, the attorney declined a sanction offered by the special counsel and the case proceeded to hearing. The ethics case eventually made it to the Missouri Supreme Court. In an extensive opinion, the court found that the attorney for the birth mother had violated the following state ethical rules, adopted from the ABA Code of Ethics:

- A lawyer shall not knowingly offer evidence the lawyer knows to be false;
- A lawyer shall not make a false statement of material fact or law to a third person;
- shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person; and
- It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.<sup>43</sup>

In its analysis, the Missouri Supreme Court examined the applicable ABA ethical rules (applied by the Court) to reach the conclusions bullet-pointed above. First, under Rule 4-3.3(a)(3) a lawyer shall not knowingly “offer evidence that the lawyer knows to be false.”<sup>44</sup> Here the court found that Krigel’s questioning of the birth mother at that hearing was designed to mislead the trial court regarding the actual circumstances between the birth

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<sup>40</sup> *Id.* at 297.

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

<sup>42</sup> *Id.* at 298.

<sup>43</sup> *See id.* at 298-300.

<sup>44</sup> *Id.* at 299.

mother and birth father. Rule 4-4.1(a) specifies that when representing a client, a lawyer shall not knowingly “make a false statement of material fact or law to a third person.”<sup>45</sup> The court found that Krigel violated this rule by indicating the child would not be adopted without the birth father’s consent and advised the birth mother not to communicate with the birth father regarding any information about the child, including the child’s birth or subsequent adoption proceedings.

Second, Rule 4-4.4(a) requires that in representing a client, a lawyer “shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”<sup>46</sup> By “actively concealing information from the birth father and his counsel so that his client’s position would prevail,”<sup>47</sup> the court found that the lawyer violated this rule. Citing comment 1 to this Rule, the court found, in pertinent part, that: “Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.”<sup>48</sup>

This second point is an especially complex family law practice with multiple parties engaged in complicated negotiations related to a child or finances in a family or prospective family relationship. The ABA Ethics Code fits the adversarial duty quite easily for prosecutors and defense lawyers or plaintiff’s lawyers and insurance defense or corporate lawyers or commercial lawyers representing parties to a transaction. The duty of candor to an opposing party and the court not to mislead can still co-exist with the duties of confidentiality and loyalty to a client.

In ARTs, adoption, or even a child custody case when a lawyer may have information related to drug or alcohol use, there appears a sharper edge: “a shift away from pushing the limits of adversarialism”<sup>49</sup> in family law quite different than the duties of zealous counsel to a client in other arenas.<sup>50</sup> If this interpretation

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

<sup>46</sup> *Id.* at 300.

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

<sup>48</sup> *Id.*

<sup>49</sup> Barbara Glesner Fines, *The Changing Landscape of Disciplinary Risks in Family Law Practice*, 50 *FAM. L.Q.* 367, 376 (2017).

<sup>50</sup> *See Comment to Rule 2.4*, *AM. ACAD. MATRIM. LAW.*, <http://aaml.org/library/publications/19/bounds-advocacy/2-communication-and-decision-making-responsibility> (last visited Aug. 5, 2017) (“The attorney must abide by the

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holds true, then explaining the boundaries of this new frontier of “soft” zealotry to the client will be required to avoid the other trap: a claim by the client that he or she did not want you to disclose anything to the opposing party that may impair the advantage and that your candor to counsel caused harm to the client? How much are family law lawyers the lawyer for the other lawyer?

Just to be clear, however, candor *to the court* remains the touchstone for this case. Thus, and third, the court found that the most egregious act of misconduct was lack of candor toward the tribunal: “when an attorney, with an intent to deceive the court, submits a false document, makes a false statement, or withholds material information, disbarment is the appropriate sanction.”<sup>51</sup> The court found that this lawyer signed and submitted documents to the trial court which hindered the administration of justice when his petition stated that the birth mother did not know of any “other person not a party to these proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.”<sup>52</sup> According to the record, as explored by the court, the lawyer knew the name, address, and attorney for the birth father and the birth father was not a party to the proceedings, but was clearly one who had a claim of child custody or visitation. Thus, the court ultimately concluded that the lawyer’s violation of this rule *actively thwarted* the opportunity for the birth father to assert his parental rights.<sup>53</sup> The Chief Justice, however, agreed with the sanction but did not find a violation of Rule 4-4.4(a) in that he did not fail to provide factual information to a potential opposing party as contemplated by the rule.<sup>54</sup>

The only remaining material issue for the court was what specific sanction should be imposed upon the lawyer for violations of these ethics rules. After consideration of mitigating factors such as the lack of prior discipline, the majority held that the

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client’s decisions as to the objectives of the representation, subject to the rules of ethics or other law.”).

<sup>51</sup> *Krigel*, 480 S.W.3d at 301.

<sup>52</sup> *Id.* at 300.

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

<sup>54</sup> *Id.* at 302-03 (Breckenridge, C.J., concurring in part and dissenting in part).

lawyer should be suspended from the practice of law for six months, with execution of such suspension stayed, subject to completion of a two-year term of probation in accordance with conditions.<sup>55</sup> The concurrence disagreed about one count but concluded that multiple acts of professional misconduct justified the six-month suspension, with execution of the suspension stayed pending completion of a two-year term of probation. The dissent held that the lawyer's actions in misleading both opposing counsel and the circuit court warranted suspension without leave to reapply for six months, such that at a minimum, "I would disbar him."<sup>56</sup>

The counter-argument, and one which legal tradition may hold persuasive, was that the attorney had properly and zealously represented his client under the ABA Code of Ethics: (1) the birth father had an affirmative obligation to take his own actions to protect and assert his interests in the child, and (2) his attorney had an obligation to know the law and not depend on the birth mother's attorney to lead him through the process and help him protect and assert his client's interests. Clearly, the appellate court found this view of "zealous advocacy"<sup>57</sup> to be excessive in the face of uncontroverted basic facts of parentage and an interest in protecting all parents' rights and interests as to their children.

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<sup>55</sup> *Id.* at 302.

<sup>56</sup> *Id.* at 306 (Fischer, J., dissenting).

<sup>57</sup> It does little good to kvetch about the standards to which family law practitioners are held and how this case may have been decided if this was a couple of large firms with corporate clients fighting about a trademark or stealing millions or billions from consumers or manufacturing products which knowingly cause death or disability. The reality is that is just the way it is. See Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 636 (2004) ("Like the Model Rules, the Restatement studiously avoids prescribing an affirmative duty to help the tribunal reach the truth. Misleading statements are not explicitly prohibited, and there is no affirmative duty to disclose a fact that the other side failed to bring to the court's attention.").

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## “Freedom of Contract” and Adoption and ARTs Practitioners

A discussion of the difference between values, ethics, and standard of care, along with a discussion of the significance of the *Krigel* decision, should highlight considerations of ethics and liability for attorneys engaged in family formation. We suggest that the standard of care and duty is rapidly evolving in conjunction with shifting judicial paradigms and experiences; and we argue that it is not enough any longer to just comply with the applicable ethics codes when undertaking what courts may in the past have recognized as “special relationships.”<sup>58</sup> This is not about whether these changes in law and policy are “good or bad” at this juncture. This discussion is about the reality that technological and social change is occurring rapidly and that there is potential peril to ignoring the environment; whether globally or locally.<sup>59</sup>

In the adoption and now the ARTs arena, the ultimate *legal* goal is to create a *legally* recognized parent-child relationship between the subject child and the intended parents. This *legal* process, or as noted so cogently in a seminal article, “bargaining in the shadow of the law,”<sup>60</sup> involves the contractual creation and transfer of rights to sale/transfer or donation of various forms of genetic material.

In a positive way, changes at the macro-, meso-, or micro-levels of policy and law are often subject to transparent discus-

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<sup>58</sup> Courts traditionally impose an affirmative duty in *special relationships* because the person upon whom the duty to act is imposed has assumed some special task or role and expects a benefit or profit. *See Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992) (“Keane assumed a task and role as a surrogacy broker, and the other professionals participated in the program Keane designed. The group were in this sense joint venturers engaged in an entirely new kind of project. They are entrepreneurs pioneering in a new field. Keane, as well as the doctors and the lawyer, expected to profit from their roles in the program.”).

<sup>59</sup> *See* Lyria Bennett Moses, *Why Have a Theory of Law and Technological Change*, 8 MINN. J.L. SCI. & TECH. 589, 600 (2007) (“The potential for legal problems from technological change comes before full social acceptance, diffusion of the technology, and the resulting social impact. Legal problems associated with technological change are thus more urgent and more difficult to anticipate than legal problems associated with social change.”).

<sup>60</sup> This famous phrase received its boost into family law nomenclature in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

sion in scholarship and at conferences.<sup>61</sup> The notion, however, that “free markets,” which are more myth than reality during election cycles, should govern the choice of contract is as old as *Lochner v. New York*.<sup>62</sup> Freedom to contract has always required government oversight even if that oversight was intended to protect the predatory potential of actors in a market.<sup>63</sup> When vulnerable populations and “freedom” to contract blend or blur, judicial oversight of any derivative child custody agreements is not new or earth-shattering.<sup>64</sup>

For adoption, centuries of statute and case law guide practitioners, judges, social workers, psychologists, and non-profit or-

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<sup>61</sup> See J.J. Liu & E.Y. Adashi, *Selective Justice: State Mandates for Assisted Reproductive Technology and Reproductive Justice*, 1 AM. J. CLIN. EXPERIMENTAL OBSTETRICS & GYNECOLOGY 53, 53 (2013) (“Understanding who qualifies for coverage for ART is painstaking. Fifteen states adopted a mandate to offer coverage to varying degrees. Improve medical legitimacy of state mandates for ART coverage. ARTs can treat infertility of both biological and situational causes, so “the focus should be on the inability to reproduce, regardless of whether it is caused by a medical disease or otherwise” Instead of socially exclusionary language, eligibility could be based on more quantitative limits based on external factors like lifetime spending.”).

<sup>62</sup> This point is not new and was made in the case of *Baby M.* thirty years ago. See *In the Matter of Baby M.*, 525 A.2d 1128, 1165 (N.J. Super. Ct. Ch. Div. 1987), as modified 537 A.2d 1227 (N.J. 1988) (“The constitutional test is to balance whether there is ‘a fair, reasonable and appropriate exercise of the police power of the state as to an unreasonable unnecessary and arbitrary interference with the right of the individual to his personal liberty to enter into these contracts . . .’ *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed.2d 937 (1905). Legislation or court action that denies the surrogate contract impedes a couple’s liberty that is otherwise constitutionally protected. The surrogate who voluntarily chooses to enter such a contract is deprived of a constitutionally protected right to perform services.”).

<sup>63</sup> See Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMAN. 37, 86 (2009) (“In the United States, freedom of contract ideology has seen its doctrinal influence diminish, but it retains rhetorical power.”).

<sup>64</sup> See, e.g., *Dewhurst v. Dewhurst*, 5 A.3d 23, 24 (Me. 2010) (“A settlement agreement in a family matter is distinguishable from contracts in general, however, because of the public interest in guaranteeing that such agreements are fairly made and consistent with public policy.”). The court then held that a trial court “must independently evaluate a settlement agreement involving minor children to ensure custody matters are resolved according to the children’s best interest.” *Id.* at 26.

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ganizations serving parents and children.<sup>65</sup> ARTs is a new form (and others may yet follow given the ever-developing science), but it has the same desired outcome: a safe and stable familial environment. Yet the “law” is conservative within its own biological clock. Lawyers understand that change that occurs too quickly or without adequate protection from ethical and legal distortions can profoundly disrupt social norms and patterns. Such a consequence can generate a kind of social and political angst which, in group form, may forge the search for simple answers while neglecting foreseeable and unforeseeable social welfare consequences.

This does not mean policy change is unwise or that improving equity within a political system is not the proper realm of any evolving society concerned with social justice. Indeed, it is vital that such changes occur to assure that rigidity does not become an excuse for exploiting others identified as less worthy.<sup>66</sup> But sometimes changes occur in incremental ways—not by the enactment of law but with changes *to the people* who interpret and apply the law as judges or the legislators and governors. What matters is that the specialty codes described below do not exist or

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<sup>65</sup> See *In re Adoption of J.S.*, 358 P.3d 1009 (Utah 2014) (the father asked the court to establish a substantive due process right to perfect his parental rights “on something less than the grounds prescribed by the legislature—by filing a paternity action but not the affidavit called for by statute.”); *Matter of Baby Boy K.*, 546 N.W.2d 86, 101 (S.D. 1996) (“When a putative father is ignorant of his parenthood due to his own fleeting relationship with the mother and her unwillingness to later notify him of her pregnancy, the child should not be made to suffer. The trial court in this case was faced with a child who was unwanted by his mother and unknown to his father. After sixty days had passed and no one had asserted a paternal interest, the State’s obligation to provide this unwanted and unclaimed child with a permanent, capable, and loving family became paramount.”).

<sup>66</sup> See Stacey A. Hammons, *Assisted Reproductive Technologies: Changing Conceptions of Motherhood?*, 23 *AFFILIA* 270 (2008) (discussing the extent to which ARTs are both liberating and oppressive, as well as how the impact of ARTs on conceptions of justice must be included in our practice); Marianne Rizk & Stacey Pawlak, *A Case Report of Embryo Donation: Ethical and Clinical Implications for Psychologists*, *J. MED. ETHICS* (June 24, 2016), <http://jme.bmj.com/content/early/2016/06/24/medethics-2015-103304.full> (“Due to the psychosocial complexities that generally accompany the donation and/or use of embryos, psychologists can play a pivotal role. While laws in the USA regulate the medical procedures involved in embryo donation, only unenforceable guidelines exist for psychologists specializing in fertility cases.”).

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operate in a vacuum but are part of a broader fabric of judicial oversight or the possibility of licensing sanctions across disciplines.

Currently a handful of state ARTs statutes address process and procedure, and perhaps indirectly, ethical issues and practices that should be of concern of ARTs practitioners. Adoption and assisted reproduction are often co-extensive events with the creation of a parent relationship being the end goal. As was seen with *In re Krigel*, adoption generates its own potential liability and ethical conundrums within the judicial environment. ARTs cases, however, are new to public surveillance and thereby present practitioners with particularly challenging ethical dilemmas and liability risks.<sup>67</sup>

Here is, however, a piece of puzzle too often ignored. Almost all these events involving children in American society (and other Western countries) end up in court. And court in the United States is an intentionally designed adversarial system with complex legal and ethical duties to clients and courts. Because of the nature of these issues, questions always arise whether the adversarial system with its demand for zealous advocacy by lawyers subject to sanction under a code of ethics and acting on behalf of their clients is an appropriate venue for dealing with these arrangements.<sup>68</sup>

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<sup>67</sup> See *In re* Petition of Doe, 638 N.E.2d 181, 182 (Ill. 1994), *cert. denied sub nom.* Doe v. Kirchner, 513 U.S. 994 (1994) (“To the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby’s existence.”).

<sup>68</sup> For an interesting approach to this evolving ethical role, see Michael Robertson & Kieran Tranter, *Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work*, 9 *LEGAL ETHICS* 211, 212 (2006) (“The approach we recommend is based principally on social scientific studies of lawyers’ work, rather than on normative accounts of lawyers’ professional responsibility. We argue that this research suggests that legal practice frequently invites lawyers to make decisions about how they will do their work. This is because the lawyer’s very role is permeated with opportunities for choice, despite the rules-rich environment in which lawyers practise. Lawyers’ work, in other words, contains multiple discretionary zones in which choices are constantly invited.”).



The unique and complex ethical and legal issues involved in these arrangements have led to calls for a different form of court system for families, as well as heightened candor to the court, other parents, and third parties.<sup>69</sup> Yet courts are still the constitutional and contextual environments in which the behavior of professionals and the choices (within the bounds of informed consent and free will) are exercised and exposed to examination and, often, retrospective comment and criticism. Within that context are the standard ethical codes and newer specialty codes which may establish standards of care and duty different than the environment which applies facts to law.

### **ARTS, Values, Ethics, and then the “Specialty Codes”**

Various professional specialty ethics codes are beginning to address the ethical dilemmas and requirements with varying degrees of specificity. As a threshold issue, *specialty* matters because even when lawyers and risk managers try to insert language that “prevents” these codes from being used against themselves or doctors, social workers, or forensic psychologists, that is rather illusory. Indeed, the fact that specialty organizations keep trying to do so is rather remarkable because courts have had little difficulty applying ethical codes as standards of care beyond local geographic areas.<sup>70</sup> The prominent placement of these credentials on websites and social media makes it rather difficult to avoid questions about how paying dues and meeting criteria for a specialty avoids that consequence.

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<sup>69</sup> For a good article with a unique title, see Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 881 (1984) (“Our attention is best directed, however, not toward the uncertain future course of constitutional doctrine, but toward the unresolved legal and policy issues presented by the bustling commercial market that already exists for noncoital reproductive services.”).

<sup>70</sup> See, e.g., *Hamilton v. Sommers*, 855 N.W.2d 855 (S.D. 2014) (Although the Model Rules do not establish the standard of care for lawyers, a violation of a Model Rule can be evidence of breach of duty. In cases where locality may be relevant to the expectations a client has of his lawyer, a statewide focus would usually be appropriate. “Attorney’s required level of skill and ability is not defined by the individual locality in which he practices. The state is the more logical and generally accepted territorial limitation on the standard of care.”).

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The very subject matter of ARTs also adds to challenges. Infertility issues often cause those experiencing them to have their emotions on overdrive. Furthermore, people participating in these processes have high financial stakes and high expectations. Clients may become tapped out financially, wanting to save money on legal and agency fees, and working with relatives or friends who “don’t need or want attorneys.” These can all create minefields for the unsuspecting ARTs attorney who becomes involved at later stages of the process.

Aside from these external traps, another challenge exists because attorneys perceive the very nature of family creation through either adoption or ARTs as “happy work” where everyone is working towards a common, shared goal.<sup>71</sup> This rather rosy perception can cause attorneys to let down their guard, shave corners, and assume that everyone is working towards the same “happy” goal. In fact, these cases are fraught with legal novelty and traps concurrent with ethical issues compounded by great frustration and emotion, thereby creating the potential for liability from agitated and disappointed clients and third parties.<sup>72</sup>

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<sup>71</sup> Of many texts that illuminate the risk and consequences of such movements, readers may wish to read (or re-read) ERIC HOFFER, *THE TRUE BELIEVER* 11 (1951) (“When hopes and dreams are loose in the streets, it is well for the timid to lock doors, shutter windows and lie low until the wrath has passed. For there is often a monstrous incongruity between the hopes, however noble and tender, and the action which follows them. It is as if ivied maidens and garlanded youths were to herald the four horsemen of the apocalypse.”); See J.E Swain et al., *Parenting and Beyond: Common Neurocircuits Underlying Parental and Altruistic Caregiving*, 12 *PARENTING* 115, 116 (2012) (“Interpersonal relationships constitute the foundation on which human society is based. The infant-caregiver bond is the earliest and most influential of these relationships. Driven by evolutionary pressure for survival, parents feel compelled to provide care to their biological offspring. However, compassion for non-kin is also ubiquitous in human societies, motivating individuals to suppress their own self-interests to promote the well-being of non-kin members of the society.”).

<sup>72</sup> The issue of third party duty and liability has been discussed extensively in Maine case law. See *Savell v. Duddy*, 147 A.3d 1179, 1180 (Me. 2016) (“The multifactor balancing test involves analysis of the following six factors: ‘(1) the extent to which the transaction was intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant’s conduct and the injury; (5) the policy of preventing future harm; and (6) the extent to which the profession would be unduly burdened by a finding of liability.’ Savell’s argument that Duddy owed him a duty of care as a nonclient

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For example, some attorneys easily slip into taking on dual roles or become overly zealous in representing a client's interests, possibly leading to lack of clarity as to who is owed the duty of care. It is also too easy for attorneys to become caught up in the view that family formation work always exemplifies goodness and morality, possibly causing them to disregard the interests of the other parent as the lawyer marches toward the goal of creating a new and legally recognized parent/child relationship. These are natural extensions of a continuum of the human condition: empathy and compassion; hopefulness and kindness; money and emotion; spite and retaliation; blame and recrimination.

How lawyers differentiate and apply values that are central to the parties in these proceedings, navigate the applicable ethics rules, and determine the duty of care and required transparency to the court is quite challenging. A preliminary question is how to differentiate between values, ethics, and the duty of care. Starting with the least formal, values are the various beliefs and attitudes that determine how a person or group actually behaves. Values identify what should be judged as good or ideal in a given culture. A well-defined value system is a moral code; but that is quite different from an ethics code.<sup>73</sup>

In contrast to values and a moral code, ethics is an action concept rather than simply a theoretical template of ideals or hopes. Ethics are organized principles of conduct that govern a group or an individual and that provide a framework for how to turn values into professional action. Ethical principles are rules of professional conduct; they are not just a convenience. Ethical decision making is a cognitive process and not, in theory, an

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is unpersuasive. In *Canders*, we explained that “[a]n attorney will never owe a duty of care to a nonclient . . . if that duty would conflict with the attorney’s obligations to his or her clients.”).

<sup>73</sup> See Frederic G. Reamer, *The Evolution of Social Work Ethics*, 43 *SOC. WORK* 488, 491 (1998) (“With most other professions—including nursing, medicine, journalism, engineering, dentistry, law, psychology, counseling, and business—social work’s literature on ethics began to change significantly in the early 1980s. In addition to discussions about the profession’s values, a small group of scholars began to write about ethical issues and challenges while drawing on literature, concepts, theories, and principles from the traditional field of moral philosophy and the newer field of applied and professional ethics.”).

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emotional process.<sup>74</sup> Unlike moral codes, ethical codes are legally imposed principles of conduct that govern professional action or inaction and for which, as in *Krigel*, a violation may result in sanctions.

Unlike values alone, ethical codes may also provide the source for liability as a standard of care and duty.<sup>75</sup> Indeed, as *Krigel* illustrates, ethical codes are not stagnant, and what may be a “safe harbor” in one era (e.g., no rights of fathers and kin) may be quite dangerous to licenses or net worth in another. In ARTs, unique relationships between the parties and emotional and economic issues heighten these concerns.<sup>76</sup> Perhaps quite apt is a famous quote by Justice Benjamin Cardozo: “Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side. Innovate,

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<sup>74</sup> See Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 500 (2004) (“The principle of partisan professionalism states that while serving as an advocate, a lawyer must, within recognized constraints of legality or professional ethics, seek to maximize the likelihood that a client will prevail. Together, these principles form the basis of how most lawyers view their work and their ethics: a lawyer is a partisan and zealous advocate, dedicated to the client’s cause, and absolved of responsibility for that cause and its pursuit, so long as the lawyer acts within the bounds of the law. He or she is an amoral gladiator.”) (footnotes omitted).

<sup>75</sup> See *In re Seare*, 493 B.R. 158, 182 (Bankr. D. Nev. 2013) (“The laws of ethics that lawyers must follow are premised on the lawyer’s role as a professional— an agent and fiduciary of the client.”); *Smith v. Haynsworth, Marion, McKay & Geurard*, 472 S.E.2d 612, 613 n.4 (S.C. 1996) (“The theory behind this view is that, since the ethical rules set the minimum standard of competency to be displayed by all attorneys, a violation thereof may be considered as evidence of a breach of the standard of care. Other courts admit this evidence in an analogous manner of admitting statutes, ordinances, or practice codes in defining the duty of care.”) (citations omitted); *Brooks v. First Interstate Bank, N.A.*, 792 P.2d 196, 201 (Wyo. 1990) (“We hold that no claim will lie on behalf of Brooks and the Bank founded upon any violation of the disciplinary rules relating to attorneys.”).

<sup>76</sup> *Id.* at 200 (“Brooks’s interests with respect to the transaction were adverse to those of the Arambels, and it is fundamental that Zebre could not have assumed a duty to Brooks without violating his primary duty to the Arambels. Hughes. The situation emphasizes scriptural wisdom. “No servant can serve two masters. For he will either hate the one and love the other, or he will cling to the one and despise the other.”).

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however, to some extent, he must, for with new conditions there must be new rules.”<sup>77</sup>

Indeed, courts traditionally have imposed an affirmative duty in special or fiduciary relationships because the person upon whom the duty to act is imposed has assumed some special role. In one liability case involving a very early ARTs situation, the attorney and his coordinating program fell afoul of these principles thereby imposing an affirmative duty to act.<sup>78</sup> There the court held that attorney Keane assumed a role as a surrogacy broker, and the other professionals participated in the program Keane designed. In this specific sense, the members were engaged in a new kind of joint venture or entrepreneurs pioneering in a new field.<sup>79</sup> As a result of the profit-nature of the enterprise, the court found a duty:

Keane, as well as the doctors and the lawyer, expected to profit from their roles in the program. Keane held out the services of his program. He should not be allowed to wash his hands of responsibility by turning the project over to others, as the dissent argues. Keane exercised control, drafting the contracts, organizing the transactions between the parties and professionals, and monitoring the contract compliance. The parties entrusted themselves to Keane and his associates. The participants were led to rely on the broker-designer’s direction and advice

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<sup>77</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 163 (1947).

<sup>78</sup> See *Stiver v. Parker*, 975 F.2d 261, 269-70 (6th Cir. 1992) (“Such arrangements may lead to the monetization of a surrogate mother’s attributes like race, intelligence, beauty and social standing, or the child may be of the wrong gender. There is more at stake here than simply the values of the marketplace and freedom to contract which prevail in ordinary commercial activities. Because surrogacy contracts create a high degree of risk of injury or loss, we conclude that the programs under which these contracts are arranged—when not outlawed as against public policy—create affirmative duties of care. The relationship between the surrogacy broker and the participating medical and legal assistants he employs on the one hand, and the surrogate mother and contracting father on the other hand is a ‘special relationship’ within the context of negligence law.”).

<sup>79</sup> See *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 182 (1st Cir. 1997) (applying Massachusetts law, and deciding that ‘an attorney is not liable for an error in judgment concerning a proposition of law that is debatable, uncertain, unsettled, or tactical.’ Ronald E. Mallen & Allison Martin Rhodes, 4 *Legal Malpractice* § 33:15 (2015).”); *Tamposi v. Denby*, 136 F. Supp. 3d 77, 127 (D. Mass. 2015) (“In general, [i]t is neither fair, practical, nor legally appropriate to benchmark an attorney against a standard of prescience.”).

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concerning procedure and professionals to trust. The defendants, by offering an attractive avenue for a woman to make \$10,000 without specifying, acknowledging, or explaining the multiple dangers involved have magnified the risks of harm. In such circumstances the defendants have an affirmative duty reasonably to protect the surrogate mother, the child, and the contracting father from foreseeable harm caused by the surrogacy undertaking. It is for the jury to decide whether the broker and the professional participants have provided the kind of care commensurate with the exercise of a high degree of diligence in protecting the parties from harm.<sup>80</sup>

With this analysis as a backdrop, there are ten common ethical issues that ARTs practitioners grapple with daily and which were certainly debated and discussed as the American Academy of Assisted Reproduction Technology Attorneys (AAARTA) enacted its recently amended and restated ethics code.<sup>81</sup> In addition to describing each ethical issue, each section will contain a brief summary of how various ethical codes and state ARTs statutes may address the issue, if at all.<sup>82</sup>

A final caveat, however. The proliferation of “uniform” acts or models along with professional codes is far from uniform in function and form. The discussion below represents a sampling not a taxonomy. Legislation and case law may change locally and events globally may alter the ethical and legal landscape in ways yet unforeseen. This is undoubtedly one area of practice in which organizations and professionals must stay current.

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<sup>80</sup> *Stiver*, 975 F.2d at 272.

<sup>81</sup> See AMERICAN ACADEMY OF ASSISTED REPRODUCTION TECHNOLOGY ATTORNEYS (AAARTA) ETHICS CODE, <http://www.aaarta.org/aaarta/academy-info/ethics-code> (last visited Aug. 31, 2017).

<sup>82</sup> It is important to note that the paucity of footnotes in this section represents the lack of case law and or ethical opinions so some of this is conjecture coupled with warning. See, e.g., *D.M.T. v. T.M.H.*, 129 So.3d 320, 346-47 (Fla. 2013) (“Finally, in addition to the uncontroverted fact that both women in this relationship were intending to, and did, jointly raise the child as their own from the time of birth until their acrimonious separation, it is clear from the affidavit submitted by the doctor who operated the reproductive center the couple attended that any waiver of rights language in the standard forms signed as part of the couple’s process of using assisted reproductive technology would be inapplicable to this situation.”). For an earlier survey of these policies and laws, see Charles P. Kindregan Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIMONIAL LAW. 43 (2008).

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1. *Independent legal counsel for all parties and appropriate licensure in relevant jurisdictions*

This issue goes to how important is it for each party to the ARTs contract to have independent legal counsel, and where that attorney must be licensed. The issue is particularly complicated given that multiple legal counsel increases the cost of these proceedings, such that parties, especially those who are close friends and relatives, frequently refuse to engage legal counsel. Because of the cross-jurisdictional nature of these matters, laws from a variety of jurisdictions can be in play, and having each party have legal counsel in each jurisdiction increases complexity and costs.<sup>83</sup> Consequently, there are issues concerning the unauthorized practice of law in a given jurisdiction and the local or national standard of care applicable to that duty.

Perhaps somewhat surprisingly, the medical community has been much more vigorous than legal groups in advocating for independent legal counsel for all parties. The American College of Obstetricians and Gynecologists (“ACOG”) Committee on Ethics provides that both the carrier and the intended parents should have separate, independent legal counsel, and that legal counsel should be “licensed to practice in the relevant state or states.”<sup>84</sup> Similarly, the American Society of Reproductive Medicine (“ASRM”) states in its Practice Committee Opinion that both intended parents and gestational carriers should have ongoing legal counsel, licensed in relevant states and home countries.<sup>85</sup>

Regarding mental health professionals, the American Psychological Association’s (“APA”) Ethical Principles for Psychologists, while not specifically addressing the role of lawyers, clearly discusses the duty of competency, the need for undivided loyalty to clients when providing assessments and therapy, the

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<sup>83</sup> See generally William S. Singer, *The Law and Ethics: Exploring New Terrain: Assisted Reproductive Technology (ART)*, 8 RUTGERS J.L. & PUB. POL’Y 918 (2010).

<sup>84</sup> See AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Family-Building-Through-Gestational-Surrogacy> (last visited Aug. 7, 2017).

<sup>85</sup> AMERICAN SOCIETY OF REPRODUCTIVE MEDICINE (“ASRM”), [http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/optimizing\\_natural\\_fertility-noprint.pdf](http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/optimizing_natural_fertility-noprint.pdf) (last visited Aug. 31, 2017).

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importance of protecting confidentiality and avoiding conflicts of interest, the need to understand ethical rules regarding dual relationships and boundary issues, and the need to always obtain informed consent.<sup>86</sup> Similarly, with social workers, the National Association of Social Workers' ("NASW") in its Code of Ethics, emphasizes a client's right to be informed, to consent to actions taken by the social worker, and to have a competent professional working with integrity, avoiding conflicts of interest.<sup>87</sup>

Of the handful of states that have enacted comprehensive ARTs statutes, Illinois provides that both carriers and intended parents are required to have consulted with independent legal counsel in order to have the protections of the statute.<sup>88</sup> Virginia provides for court appointed counsel for the surrogate during drafting of the contract.<sup>89</sup> California provides that prior to signing a gestational carrier agreement, both the carrier and intended parents must be represented by independent legal counsel of their own choosing.<sup>90</sup> Maine requires independent legal counsel for both the carrier and the intended parents.<sup>91</sup> The Nevada stat-

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<sup>86</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION'S ("APA") ETHICAL PRINCIPLES FOR PSYCHOLOGISTS, <https://www.apa.org/ethics/code/index.aspx> (last visited Aug. 31, 2017).

<sup>87</sup> See NATIONAL ASSOCIATION OF SOCIAL WORKERS' ("NASW") CODE OF ETHICS, <https://socialworkers.org/pubs/code/code.asp> (last visited Aug. 31, 2017); George Palattiyil et al., *Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work*, 53 INT'L. SOC. WORK 686, 695-96 (2010) ("Social workers should advocate the development of safe and reasonable reproductive health services and for community education in relation to fertility and reproductive health issues: they have a significant role in challenging practices that exploit materially disadvantaged women for the purposes of reproduction, and advocating regulations that ensure the protection of all individuals affected by reproductive services.").

<sup>88</sup> ILLINOIS GESTATIONAL SURROGACY ACT (BASED ON ABA MODEL ACT OF 2008), § 750 ILL. COMP. STAT. § 47/25 (2017-18).

<sup>89</sup> See VA. CODE § 20-156 (2017) ("Surrogacy contract' means an agreement between intended parents, a surrogate, and her husband, if any, in which the surrogate agrees to be impregnated through the use of assisted conception, to carry any resulting fetus, and to relinquish to the intended parents the custody of and parental rights to any resulting child.").

<sup>90</sup> California 2015 Surrogacy Statute, CAL. FAM. CODE §§ 7960-7962 (2015).

<sup>91</sup> On July 1, 2016, the Maine Parentage Act, 19-A ME. REV. STAT. §§ 1831-1938 (2016), adapted from the UPA, became effective, and requires only a showing that "[t]he continuing relationship between the person and the



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ute requires independent legal counsel for both parties in all matters concerning the gestational carrier arrangement and gestational carrier agreement.<sup>92</sup>

In its 2008 ART Model Act, the American Bar Association provided that a carrier must obtain legal consultation with independent counsel regarding the terms of the gestational carrier agreement and the potential legal consequences of the arrangement.<sup>93</sup> Interestingly, the AAARTA Ethics Code does not require independent legal representation for all parties but explicitly allows intended parents to be unrepresented and provides a “good faith efforts” exception to legal representation for surrogates.<sup>94</sup>

Thus, the AAARTA Code makes provision for no legal representation for a party in a parentage matter. Fellows are required to follow all applicable laws and ethics rules pertaining to competence, including rules of jurisdictions in which they are allowed to practice, and the Fellow must be licensed in at least one of the relevant jurisdictions or must co-counsel with someone who is admitted in that jurisdiction. In the event a dispute arises based on lack of independent legal counsel or lack of licensure to practice in a particular jurisdiction, relevant ethics codes and most of the ARTs statutes do support a preference for independent, properly licensed legal counsel.

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child is in the best interest of the child.” 19-A ME. REV. STAT § 1891(3)(E) (2015). The Maine UPA also proscribes certain ways by which biology and legal status may collide in the life of a child so as to apportion rights and responsibilities among adults.

<sup>92</sup> Nevada Parentage Act, 11 NEV. REV. STAT. §§ 126.500-126.810 (2016).

<sup>93</sup> See AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (Feb. 2008), [https://www.americanbar.org/content/dam/aba/publishing/family\\_law\\_quarterly/family\\_flq\\_artmodelact.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf) (last visited Aug. 31, 2017).

<sup>94</sup> AAARTA ETHICS CODE 16(a), *supra* note 81 (“No Fellow may represent any Party in an ART Matter in which the Surrogate or Donor does not have legal representation, except in an uncontested process to establish parentage in which no conflict of interest exists or is likely to arise among the Parties to that proceeding, or except where good faith efforts have been made to ensure such representation without success.”).

2. “Ongoing” independent legal counsel for all parties - not just at the contract phase

This issue is a slight variation on the first ethical issue discussed. The question is which stages of the ARTs procedure require independent counsel. Neither ACOG nor the ASRM nor either the APA or NASW specifically address this beyond the provisions cited above. The ACOG does discuss the complexity of the legal issues at all stages of the gestational carrier arrangement, from the drafting of the contract, through the establishment of parentage, to the confidentiality issues that arise in the handling of medical and mental health information.

As far as the state statutes go, only Virginia requires legal representation for the surrogate and only through the drafting of the contract. Maine seems to support a similar approach. Illinois and California do not specify duration of representation. Nevada is not specific, but does reference legal representation for the “gestational carrier arrangement.”<sup>95</sup> The ABA 2008 ART Model Act provides that each party to the gestational carrier arrangement must have been represented by separate independent legal counsel in all matters relevant to the arrangement and the agreement.<sup>96</sup> AAARTA is not explicit beyond what was discussed above. If the ABA sets forth the higher standard of full independent legal representation for all parties in all phases of the ARTs process this Code may create the applicable standard of care nationally in terms of both ethical duty and liability if national, rather than local, standards of care are adopted in litigation.

3. *Psychological consultation or evaluations*

It seems relatively common for most gestational carrier agreements to contractually require psychological testing of the

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<sup>95</sup> See NEV. REV. STAT. § 126.750(2) (2016) (“The gestational carrier and the intended parent or parents must be represented by separate, independent counsel in all matters concerning the gestational carrier arrangement and gestational agreement.”).

<sup>96</sup> AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (Feb. 2008), [https://www.americanbar.org/content/dam/aba/publishing/family\\_law\\_quarterly/family\\_flq\\_artmodelact.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf) (last visited Aug. 7, 2017).

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carrier, and sometimes the intended parents.<sup>97</sup> But this is not universal, and may be criticized as an onerous burden on intended parents, especially when they are using their own genetic material. There is also the additional puzzle of what clinical or forensic testing may be relevant and if there is even psychological or personality testing which is a reliable predictor of non-genetic risk factors.<sup>98</sup> Is the purpose to establish capacity to consent or fitness to parent or the risk of diagnosable mental health disorders or some other matrix of factors defined by statute or case?

For reasons that are rather disconcerting, ethics codes and statutes seem to uniformly require or strongly suggest this is good practice. Perhaps the logic or purpose is to determine if there is some reason, genetically or clinically, why a person should not share genetic material or parentage, but that is one very slippery ethical slope; both as to assessing risk and assuring parents there are none based upon testing and forensic assessment.<sup>99</sup> Virginia requires such testing for the surrogate and her spouse, if any, and intended parents.<sup>100</sup> Illinois requires both the carrier and the intended parents to psychological evaluations to

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<sup>97</sup> For a recent discussion of this topic, see Andrea Mechanick, *Mental Health Counseling in Third-Party Reproduction in the United States: Evaluation, Psychoeducation, or Ethical Gatekeeping?*, 104 *FERTILITY & STERILITY* 501 (2015).

<sup>98</sup> See, e.g., Doron Dorfman, *Surrogate Parenthood: Between Genetics and Intent*, 3 *J. LAW & BIOSCIENCES* 404 (2016); B. R. Sharma, *Forensic Considerations of Surrogacy—An Overview*, 13 *J. CLIN. FORENSIC MED.* 80 (2006).

<sup>99</sup> There is a risk that testing is not normed for certain populations or that biases may impair the efficacy and ethical use of testing and evaluations. See Dorothy Greenfeld & Emre Seli, *Gay Men Choosing Parenthood Through Assisted Reproduction: Medical and Psychosocial Considerations*, 95 *FERTILITY & STERILITY* 225, 228 (2011) (“In addition to the psychological assessment, the medical evaluation and its documentation are a key component of ART treatment for male gay couples. It is noteworthy that the medical assessment of gay men is essentially the same as the medical assessment of heterosexual men attempting parenthood though oocyte donation and gestational surrogacy.”).

<sup>100</sup> See VA. CODE § 20-160(B)(7) (2017) (“Prior to signing the surrogacy contract, the intended parents, the surrogate, and her husband, if any, have submitted to physical examinations and psychological evaluations by practitioners licensed to perform such services pursuant to Title 54.1, and the court and all parties have been given access to the records of the physical examinations and psychological evaluations.”).

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get protection of the statute.<sup>101</sup> Maine requires a “mental health consultation” (undefined) coupled with independent legal advice.<sup>102</sup>

Apart from the proper and ethical use of testing/evaluation, ACOG encourages separate and independent mental health counseling for all parties.<sup>103</sup> ASRM states that psychological assessment and counseling are strongly recommended for all intended parents and carriers and their partners.<sup>104</sup> The ABA 2008 ART Model Act requires all parties to have undergone mental health evaluations and be offered the chance to receive counseling.<sup>105</sup> The AAARTA Code does not address this issue.

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<sup>101</sup> See 750 ILL. COMP. STAT. § 47/10 (2017) (“‘Mental health evaluation’ means an evaluation and consultation of a mental health professional meeting the requirements of Section 60.”).

<sup>102</sup> See 19-A ME. REV. STAT. §§ 1931(2)(A), (B) (2016) (“Prior to executing a gestational carrier agreement, a person or persons intending to become a parent or parents, whether genetically related to the child or not, must: A. Complete a medical evaluation and mental health consultation; and B. Retain independent legal representation regarding the terms of the gestational carrier agreement and have been advised of the potential legal consequences of the gestational carrier agreement.”).

<sup>103</sup> ACOG, *Family Building Through Gestational Surrogacy*, COMMITTEE OPINION, NUMBER 660 (Mar. 2016) (replacing Committee Opinion No. 397, Feb. 2008), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co660.pdf?dmc=1> (last visited Aug. 31, 2017).

<sup>104</sup> ASRM, *Recommendations for Gamete and Embryo Donation: A Committee Opinion* (Jan. 2013), [http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/recommendations\\_for\\_gamete\\_and\\_embryo\\_donation-noprint.pdf](http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/recommendations_for_gamete_and_embryo_donation-noprint.pdf) (last visited Aug. 31, 2017).

<sup>105</sup> The analysis of the ABA 2008 Model Act by these authors provides an excellent summary of the complex debates between professions on this issue and the rationale for the ABA’s final position. See Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 212 (2008) (“As a result, the final position of the drafters was that the mental-health evaluation was required only to educate and advise the participants about issues and concerns that are unique to third-party reproduction (i.e., control issues over a pregnancy where the gestating woman is not the child’s genetic or intended mother, accepting parentage of a child that is not the intended parent’s genetic offspring, etc.). As provided in section 301(1), the drafters of the Model Act specifically did not intend the mental-health evaluation to be an assessment of the “parental fitness” of the intended parents, which could be arbitrarily used to deny a patient the right to procreate.”).

#### 4. *Independent physicians for all parties to advise regarding risks and benefits*

As with psychological evaluations, the role of physicians and the requirement for medical evaluations varies from contract to contract. An ethical issue is whether the carrier may select her own physician as opposed to the intended parents choosing one for her, and then whether each party is entitled to their own independent physician to evaluate the situation and provide their own medical care and risks to parent and child related to the pregnancy.<sup>106</sup> Within this framework are vast web of federal and state medical and mental health privacy laws which are not easily waived or by-passed.

ACOG provides for separate and independent doctors discussing medical risks, benefits, and alternatives with the parties.<sup>107</sup> ASRM offers more discussion regarding the medical practice standards in its applicable ethics code, stating that genetic material should be quarantined for six months and that re-testing of genetic parents should be offered as an option for all carriers.<sup>108</sup> The focus is on protecting the health of the carrier but, as discussed throughout this paper, ethical codes may trigger an overarching and non-waivable duty by a state-licensed professional to assure informed consent and self-determination even if there is no explicit requirement in statute or rule.

As far as the state statutes go, Virginia requires medical evaluations for all parties, but does not specify independent phy-

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<sup>106</sup> See Sheree L. Boulet et al., *Assisted Reproductive Technology and Birth Defects among Liveborn Infants in Florida, Massachusetts, and Michigan, 2000-2010*, 170 JAMA PEDIATRICS 1, 8 (2016) [E154934-E154934] (“In total, these findings suggest that factors related to subfertility may explain the association between use of ART and birth defects, although additional studies on specific ART procedures are needed.”); Carrie L. Williams et al., *Cancer Risk among Children born after Assisted Conception*, 369 NEW ENG. J. MED. 1819, 1826 (2013) (“In conclusion, our population-based cohort study showed no increase in the overall risk of cancer among children younger than 15 years of age who were born after assisted conception, as compared with the expected risk. This is reassuring for couples considering assisted conception, children conceived in this way, and their families and clinicians.”).

<sup>107</sup> See ACOG, *Family Building through Gestational Surrogacy*, *supra* note 103.

<sup>108</sup> See ASRM, *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, *supra* note 104.

sicians.<sup>109</sup> Illinois provides that the carrier can choose her own physician after consultation with the intended parents and there must be a medical evaluation of the carrier to obtain the protection of the statute.<sup>110</sup> Maine provides that medical evaluations are required of both the carrier and the intended parents.<sup>111</sup> Nevada provides that the carrier can use a physician of her choosing for prenatal care, but only after consultation with the intended parents.<sup>112</sup>

Interestingly, the ABA 2008 ART Model Act does not specifically require independent physicians, but does require the car-

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<sup>109</sup> See *supra*, note 100.

<sup>110</sup> Illinois law provides a unique balance of policy and prescriptive requirements worth setting forth here. See 750 ILL. COMP. STAT. § 47/20(a)-(b) (201) (“A gestational surrogate shall be deemed to have satisfied the requirements of this Act if she has met the following requirements at the time the gestational surrogacy contract is executed: (1) she is at least 21 years of age; (2) she has given birth to at least one child; (3) she has completed a medical evaluation; (4) she has completed a mental health evaluation; (5) she has undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy; and (6) she has obtained a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for 8 weeks after the birth of the child; provided, however, that the policy may be procured by the intended parents on behalf of the gestational surrogate pursuant to the gestational surrogacy contract; (b) The intended parent or parents shall be deemed to have satisfied the requirements of this Act if he, she, or they have met the following requirements at the time the gestational surrogacy contract is executed: (1) he, she, or they contribute at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term; (2) he, she, or they have a medical need for the gestational surrogacy as evidenced by a qualified physician’s affidavit attached to the gestational surrogacy contract and as required by the Illinois Parentage Act of 2015; (3) he, she, or they have completed a mental health evaluation; and (4) he, she, or they have undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy.”)

<sup>111</sup> See *supra* note 102 and accompanying text.

<sup>112</sup> See NEV. REV. STAT. § 126.750(4)(c) (2017) (“The express written agreement of each party to the use by the gestational carrier of the services of a physician of her choosing, after consultation with the intended parent or parents, to provide care to the gestational carrier during the pregnancy.”).

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rier to have applicable health insurance.<sup>113</sup> AAARTA's ethics code, again, is silent on this important issue. Getting experienced and competent medical advice for all parties is critical, most reputable agencies require it, and most attorneys provide extensively in their contracts for medical care and the allocation of medical decision making.

*5. Gestational carrier agreement and constitutional limits and choices*

This issue is one fraught with ethical considerations and risks in the United States given constitutional privacy rights to abortion and the carrier's autonomy when it comes to making health care decisions affecting her own health and body, while at the same time entering into a contractual relationship to carry someone else's child.<sup>114</sup> This element requires careful consideration and counsel by all attorneys and professionals involved to assure there is a well-informed meeting of *all* minds.

ACOG states that a carrier possesses the same rights as any other patient to independent medical care, autonomous decision making, and to be informed of medical risks and to knowing consent before any medical procedures are undertaken.<sup>115</sup> ASRM emphasizes the importance of discussing with the carrier the medical risks involved and the obligations she will undertake to care for herself and the fetus during the pregnancy, and insists that the carrier and intended parents must be in agreement as well on the number of embryos that will be implanted.<sup>116</sup>

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<sup>113</sup> See AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 96.

<sup>114</sup> The literature in this area is complex and the debates find truth in the old saw by Winston Churchill about the Russians: "Russia is a riddle wrapped in a mystery inside an enigma." For one point of view discussing others, see Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1627 (2007) ("Logically, if regulation of adoption is constitutionally permissible to safeguard the interests of the adoptive child, her biological parents, and would-be adoptive parents, so is regulation of reproductive technology aimed at protecting the various actors involved and any children that might be produced.").

<sup>115</sup> See ACOG, *Family Building through Gestational Surrogacy*, *supra* note 103.

<sup>116</sup> See ASRM, *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, *supra* note 104.

State statutes find this matter to be of primacy as well; though the means for accomplishing this objective are disparate. Virginia, for example, provides that the surrogate is solely responsible for the clinical management of the pregnancy.<sup>117</sup> Maine provides that the surrogate has the right to use a health care provider of her choosing for pre-natal care and that nothing in the gestational carrier agreement can limit the right of the carrier to make decisions “to safeguard her health.”<sup>118</sup> Nevada provides that a carrier can use a “physician of her choosing for prenatal care after consultation with the intended parents.”<sup>119</sup>

Once again, the AAARTA ethics code is silent on this rather important ethical and legal issue. The ABA 2008 ART Model Act provides that a gestational carrier agreement may not limit the right of the carrier to make decisions to safeguard her health.<sup>120</sup> In the absence of a pattern of judicial outcomes, the interpretation of these state statutes and tensions between the rights and responsibilities of all parties will have to await definitive rulings. Time will tell if these ethical codes will influence the standard of care for professionals offering services and advice and assessment.<sup>121</sup>

6. *The contract can be terminated by any party prior to pregnancy with no penalty*

This provision is often a central aspect of the breach section of the contract, making it a legalistic aspect of the negotiations. Not surprisingly, neither the ACOG or ASRM ethics codes explicitly address this issue. The Virginia statute has a provision allowing court approved contracts to be rescinded prior to conception with notice to the parties and the court or if the sur-

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<sup>117</sup> See VA. CODE § 20-163(A) (2017) (“The surrogate shall be solely responsible for the clinical management of the pregnancy.”).

<sup>118</sup> See 19-A ME. REV. STAT. ANN. § 1932(5) (2016) (“A gestational carrier agreement may not limit the right of the gestational carrier to make decisions to safeguard her health.”).

<sup>119</sup> See *supra* note 112.

<sup>120</sup> See AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 96.

<sup>121</sup> The reality of this topic is that many of these ethical codes may be antiquated by the time litigation is completed or “new sciences” render the codes inapplicable to a specific technology. See THE ETHICS OF THE NEW EUGENICS (Calum MacKellar & Christopher Bechtel eds. 2014).



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rogate is a genetic parent.<sup>122</sup> In Maine, any party can terminate the gestational carrier agreement at any time prior to an embryo transfer with no liability whatsoever.<sup>123</sup> Thus, the intended parents remain responsible for obligations already incurred. Nevada provides that a gestational carrier contract can be terminated by any party prior to pregnancy with no penalty.<sup>124</sup> Similarly, the ABA 2008 ART Model Act provides that any party can terminate the gestational carrier agreement before a pregnancy, with

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<sup>122</sup> See VA. CODE §§ 20-161(A), (B) (2017) (“A. Subsequent to an order entered pursuant to subsection B of § 20-160, but before the surrogate becomes pregnant through the use of assisted conception, the court for cause, or the surrogate, her husband, if any, or the intended parents may terminate the agreement by giving written notice of termination to all other parties and by filing notice of the termination with the court. Upon receipt of the notice, the court shall vacate the order entered under subsection B of § 20-160. B. Within 180 days after the last performance of any assisted conception, a surrogate who is also a genetic parent may terminate the agreement by filing written notice with the court. The court shall vacate the order entered pursuant to subsection B of § 20-160 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate has voluntarily terminated the agreement and that she understands the effects of the termination. Unless otherwise provided in the contract as approved, the surrogate shall incur no liability to the intended parents for exercising her rights of termination pursuant to this section.”).

<sup>123</sup> See 19-A ME. REV. STAT. ANN. § 1936(1), (2) (2016) (“A party to a gestational carrier agreement may withdraw consent to any medical procedure and may terminate the gestational carrier agreement at any time prior to any embryo transfer or implantation by giving written notice of termination to all other parties. 2. Obligations upon termination; no liability to gestational carrier. Upon termination of the gestational carrier agreement under subsection 1, the parties are released from all obligations recited in the agreement except that the intended parent or parents remain responsible for all expenses that are reimbursable under the agreement incurred by the gestational carrier through the date of termination. The gestational carrier is entitled to keep all payments she has received and obtain all payments to which she is entitled. Neither a prospective gestational carrier nor her spouse, if any, is liable to the intended parent or parents for terminating a gestational carrier agreement.”).

<sup>124</sup> See NEV. REV. STAT. § 126.700(1), (2) (2017) (“If a marriage or domestic partnership is dissolved or terminated before the transfer of eggs, sperm or embryos, the former spouse or former domestic partner is not a parent of the resulting child unless the former spouse or former domestic partner consented in a record that if assisted reproduction were to occur after a dissolution or termination, the former spouse or former domestic partner would be a parent of the child. 2. The consent of a person to assisted reproduction may be withdrawn by that person in a record at any time before placement of the eggs, sperm or embryos.”).

no liability to the carrier for doing so. The AAARTA Code of Ethics is completely silent on this issue.<sup>125</sup>

### 7. *Escrow must be independent, insured, and bonded*

A significant issue has been the necessity of an escrow agent holding any funds passing between the parties. If an escrow account is mandated, the issue then becomes whether the escrow agent can or should be the coordinating program or one of the parties' attorneys. Neither ACOG or ASRM substantially address this financial and legal issue, other than ASRM saying that compensation should be discussed and addressed in the carrier agreement.

A handful of state statutes explicitly address this issue. All model acts and state laws require specificity regarding fees and expenses but escrow funds and bonding are not uniform requirements. Illinois provides, for example, that if a carrier will be compensated, all compensation must be placed with an independent escrow agent prior to any medical procedure.<sup>126</sup> California requires the use of an escrow account only when non-lawyers are in charge of the process and managing payments between the parties.<sup>127</sup>

The ABA 2008 ART Model Act states that if there is compensation to the carrier, it must be placed with an independent

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<sup>125</sup> The issue of children as subject to contracts and all the implications that arise from human efforts to find precision and predictability when there are so many emotional and legal variables has many consequences at the policy and ethical levels. *See generally* THE ETHICS OF THE NEW EUGENICS, *supra* note 121; Cynthia R. Daniels & Erin Heidt-Forsyth, *Gendered Eugenics and the Problematic of Free Market Reproductive Technologies: Sperm and Egg Donation in the United States*, 37 SIGNS: J. WOMEN IN CULTURE & SOC'Y. 719 (2012).

<sup>126</sup> *See* 750 ILL. COMP. STAT. § 47/25(b)(4) (2017) ("If the gestational surrogacy contract provides for the payment of compensation to the gestational surrogate, the compensation shall have been placed in escrow with an independent escrow agent prior to the gestational surrogate's commencement of any medical procedure (other than medical or mental health evaluations necessary to determine the gestational surrogate's eligibility pursuant to subsection (a) of Section 20 of this Act).").

<sup>127</sup> *See* CAL. FAM. CODE § 7961(c) (2017) ("Client funds may only be disbursed by the attorney or escrow agent as set forth in the assisted reproduction agreement and fund management agreement.").

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escrow agent before procedures commence.<sup>128</sup> The ABA 2016 Model Act Governing ART *Agencies* states that escrow means an “independent, insured, bonded” third party escrow company or an “insured and bonded trust account maintained by an attorney.”<sup>129</sup> In some instances, a non-attorney ART agency and its officers, managers, owners, directors, or employees cannot be escrow agents.

On this issue, the AAARTA ethics code is quite explicit: it allows an attorney involved in an ART matter to hold escrow funds.<sup>130</sup> Compensation (and security for that compensation) has been a significant issue in legislative reforms and model initiatives. The ethics trend should be to err on the side of caution and emphasize the use of independent, insured, and bonded professional escrow agents.

*8. Breach or noncompliance with contract resolved by neutral party*

One would think that how to resolve breach or noncompliance would be an obvious component of any basic notion of a fair process when the stakes pertain to a child without voice and there may be disproportionate bargaining power between the contracting parties, particularly given the practice of reproductive tourism in a flatter world. However, ethics codes and the state statutes are largely silent. Contracts that do not address this do a disservice to the clients by forcing parties to either litigate immediately or come up with their own acceptable and workable alternative dispute resolution process.<sup>131</sup> The ABA 2008 ART

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<sup>128</sup> See AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 96.

<sup>129</sup> AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY AGENCIES art. 10 (2016), [https://www.americanbar.org/content/dam/aba/uncategorized/family/Model\\_Act.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/family/Model_Act.authcheckdam.pdf) (last visited Aug. 31, 2017) (“Escrow Account” means an independent, insured, bonded escrow depository maintained by a licensed, independent, bonded escrow company; or an insured and 130 bonded trust account maintained by an attorney.”).

<sup>130</sup> See AMERICAN ACADEMY OF ASSISTED REPRODUCTION TECHNOLOGY ATTORNEYS (AAARTA) ETHICS CODE, *supra* note 81.

<sup>131</sup> See Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL’Y 279, 312 (2010) (“While the future of reproductive surrogacy remains

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Model Act does provide that if there is non-compliance, the issue must be resolved by a court or other neutral based solely on evidence of the parties' original intent, with no rights to specific performance.<sup>132</sup>

Illinois only discusses remedies that are available (possible damages, but not specific performance), without a mandated resolution process.<sup>133</sup> Maine provides that all remedies are available for breach, including specific performance, except that a carrier cannot be forced to terminate a pregnancy or become impregnated; there is no discussion of methods of dispute resolution except that the court retains jurisdiction to address all issues related to the contract.<sup>134</sup> The AAARTA Code of Ethics is silent on this issue.

*9. Agency or coordinating program required to disclose all potential conflicts*

This was a significant issue for the AAARTA group that re-wrote its ethics rules. As a result, Section 18 of the AAARTA Ethics Code contains specific written notice provisions that must be complied with by any party who will be receiving such services

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unclear, its regulation, contractual or otherwise, is a necessary evil and perhaps a societal good.).

<sup>132</sup> See AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 96.

<sup>133</sup> See 750 ILL. COMP. STAT. § 47/50(b) (2017-18) ("There shall be no specific performance remedy available for a breach by the gestational surrogate of a gestational surrogacy contract term that requires her to be impregnated.").

<sup>134</sup> See 19-A ME. REV. STAT. ANN. §§ 1938(3), (5) (2016) ("Except as expressly provided in a gestational carrier agreement and in subsection 4, in the event of a breach of the gestational carrier agreement by the gestational carrier or the intended parent or parents, the gestational carrier or the intended parent or parents are entitled to all remedies available at law or in equity. . . Specific performance is not an available remedy for a breach by the gestational carrier of any term in a gestational carrier agreement that requires the gestational carrier to be impregnated or to terminate a pregnancy. Specific performance is an available remedy for a breach by the gestational carrier of any term that prevents the intended parent or parents from exercising the full rights of parentage immediately upon birth of the child."); See also Nev. Rev. Stat. 126.790(1), (2) (2017) ("1. Except as otherwise provided by NRS 126.780 or by an express term of the gestational agreement, the intended parent or parents are entitled to any remedy available at law or equity. 2. Except as expressly provided by an express term of the gestational agreement, the gestational carrier is entitled to any remedy available at law or equity.").

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if a member provides coordinating services.<sup>135</sup> Neither ACOG or ASRM address this concern.

The ABA has a separate, recently enacted Model Act devoted specifically to this topic. The ABA 2016 Model Act Governing ART Agencies<sup>136</sup> provides rules pertaining to ART Agencies, applicable to any member who has real or apparent authority over, or who supervise directly or indirectly, the matching process. This Act also pertains to anyone who is in charge or apparent charge of, or who supervises directly or indirectly, the services to be provided by someone else, and to anyone who holds himself out as engaged in the process of providing such services. Someone who manages or supervises the operation of an agency, other than with respect to purely administrative matters, must disclose in the service agreement all relationships, activities, or interests of the owners of the ART agency that may constitute an actual or potential conflict of interest.

The clearest state statute that addresses this policy issue is Virginia. The law expressly prohibits surrogacy brokers who accept compensation for recruitment, procuring, and inducing surrogates and intended parents. Lawyers, however, can still give legal advice and negotiate contracts.<sup>137</sup> As mentioned above,

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<sup>135</sup> See AMERICAN ACADEMY OF ASSISTED REPRODUCTION TECHNOLOGY ATTORNEYS (AAARTA) ETHICS CODE, *supra* note 81.

<sup>136</sup> American Bar Association's 2016 Model Act Governing ART Agencies was approved and accepted by the ABA House of Delegates at the ABA Midyear Meeting in February of 2016. See AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY AGENCIES, *supra* note 132.

<sup>137</sup> See VA. CODE § 20-165(A-C) (2017) (“A. It shall be unlawful for any person, firm, corporation, partnership, or other entity to accept compensation for recruiting or procuring surrogates or to accept compensation for otherwise arranging or inducing intended parents and surrogates to enter into surrogacy contracts in this Commonwealth. A violation of this section shall be punishable as a Class 1 misdemeanor. B. Any person who acts as a surrogate broker in violation of this section shall, in addition, be liable to all the parties to the purported surrogacy contract in a total amount equal to three times the amount of compensation to have been paid to the broker pursuant to the contract. One-half of the damages under this subsection shall be due the surrogate and her husband, if any, and if he is a party to the contract, and one-half shall be due the intended parents. An action under this section shall be brought within five years of the date of the contract. C. The provisions of this section shall not apply to the services of an attorney in giving legal advice or in preparing a surrogacy contract.”).

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however, this exception for lawyers acting as lawyers may become strained if the lawyer owns an agency or is offering services beyond the role of lawyer, including practice outside the jurisdiction of licensure.

10. *Contract must be signed prior to any medical procedures other than screening*

This is a common concern, since all ARTs codes and statutes emphasize the requirement of *written* contracts being in place before *any* medical procedures are commenced.<sup>138</sup> Many ARTs practitioners are fond of asserting that ARTs and adoption are very different legally and ethically and, therefore, ethical concerns in adoption are not the same ethical issues and concerns faced in ARTs.<sup>139</sup> Adoption, however, has always invoked the need for compliance with statute or, in some circumstances the notion of equitable adoption with all the attendant features of a valid adoption.<sup>140</sup> Adoption has its own painful risks and heartfelt benefits.

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<sup>138</sup> See Maria E. Garcia, *In with New Families, Out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements*, 21 DUKE J. GENDER L. & POL'Y 197, 200 (2013) ("Several states have written agreement, opt-out statutes which are more favorable to determining the rights of known donors and recipient-mothers based on their intent. These statutes allow donors and recipient-mothers to retain parental rights by opting-out of the default donor paternity bar in a written agreement.").

<sup>139</sup> See Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIM. LAW. 289, 290 (2014) ("While the two processes— adoption and ART—may achieve a similar outcome in terms of adding children to a family unit outside the privacy of a couple's bedroom, their legal and ethical attributes could not be more different.").

<sup>140</sup> For a learned and comprehensive discussion of this topic, see *Johnson v. Johnson*, 617 N.W.2d 97, 101 (N.D. 2000) ("North Dakota law clearly recognizes the doctrine of equitable adoption. Adoption, unknown to the common law, is entirely a creature of statute."); See also *In re Adoption of B.B.*, 2017 UT 59, ¶1, \_\_ P.3d \_\_ ("So it is vital that the courts of this state, this court included, take care to ensure that adoption proceedings are as free as possible from fatal defects. Regrettably, this case is septic: Birth Mother admitted to having perpetrated a fraud on the district court and suborning perjury from her brother-in-law, all in an effort to keep Birth Father from intervening in the proceedings, and all against the backdrop of what I believe was untimely and therefore invalid consent.").

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ARTs and its variations, particularly as technology evolves and jurisdictional boundaries further blur, involves contractual duties attendant to the creation of a child and the allocation of parental rights and responsibilities months later and after delivery of that child as a living being. There is nothing linear about multi-party contracts involving money and physical and psychic risk. Clarity and precision are a function of meeting duties of informed consent, self-determination, and freedom of contract.

In reality, both areas deal with family formation and the interests of children, competing interests of the adults, iterations of intersection with agencies and judicial systems, and the most basic of human epigenetic events: reproduction of species.<sup>141</sup> It is true that special care must be taken to protect the interests of everyone involved, while still protecting and advocating for one's client. The Missouri Supreme Court in its 2016 *Krigel* decision issued a wakeup call to *all* attorneys in *all* family-related fields.

## Conclusion

In *Krigel*, the Missouri Supreme Court found ethics violations and imposed serious sanctions. Clearly, complications arise when values, ethics, and duties collide and practitioners may not have sufficient awareness of changes in the local juridical environment. We can apply several lessons from the *Krigel* decision. We became convinced, upon reading the entire decision in context, that this decision represented a reaction to the role of lawyers in adoption when non-married mothers act unilaterally and non-married fathers have been set to the margins for decades.<sup>142</sup>

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<sup>141</sup> For a thoughtful discussion of the differences and the need for legislative action in this policy arena, see *In re Paternity of F.T.R.*, 833 N.W.2d 634, 653 (Wis. 2013) (“We respectfully urge the legislature to consider enacting legislation regarding surrogacy. Surrogacy is currently a reality in our Wisconsin court system. Legislation could ‘address surrogacy agreements to ensure that when the surrogacy process is used, the courts and the parties understand the expectations and limitations’ under Wisconsin law.”) (footnote omitted).

<sup>142</sup> See, e.g., *Bruce v. Boardwine*, 770 S.E.2d 774, 777 (Va. App. 2015) (“Furthermore, the examples of ‘noncoital reproductive technology’ listed in Code § 20-156 involve procedures performed with the assistance of medical personnel. An ordinary kitchen implement [turkey baster] used at home is simply not analogous to the medical technologies that are listed in Code § 20-156, nor does it constitute a ‘reproductive’ technology under the plain meaning of the term.”).

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Lawyers have an ancient duty of candor to the court. What may have shifted beneath the legal turf of adoption and ARTS is the *affirmative* duty to assist the other lawyers and self-represented parties with standing (as that state law may define it) with material information related to a judicial proceeding. A strategy of silence or passive conduct is not a protection against sanction—at least in Missouri.

In addition, it is critical never to confuse or forget the role of science and ethics in generating new conundrums for courts and policy makers.<sup>143</sup> First, as in adoption where getting the adoption completed no matter what ethical violations occur cannot be the primary goal; getting parentage established in an ARTs case cannot be a lawyer's only concern or even the primary consideration any longer. Lawyers in this area of specialty need to consider the rights and interests of all parties, interested third parties, and the integrity of judicial systems.

Second, and as has always been the case with adoptions in general and the “adoption triad” (child, birth parents, and adoptive parents), particular challenges will arise from competing interests and positions of all involved. This is even more apparent in the world of ARTs where competing interests of intended parents, surrogates and their spouses or partners, other relatives and children of the participants, coordinating programs, and professionals all exist. While ARTs is a relatively new and dynamic area of practice, it involves relationships that have long been problematic.

Society and the flatter world of “reproductive tourism” matters to lawyers and judges and scholars whose lenses on the

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<sup>143</sup> See Ubaka Ogbogu et al., *From Human Embryos to Interspecies Creations: Ethical and Legal Uncertainties surrounding the Creation of Cytoplasmic Hybrids for Research*, 9 *MED. L. INT'L.* 227, 232 (2008) (“The cytoplasmic hybrid controversy highlights the profound difficulty in crafting enduring legislative provisions to govern scientific conduct.”); Richard A. Warshak, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20 *PSYCHOL., PUB. POL'Y & L.* 46, 47 (2012) (“But the road from laboratories to legislatures and family law courtrooms is hazardous—fraught with potential for misunderstandings, skewed interpretations, logical errors, even outright misrepresentations. The hazards can be traced, in large measure, to differences between science and advocacy.”).



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world may be quite different than the preferred narrative.<sup>144</sup> Areas where there has been a sea change in perceptions of interests and obligations involve notions of parentage, the roles, rights, and responsibilities of non-married mothers and fathers, and the modern expectations put upon attorneys working in the realm of family formation. Historically, lawyers owed their primary duty to their client. After *Krigel*, that is no longer the case in adoption practice and no longer so clear in the ARTs arena.

Comparing the AAARTA Code of Ethics with other such codes, state statutes, and the *Krigel* decision, lawyers cannot assume that conventional values or the values of a community or society from the past will protect lawyers today. These shifts in common law of tort and contract and the interpretation of statutes and rules organically evolve as Justice Cardozo well knew. Self-awareness suggests that doing the right thing for *a* client may not be enough in this field any longer. The legal profession, and any other licensed professionals who engage in this joint venture, must accept the view that not everyone sees all aspects of family formation through adoption and now ARTs as inherently good.<sup>145</sup> Problems can arise in these situations that require a careful, objective, and expansive view of the ethics issues and conflicting interests involved.

Ultimately, lawyers *today* must assess individual cases and respect the interests of all persons outside the conventional legal paradigm that zealous advocacy is a defense. Attorneys must exhibit empathy, understanding, and “zealous advocacy” for due

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<sup>144</sup> See Jyotsna Agnihotri Gupta, *Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies*, 13 EUR. J. WOMEN'S STUD. 23, 31-32 (2006) (“Thanks to women willing to sell their eggs or rent their wombs as surrogates, helping infertile women has become a thriving global business. A whole range of professionals – such as infertility specialists, psychologists, lawyers, middlemen – also profit from it.”).

<sup>145</sup> For a different perspective but one which reflects government policy and its power, see Daniel Sperling, *Commanding the “Be Fruitful and Multiply” Directive: Reproductive Ethics, Law, and Policy in Israel*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 363, 368 (2010) (“In addition, Israel is one of the single countries and the first in the world where surrogacy is legal. Single women, including lesbians, are fully eligible to access IVF services funded by the State. There are precedents approving the retrieval of sperm from a dead body (including a request from parents of a soldier killed in a terrorist attack) and the use of sperm deposited before the death of a person.”).

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process, in its very broadest sense. There must be affirmative candor to any court so that it can make a fair and principled decision. Adoption and ARTs contracts are not just another space for lawyer-advocacy because the client wants it (even if the client is right at the moral and legal levels).

There is now a not-so-brave new world of lawyering mixed with science and technology organically crossing intranational law in fifty states and then passing internationally into many sovereign countries.<sup>146</sup> This means that the legal and ethical rules are more about social justice and protecting vulnerable populations from exploitation than the inherent good perceived by lawyers and agencies doing this work. Times have changed, and as this paper suggested at the outset, so have the experiences and beliefs of policy makers and judges.

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<sup>146</sup> See John A. Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, 1 J. LAW & BIOSCIENCES 113, 113 (2014) (“Empowerment through reproductive technology is usually a double-edged sword. Egg freezing is no exception. While it empowers women in some respects, it creates unwanted pressure and alienation in others. Those who gain the most may be the egg sellers and entrepreneurs who have emerged to fill—and create—the market demand for egg freezing.”).